
THE STATE OF WISCONSIN

Plaintiff,

CASE NO. 04-CV-1709

v.

ABBOTT LABORATORIES, et al.

Defendants.

**DEFENDANT DEY, INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFF'S
FIRST SET OF CONSOLIDATED DISCOVERY REQUESTS TO ALL DEFENDANTS**

Pursuant to Wis. Stat. §§ 804.01, 804.08, 804.09, and 804.11, Defendant Dey, Inc. (“Dey”), by its undersigned counsel, asserts the following responses and objections to the First Set of Consolidated Discovery Requests to All Defendants, dated May 15, 2008, (“Consolidated Discovery Requests”) propounded by Plaintiff the State of Wisconsin (“Wisconsin,” “Plaintiff,” or the “State”) as follows:

GENERAL OBJECTIONS AND RESERVATION OF RIGHTS

1. These responses and objections are made without waiving or intending to waive, but to the contrary intending to preserve and preserving: (a) any objections as to the competency, relevancy, materiality, privilege, or admissibility as evidence, for any purpose, of any documents or information produced in response to the Consolidated Discovery Requests; (b) the right to object on any ground to the use of documents or information produced in response to the Consolidated Discovery Requests at any hearing, trial or other point during this action; (c) the right to object on any ground at any time to a demand for further responses to the Consolidated Discovery Requests; or (d) the right at any time to revise, correct, add to, supplement, or clarify any of the responses or objections contained herein.

2. The documents, information, and responses supplied herein are for use in this action and for no other purpose.

3. No response or objection made herein, or lack thereof, is an admission by Dey as to the existence or non-existence of any documents or information.

4. Dey provides its responses subject to the Protective Order, entered on November 29, 2005 in this action.

5. Dey objects to the Consolidated Discovery Requests to the extent they seek to impose duties and obligations on Dey greater than Dey's duties and obligations under the Wisconsin Rules of Civil Procedure and any applicable local rules. Dey will comply with its duties and obligations under the Wisconsin Rules of Civil Procedure and any applicable local rules.

6. Dey objects to the Consolidated Discovery Requests to the extent they are vague, ambiguous, unduly burdensome, overbroad, oppressive, duplicative, or not limited to the discovery of information which is relevant to the subject matter of this litigation or reasonably calculated to lead to the discovery of admissible evidence.

7. Dey objects to the Consolidated Discovery Requests to the extent that any of the Consolidated Discovery Requests seek documents, information, or admissions not related to sales in the State of Wisconsin on the grounds that such Consolidated Discovery Requests are overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and fail to identify with sufficient particularity the documents or information sought.

8. Dey objects to the Consolidated Discovery Requests as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the

extent they seek documents, information, or admissions concerning pharmaceutical products not at issue in this action. Dey will provide documents or information, relating only to pharmaceutical products attributed to Dey in the Stipulated Targeted Drug List (the “Dey Targeted Drugs”).

9. Dey objects to the Consolidated Discovery Requests as unduly burdensome to the extent that they purport to require Dey to create, compile, analyze, compute, and/or summarize voluminous data or information that Wisconsin has the ability to create, compile, analyze, compute, and/or summarize by reviewing the documents, information, or data that Dey has produced.

10. Dey objects to the Consolidated Discovery Requests to the extent they seek documents, information, or admissions concerning matters, that are privileged or otherwise protected against discovery pursuant to the attorney-client privilege, the work product doctrine, the joint defense privilege, the consulting expert rule, the common interest doctrine, investigative privileges, or any other legally recognized privilege, immunity, or exemption from discovery. To the extent any such protected documents or information are inadvertently produced or disclosed in response to the Consolidated Discovery Requests, the production of such documents or information shall not constitute a waiver of Dey’s right to assert the applicability of any privilege or immunity to the documents, and any documents shall be returned to Dey’s counsel immediately upon discovery thereof.

11. Dey objects to the Consolidated Discovery Requests to the extent that they seek documents, information, or admissions concerning or containing trade secrets, or proprietary, commercially sensitive or other confidential information.

12. Dey objects to the disclosure, under any circumstance, of trade secret information where the probative value in this litigation is greatly exceeded by the potential harm to Dey if the information were to fall into the hands of its competitors, and further asserts each and every applicable privilege and rule governing confidentiality to the fullest extent provided by the law.

13. Dey objects to the Consolidated Discovery Requests to the extent that they seek documents, information, or admissions concerning matters, that are: (a) not within the knowledge, possession, custody, or control of Dey, its agents, or its employees, (b) publicly available or publicly known; or (c) more appropriately sought from third parties or other defendants to whom requests or interrogatories have been or may be directed.

14. Dey objects to the Consolidated Discovery Requests to the extent that they seek documents, information, or admissions concerning matters, from outside of the statute of limitations applicable to Wisconsin's claims in this action, or beyond the time period relevant to this action. Dey objects to the Consolidated Discovery Requests as irrelevant, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that they seek documents, information, or admissions relating to a period of time after the filing of the Complaint on or around June 3, 2004.

15. Dey objects to the Consolidated Discovery Requests to the extent that they demand the production of proprietary documents or information of third parties.

16. Dey objects to any implications and to any explicit or implicit characterization of facts, events, circumstances, or issues in the Consolidated Discovery Requests. Any response by Dey to a particular request or interrogatory is not intended to indicate that Dey agrees with any implication or any explicit or implicit characterization of facts, events, circumstances, or issues

in the Consolidated Discovery Requests, or that such implications or characterizations are relevant to this action.

17. Dey objects to the Consolidated Discovery Requests as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent they seek documents, information, or admissions concerning any discontinued product dated after the date of such product's discontinuation.

18. Dey objects to the Consolidated Discovery Requests to the extent they seek documents, information, or admissions relating to Dey's activities that are outside the scope of the allegations in the Second Amended Complaint.

19. Dey objects to the Consolidated Discovery Requests to the extent they seek documents, information, or admissions relating to Dey's activities other than those which concern Wisconsin, on the grounds that such documents are neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence.

20. Dey objects to the Consolidated Discovery Requests to the extent they purport to impose on Dey an obligation to search or produce email or other electronically stored data in any format on the grounds that such Consolidated Discovery Requests are overly broad, unduly burdensome, harassing, and not reasonably limited in scope.

21. Dey objects to the Consolidated Discovery Requests to the extent they seek documents, information, or admissions duplicative of what Dey has produced and provided in response to Wisconsin's prior discovery requests.

22. Dey reserves the right to assert additional objections to these Consolidated Discovery Requests as appropriate and to amend or supplement these objections and responses in

accordance with the applicable rules and court orders and based on results of its continuing investigation.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

The General Objections and Reservations of Rights stated above apply to and are incorporated into Dey's objections to the definitions and instructions set forth below. Dey also objects to the definitions and instructions as follows:

1. Dey objects to the definition of "document" as set forth in Definition No. 1 to the extent that it seeks to impose discovery obligations that are broader than, or inconsistent with, Dey's obligations under the Wisconsin Rules of Civil Procedure and any applicable local rules. Dey will comply with the Wisconsin Rules of Civil Procedure and any applicable local rules. Dey further objects to this definition to the extent it requires or seeks to require Dey to search for information that was not generated in the form of written or printed records, or to create or re-create printouts from electronic data compilations, on the grounds that such a request would be unduly burdensome. Dey further objects to this definition to the extent it requires or seeks to require Dey to: (a) produce documents or data in a particular form or format; (b) convert documents or data into a particular or different file format; (c) produce data, fields, records, or reports about produced documents or data; (d) produce documents or data on any particular media; (e) search for and/or produce any documents or data on back-up tapes; (f) produce any proprietary software, data, programs, or databases; or (g) violate any licensing agreement or copyright laws.

2. Dey objects to the definition of "identify" as set forth in Definition No. 2 to the extent it purports to seek the production of documents or information not within the knowledge, possession, custody, or control of Dey, its agents, or its employees, or that are more

appropriately sought from third parties to whom requests have been or may be directed. Dey further objects to the definition as unduly burdensome.

3. Dey objects to the definition of “incentive” as set forth in Definition No. 3 on the grounds that it is vague, ambiguous, overly broad, and unduly burdensome because, *inter alia*, it contains terms that are themselves vague, ambiguous, or undefined, including but not limited to, “anything of value,” “provided,” “customer,” “reward,” “lowering the cost of a pharmaceutical to the customer in any way, regardless of the time it was provided ... and regardless of its name,” “payments or proposed payments in cash or in kind,” “chargebacks,” “credits,” “discounts,” “return to practice discounts,” “prompt-pay discounts,” “volume discounts,” “on-invoice discounts,” “off-invoice discounts,” “rebates,” “market-share rebates,” “access rebates,” “bundled-drug rebates,” “free goods or samples,” “administrative fees or administrative fee reimbursements,” “marketing fees,” “stocking fees,” “conversion fees,” “patient education fees,” “off-invoice pricing,” “educational or other grants,” “research funding,” “clinical trials,” “honoraria,” “speaker’s fees or payments,” “patient education fees,” and “consulting fees.”

4. Dey objects to the definitions of “you,” “your,” and “your company” as set forth in Definition No. 4 on the grounds that they are vague, ambiguous, overly broad, and unduly burdensome because, *inter alia*, it contains terms that are themselves vague, ambiguous, or undefined, including but not limited to affiliated company,” “joint venture,” and “any other person or entity acting on behalf of defendant”. Dey further objects to this definition as overly broad to the extent it purports to include persons or entities that have no authorization to act on behalf of Dey and over whom Dey has no control. Dey further objects to this definition as overly broad and unduly burdensome to the extent that it purports to include persons or entities that are not parties to this action and whose conduct is in no way relevant to the claims in this

action. Dey further objects to this definition as unduly burdensome and irrelevant on the grounds that the phrase “your company” does not appear in any of the Consolidated Discovery Requests.

5. Dey objects to the Instructions to the extent they seek to impose obligations on Dey that are greater than, or inconsistent with, Dey’s obligations under the Wisconsin Rules of Civil Procedure and any applicable local rules.

6. Dey objects to Instruction No. 1 for Interrogatories the extent that it requires Dey to provide any information or documents within the knowledge, possession, custody or control of Dey’s “attorneys” when such information or documents are protected by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, rule, or doctrine. Dey further objects to this Instruction because the phrase “subject to reasonable inquiry by you” is vague, ambiguous and overbroad.

7. Dey objects to Instruction No. 2 for All Discovery Requests as unduly burdensome.

SPECIFIC RESPONSES AND OBJECTIONS TO THE CONSOLIDATED DISCOVERY REQUESTS

Dey expressly incorporates all of the above-stated General Objections and Reservation of Rights, and the Objections to Definitions and Instructions into each and every response and objection to the Consolidated Discovery Requests set forth below. Any specific objection provided below is made in addition to these Objections and Reserved Rights and a failure to reiterate an Objection or Reserved Right below shall not constitute a waiver of that or any other objection.

CONSOLIDATED DISCOVERY REQUEST NO. 1

REQUEST FOR ADMISSION NO. 1:

At no time has the State of Wisconsin, its Department of Health & Family Services, or any employee thereof, explicitly approved your practice of reporting to First DataBank average wholesale prices (“AWPs”) for your drugs that were not the true average prices charged by wholesalers to their customers for your drugs.

DEY’S RESPONSE AND OBJECTIONS:

Dey objects to Request for Admission No. 1 on the grounds that it is vague and ambiguous because, *inter alia*, it contains terms and phrases that are themselves vague, ambiguous, or undefined, including, but not limited to, “your practice,” “reporting,” “average wholesale prices (‘AWPs’)” and “true average prices.” Dey further objects to this request as unduly burdensome to the extent that it seeks admissions concerning matters that are not within Dey’s knowledge, are already within Wisconsin’s knowledge, or are more appropriately sought from third-parties as Dey is not aware of the “true average prices charged by wholesalers.” Dey further objects to this request on the grounds that it improperly assumes facts not in evidence. Dey further objects to this request to the extent that it improperly implies that the AWPs Dey provided to First DataBank were false. Dey further objects to this request to the extent that it improperly implies that Dey was obligated to seek approval from Wisconsin concerning its determination and reporting of AWPs, or that Wisconsin had adopted statutes, regulations, or guidelines governing, or in any way controlled or sought to control, the manner in which Dey or any other drug manufacturer determined and reported AWPs. Dey further objects to this request as overly broad and unduly burdensome to the extent it seeks admissions concerning unspecified actions and/or statements taken and/or made by unspecified individuals during an unspecified period of time.

Subject to and without waiving the foregoing general and specific objections, Dey denies

the matters set forth in Request for Admission No. 1.

INTERROGATORY NO. 1:

If your response to Request for Admission No. 1 is anything other than an unqualified admission, state all bases for your response, including the following:

- (a) identify whether the approval was made verbally or in writing;
- (b) identify the person(s) who approved the practice;
- (c) identify the date(s) on which the approval was made;
- (d) state whether the approval was communicated to you;
- (e) if the approval was communicated to you, state whether the communication was made verbally or in writing;
- (f) if the approval was communicated to you, identify the date of such communication(s);
- (g) if the approval was communicated to you, identify the person(s) who made the communication(s);
- (h) if the approval was communicated to you, identify the person(s) who received the communication(s);
- (i) identify all documents relating to the approval of the practice;
- (j) identify all documents relating to the communication of the approval to you.

DEY'S RESPONSE AND OBJECTIONS:

Dey hereby adopts and incorporates its specific objections to Request for Admission No. 1 into its response to Interrogatory No. 1. Dey further objects to this interrogatory as unduly burdensome to the extent it seeks information that is: (a) not within Dey's knowledge, possession, custody, or control; (b) already within Wisconsin's knowledge, possession, custody, or control; or (c) more appropriately sought from third-parties.

Subject to and without waiving the foregoing general and specific objections, Dey responds as follows:

Dey has never reported false AWP. AWP is not defined by any federal statutes or regulations and Wisconsin has never set forth a definition of AWP in statute or regulation or otherwise prescribed the manner in which drug manufacturers should set, calculate, or report AWP.

Dey's general practice was as follows: When Dey introduced a new generic drug product to the market, it set the AWP for its drug at a certain percentage below the AWP for the therapeutically-equivalent branded product. Early on in Dey's business, Ed Edelstein of First Data Bank advised Dey that, for purposes of acceptance by the reporting services of Dey's product as a generic, the AWP for that product should be a minimum of 10% below the innovator product's AWP, and historically, Dey has observed this principle. Generally, it is Dey's practice to set AWP for its generic drugs before they are first sold and not to subsequently change that AWP. Dey understands that this is consistent with industry practice. There are some instances to the contrary depending on the market and/or other forces. Dey's AWP for its brand name drugs at issue in this action have been set and revised as Dey's WACs have increased. Dey understands that this practice is also consistent with industry practice.

Dey further states that, as numerous documents produced in this action demonstrate, Wisconsin has known since well before the time period relevant to this action that AWP reported by drug manufacturers, including Dey, were not an actual average of the prices charged by drug wholesalers to their customers. The following are some examples of such documents:

- A 1975 memorandum from the Director of the Legislative Fiscal Bureau ("LFB") to the Joint Committee on Finance, states that "the policy of the Department of Health and Social Services has been to reimburse at the listed wholesale price plus \$2 dispensing fee. Many observers believe that this method of reimbursement is not economical since it fails to take into account state variations from the national wholesale price list or discounts obtained through bulk purchasing." (Memorandum from Dale Cattanach to the Joint Committee on Finance, *Health and Social Services—Medical Assistance Cost Controls and Sum Sufficient Reestimate* at 4 (Apr. 25, 1975).)

- In 1976, the Governor’s Task Force on Medicaid Pharmacy Reimbursement (the “Task Force”) concluded “that the Blue Book prices overstate actual drug costs.” The Task Force recommended that Wisconsin reimburse Medicaid providers at actual acquisition costs, defined as “invoice cost minus bulk purchasing discounts plus billed warehouse costs.” (1976 Task Force Report at 3, 5.)
- In memo from November of 1989, a Wisconsin Medicaid official suggested revising Wisconsin’s reimbursement methodology to AWP-10% because of an August 1989 transmittal from the Health Care Financing Administration¹ which stated that: “...absent valid documentation to the contrary, a published AWP level as a State determination of EAC without a significant discount being applied is not an acceptable estimate of prices generally and currently paid by providers.” (Memorandum from Mike Boushon to Peggy Bartels and Dr. Dally, *Alternatives to Current Drug Reimbursement Method* at 1 (Nov. 24, 1989) (WI-Prod-AWP-097939 to 942).)
- In a 1995 study, the Wisconsin Department of Agriculture, Trade and Consumer Protection described AWP as follows:

The AWP is set by the manufacturer and provides a starting point for many of the price negotiations which are outlined later in this section.

...

The AWP is the manufacturer’s suggested selling price for wholesalers to use. The “Actual Acquisition Cost” is the true cost that retailers pay. This amount may, and does, differ significantly from AWP. The wholesaler is often granted discounts from the AWP from the manufacturer.

(Wisconsin Department of Agriculture, Trade and Consumer Protection, *Wholesale Pricing of Prescription Drugs in Wisconsin* (July 28, 1995), at 18, 21(WI-Prod-AWP-106223 to 297)

- In a 1998 e-mail to the Director of the Bureau of Health Care Program Integrity for the Wisconsin Division of Health Care Financing (“Wisconsin DHCF”), a consultant who was later employed by Wisconsin DHCF stated: “since AWP (i.e., ain’t what’s paid) prices rarely reflect the market, we should continue to have a MAC price.” (E-mail from Ted Collins to Alan White Re: Generic Supplies (Feb. 24, 1998) (WI-Prod-AWP-090070 to 71).)
- A Budget Issue Paper prepared by Wisconsin DHFS in June of 1998 states that AWP “represents more than cost[,]” and that “Wisconsin MA’s current drug payment methodology over-compensates pharmacy providers for their cost of drugs.” DHFS 1999-2001 Biennial Budget Issue Paper, *Cost of Drugs* at 1 (June 2, 1998) (WI-Prod-

¹ The Health Care Financing Administration or HCFA is now known as the Centers for Medicare and Medicaid Services. The Health Care Financing Administration and the Centers for Medicare and Medicaid Services are collectively referred to hereinafter as “CMS”.

AWP-095303-306).

- An LFB paper dated June 1, 1999 states that “AWP is the manufacturer’s suggested wholesale price of a drug and is analogous to the ‘sticker price’ of a car. It does not reflect the actual cost of acquiring the drug.” (LFB, Joint Committee on Finance, *Drug Reimbursement*, Paper #479 at 3 (June 1, 1999) (attached as Ex. 32) (WI-Prod-AWP-106010–18).)
- A 2002 study commissioned by Wisconsin to investigate pharmacy reimbursement concluded that AWP exceeded actual acquisition costs by 17.52 to 17.58% for brand name drugs, and 74.44 to 76.16% for generics. (David Kreling, *Pharmacy Cost of Dispensing/Acquisition Cost Study Final Report* (“Kreling Report”) at ii (Mar. 6, 2002) (PSW_00010245-67).)
- In a 2004 letter responding to a private attorney’s solicitation to participate in an AWP litigation, a Wisconsin DHFS official noted that Wisconsin had been aware of the disparity between AWP and actual acquisition costs for some time:

The issue you present is one of which we have been aware for several years. In 1997, and again in 2001, Wisconsin was one of the eight states that the Department of Health and Human Services’ Office of the Inspector General included in its survey of Medicaid Coverage of Prescription Drugs. That survey indicated that pharmacists could obtain brand name prescription drugs at 21.84 percent below the average wholesale price, while Medicaid reimbursement for those drugs averaged around 10-12 percent below the average wholesale price.

(Letter from Mark B. Moody to Gary F. Franke (Mar. 17, 2004) (WI-Prod-AWP-126686).)

In addition to the documents listed above, Wisconsin has received directives and/or reports from the federal government that AWP does not reflect the cost to providers for Dey’s drugs. For example, Medicaid Action Transmittal No. 84012 explained to the State and other state governments that “states can save money under Medicaid by paying for drugs at rates paid by pharmacies, rather than paying the average wholesale price as is often the custom.” The Federal Department of Health & Human Services Office of the Inspector General (“HHS-OIG”) also issued reports comparing AWP to providers’ actual acquisition costs. *See, e.g., OIG Report Concerning Medicaid and Medicare Reimbursement for Drugs* (Oct. 1989), reprinted in *Medicare and Medicaid Guide* (CCH) § 38,215 at 1 (1990) (“[I]n August 1989, the Health Care

Financing Administration (HCFA) issued a revision to the State Medicaid Manual pointing out the preponderance of evidence demonstrating that AWP overstates the prices that pharmacies actually pay for drugs by as much as 10 to 20 percent. The Manual issuance provides that, absent valid documentation to the contrary, it will not be acceptable under Medicaid for a state to make reimbursements using AWP without a significant discount.”).

In addition, many other government reports and studies confirm that participating Medicaid states, including Wisconsin, knew AWPs were only benchmark prices that did not reflect the providers’ actual acquisition costs. For example, in 1984, the HHS-OIG issued a report alerting every state Medicaid agency that “[w]ithin the pharmaceutical industry, AWP means non-discounted list price. Pharmacies purchase drugs at prices that are discounted significantly below AWP or list price.” That AWP is a benchmark price has been recognized in numerous other public reports, including the following:

- In 1977, HCFA told the States that “[i]n order to set estimated acquisition costs which come close to AAC [actual acquisition costs], some states, for example, begin with AWP prices but apply a percentage markdown to determine acquisition costs.” HCFA Action Transmittal No. HCFA-AT-77-113 (MMB), Dec. 13, 1977, *Medicaid - Formula for Determining EAC for Drugs*, reprinted in *Medicare and Medicaid Guide* (CCH) ¶ 28,714.
- In 1984, the HHS-OIG reported that “AWP represents a list price and does not reflect several types of discounts, such as prompt payment discounts, total order discounts, . . . rebates, or free goods that do not appear on the pharmacist’s invoices,” and recommended that state agencies be precluded from using an undiscounted AWP. The report found pharmacy drug purchases were made at prices averaging approximately 15.93% below AWP, with some at 42% below AWP. *Medicaid Action Transmittal No. 84-12* at 3, 6.
- In 1989, the HHS-OIG reported: “[w]e continue to believe that AWP is not a reliable price to be used as a basis for making reimbursements for either the Medicaid or Medicare Programs. When AWP is used, we believe it should be discounted.” *OIG Rep. Concerning Medicaid and Medicare Reimbursement for Drugs* at 7.
- In 1996 and 1997, the HHS-OIG publicly issued thirteen audit reports finding that AWPs significantly exceed pharmacies’ actual acquisition costs.
- In 1997, in connection with legislative efforts to change Medicare’s AWP-based

reimbursement system, the Secretary of HHS testified that “the AWP is not the average price actually charged by *wholesalers to their customers*. Rather, it is a ‘sticker’ price set by drug manufacturers and published by several commercial catalogs.” President’s Fiscal Year 1998 Budget Proposal for Medicare, Medicaid and Welfare, 105th Cong. at 265 (1997).

In May 2000, the Wisconsin Medicaid program received average wholesale market pricing information for about 400 national drug codes compiled by the U.S. Department of Justice (“DOJ”), without reliance on published AWP (the “DOJ Prices”). All of the States that participated in the Medicaid program, including Wisconsin, were told actual acquisition costs may be even lower than the DOJ Prices, “because purchasers often receive further discounts, below the advertised wholesale catalog price” *Program Memorandum Intermediaries/Carriers*, Transmittal AB-00-86 (September 8, 2000).

Dey has never represented to Medicaid or Medicare that the AWP published for Dey’s products represented actual costs or the average of wholesale prices paid by anyone. Dey has explained to Medicaid officials exactly what Dey’s AWP represent and their relationship to the final “cost” to the purchaser. Starting in at least 1999, Dey informed Wisconsin Medicaid officials:

As you know, the AWP listed here does not represent the actual price which will be or has been charged for this product. It is Dey’s practice to set an AWP before a product is first sold and not subsequently to change that figure. Dey believes this to be clearly understood by state and federal Medicaid regulators.

(Letter from Robert F. Mozak to State Medicaid Administrator, August 10, 1999, WI-Prod-AWP-128276.) Despite this disclosure, Wisconsin has never objected to the manner in which Dey set its AWP prior to this lawsuit. Indeed, as far as Dey knows, Wisconsin has never even attempted to contact Dey to discuss the manner in which it sets its AWP.

Dey further states that, throughout the relevant time period, Wisconsin calculated its reimbursement payments for drugs dispensed to Medicaid beneficiaries based on a methodology

that included a percentage discount off of AWP as one of its options, despite knowing that AWP did not represent an average of providers' actual acquisition costs. From at least the late-1970s until June 1990, Wisconsin has reimbursed based on the lower of (1) EAC, which Wisconsin defined as the Direct Price charged by certain manufacturers, an undiscounted AWP, or MAC plus a reasonable dispensing fee; or (2) "usual and customary charge." (*See* State Plan Amendment No. 79-0032 (Sept 21, 1979) (WI-Prod-AWP-022148); State Plan Amendment No. 90-0006 (Apr. 17, 1990) (WI-Prod-AWP-011366).) In July 1990, Wisconsin Medicaid changed its definition of EAC from an undiscounted AWP to AWP-10%. (Vavra Tr. at 394:5-21.) In July 2001, Wisconsin modified the reduction off AWP in its reimbursement methodology to AWP-11.25%. (Vavra Tr. at 97:6-13; State Plan Amendment No. 01-0009 (July 1, 2001) (WI-Prod-AWP-027602).) In 2003, Wisconsin modified the reduction off AWP in its reimbursement methodology to AWP-12%, and, in 2004, to AWP-13%, and has not changed it since. (Vavra Tr. at 436:2-13, 452:12-15.) Indeed, even today, after the commencement of this lawsuit, Wisconsin continues to use a percentage discount off of AWP as one of the possible bases to calculate reimbursement.

The existence of a "spread" between reimbursement rates based on AWP and the prices at which Dey's drugs were purchased by providers did not violate the law, was not misleading, and did not cause Medicare or the Wisconsin Medicaid program to make excessive reimbursement payments. The Medicare and Medicaid professionals devised their reimbursement program to use the spread and used reimbursement methodologies that built in a "spread" between a provider's acquisition costs and reimbursement amounts to serve their own needs, including ensuring that beneficiaries of the programs had adequate access to care. Indeed, the Government knew of the spread between Dey's AWP and WAC which by itself was publicly

disclosed in the published compendia and otherwise.

Participation by providers in the Medicaid and Medicare programs is voluntary. To ensure that beneficiaries have adequate access to medical care, the Wisconsin Medicaid program utilizes a reimbursement methodology that includes, as one of its bases, a percentage discount off of AWP to provide an economic incentive for providers' participation. Likewise, prior to 2005, the Medicare Part B program used a reimbursement methodology that included a percentage discount off of AWP to provide an economic incentive for providers' participation. The Medicaid and Medicare programs knew that their reimbursement methodology for the ingredient portion did not approximate providers' costs to acquire the drugs, but did not change their reimbursement methodologies because, among other reasons, they had to ensure that a sufficient number of providers enrolled to ensure access to care for Medicaid beneficiaries. Additionally, federal law requires that States' Medicaid payments "are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A).

The Medicaid and Medicare programs have used AWP as benchmark price as a way of ensuring access to care for beneficiaries because the "spread" the programs built in has been intended to cover providers' costs and ensure providers receive a profit on the transactions. Indeed, Wisconsin recognizes that Medicaid reimbursement must provide pharmacists with a reasonable profit margin. In 2006, the Governor of Wisconsin established a commission to study cost-saving alternatives to reducing pharmaceutical reimbursement rates. One of the goals of the commission was "to balance the interests of various stakeholders," including pharmacists' interest "to be provided with sufficient reimbursement to cover their costs of doing business, i.e.,

the cost of the drug (ingredient cost), and the costs of dispensing and some profit margin.”

(Governor’s Commission on Pharmacy Reimbursement -- Final Report (“2006 Governor’s Commission Report”) at 7 (Mar. 30, 2006) (emphasis added).)

Reimbursement for prescription drugs is intended to cover the ingredient cost of the drug, the costs incurred by a provider in dispensing the product, and a reasonable profit to the provider. Generally, dispensing fees do not cover dispensing costs incurred by providers, much less provide a profit. The dispensing fee component of Wisconsin’s reimbursement methodology has long been well below Wisconsin’s own estimates of pharmacists’ dispensing costs. For instance:

- In 1990, extrapolating from a study performed in 1979, Wisconsin estimated that the average cost of dispensing, in 1990, was \$5.28 per prescription. (*Projecting a 1990 Cost of Dispensing a Prescription Drug*, (1990) (WI-Prod-AWP-097969-971).) However, Wisconsin did not raise its dispensing fee to \$5.28; rather, it only raised the fee to \$4.69. (Memorandum from Christine Nye to Mark Gajewski (May 1, 1990).)
- In 2000, Wisconsin commissioned Dr. David Kreling to determine the average cost of dispensing prescriptions. Dr. Kreling concluded that, in 2000, the average dispensing costs was \$6.60. (Kreling Report at 2.) Yet, during this time, Wisconsin’s dispensing fee was \$4.38. (*See* State Plan Amendment No. 01-0009, (July 1, 2001) (WI-Prod-AWP-027605).)
- In 2002, Dr. Kreling projected the average dispensing cost to be between \$7.03 and \$7.43 per prescription. (2002 Kreling Report at 2.) During this time, Wisconsin retained its \$4.38 dispensing fee.
- In 2006, the commission convened by the Governor to explore alternative cost-reduction measures found that the average dispensing cost was \$9.50. (2006 Governor’s Commission Report at 7.) Yet Wisconsin’s dispensing fee remained at \$4.38.

Thus, Wisconsin relies on the spread between pharmacists’ acquisition costs and the reimbursement calculations based on AWP to cover pharmacists’ costs and provide them with a reasonable profit, as the following demonstrates:

- In 1988, the Bureau of Health Care Financing (“BHCF”), the bureau responsible at the time for administering Medicaid, stated that: “It is generally accepted that [Wisconsin Medicaid’s] stated professional fee is lower than actual pharmacy overhead costs, but this discrepancy had previously been nullified by the difference between [Wisconsin Medicaid’s] payment for the drug and the actual new drug cost to the pharmacy. (A

lower net cost can be due to 'volume' or early-pay discounts offered by wholesalers.)” (Memorandum from Christine Nye to Roberta Kostrow at 3 (Nov. 22, 1988).)

- In 1989, BHCF “acknowledge[d] that AWP is inflated, but argue[d] that total payments are not excessive because dispensing fees are artificially low and off-set the over allowance.” (Memorandum from Christine Nye to George MacKenzie at 2 (June 26, 1989).)
- In 2001, the Legislative Fiscal Bureau noted that “[t]he margin between the acquisition cost and the reimbursement rate, together with the dispensing fees, represents the pharmacies' total reimbursement for service costs.” (Legislative Fiscal Bureau, *Reimbursement Rates for Prescription Drugs (DHFS-Medical Assistance)* Paper #474 at 4 (June 4, 2001).)
- In 2003, the Legislative Fiscal Bureau warned that a proposed cut in reimbursement from AWP-11.25% to AWP-15% would reduce a pharmacist’s margin to a “\$2.22 margin on AWP,” which “may not cover all of a pharmacy’s costs to dispense a prescription.” (Legislative Fiscal Bureau, *Reimbursement Rates for Prescription Drugs (DHFS-Health Care Financing-Payments, Services and Eligibility)* Paper #389 at 5 (May 21, 2003).)

As a result, the Medicare program used, and the Wisconsin Medicaid program continues to use, a reimbursement methodology that includes, as one of its bases, a percentage discount off of AWP to compensate for this shortfall in dispensing fees and to ensure that providers earn a profit on Medicaid transactions. Meanwhile, when the federal government switched Medicare reimbursement from an AWP-based system to a system based on Average Sales Price (“ASP”), it drastically increased dispensing fees.

Wisconsin was free at all times to change its pharmaceutical reimbursement methodology under its Medicaid program to a methodology that did not include a percentage discount off of AWP and which did not include a reimbursement “spread.” In addition to the published AWPs for Dey’s products, Wisconsin and the federal government had access to a number of other prices for Dey’s products, including Federal Supply Schedule prices, AMPs, 340B prices, Department of Veterans Affairs prices, and direct contract prices with Dey or contract prices through group purchasing organizations (“GPO”) prices at which federal and state agencies purchased Dey drugs directly from Dey or from wholesalers. Wisconsin Medicaid program could have

compared the published AWP for Dey's products with any one of these prices and used one of the lower prices in its reimbursement methodology.

Through its reimbursement methodology, Wisconsin knowingly provided larger "spreads" or margins for generic drugs than for brand-name drugs in order to provide an incentive for pharmacies to dispense lower-cost generic drugs. Generic drugs are typically less costly than brand-name drugs. For example, in 1996, the HHS-OIG found that providers' acquisition costs, on average, was 18.3% below AWP for brand name drugs and 42.5% for generic drugs.

Even though reimbursement for a generic drug may give a provider a larger "spread" than reimbursement for a brand name drug, its total reimbursement payment for the generic drug will still be lower than that for a brand-name drug, thereby saving Wisconsin money. As "spreads" for generic drugs increase, Wisconsin benefits because the larger spreads increase incentives for providers to dispense generic drugs. Moreover, contrary to Plaintiff's claims, Dey does not benefit from increased spreads. First, drug manufacturers, like Dey, do not receive the money which comes from the spread. The so-called spread in the reimbursement payments goes to the providers. Second, if the spread for a particular generic Dey drug is getting larger, it is almost always because the AWP of the drug is remaining the same, while the actual selling price is getting lower. At the same time, Dey's costs are increasing and its margins are declining.

Dey further states that the federal and state governments, including Wisconsin, also had access to Dey's AMPs during the relevant time period. On January 1, 1991, Dey entered into a Rebate Agreement with the Secretary of the Department of Health and Human Services, who enters into the agreement on behalf of states with Medicaid programs, including Wisconsin. *See* 42 U.S.C. § 1396r-8(a)(1). The Rebate Agreement requires Dey to pay rebates to the states

based on the AMP and, where applicable, Best Price for its products. *See* 42 U.S.C. § 1396r-8(b)(1)(A). Dey has paid rebates to the States and the federal government, further lowering the costs of drugs to the Medicaid program. The Rebate Agreement requires Dey to provide to CMS, on a quarterly basis, the AMP and, where applicable, Best Price for its products that are reimbursed by Medicaid. *See* 42 U.S.C. § 1396r-8(b)(3). Federal statute and the Rebate Agreement only obligated Dey to report AMP and, where applicable, Best Price information, not AWP or WAC. Under the Rebate Agreement and federal statute, 42 U.S.C. § 1396r-8(k)(1), Dey must include in its AMP calculation certain discounts and other price reductions which reduce the price paid for Dey's products.

CMS has calculated unit rebate amounts ("URAs") based upon the formula set forth in federal statute and the AMPs and Best Prices reported by the drug manufacturers to the Medicaid program. *See* 42 U.S.C. § 1396r-8(c). For instance, rebates for non-innovator, multiple source (*i.e.* generic) drugs are equal to 11% of AMP. *See* 42 U.S.C. § 1396r-8(c)(3)(A-B). (Prior to January 1, 1994, the rebate percentage was 10%. *See id.*) CMS provides the URAs, which constitute AMP information, to the State Medicaid programs, including Wisconsin's. Thus, Wisconsin Medicaid officials have the necessary information to determine the AMP for each of Dey's generic products by performing a simple arithmetic calculation, *i.e.*, dividing the URA by 11%, the applicable rebate percentage for non-innovator, multiple source drugs. *See* 42 U.S.C. § 1396r-8(c)(3)(A-B).

Deirdre Duzor, the CMS Director of the Pharmacy Division for the Medicaid program, testified:

Q: Okay. So if you had the URA and you divided by .11, that would tell you what the AMP is, right?

* * *

A: Yes. The AMPs have been fairly transparent for generic drugs.

Duzor Tr. 679: 12-17.

The administrators in charge of running the Medicaid program have testified that States have had access to AMPs. *See* Vladeck Tr. 461:12-15; 463:19-464:06; Scully Tr. 627:13-20.

Bruce Vladeck, the Administrator of HCFA from May 1993 to September 1997 testified:

Q: So as far as you know, people within HCFA shared AMP data with state Medicaid agencies?

A: That was my understanding.

* * *

Q: So it was entirely possible -- it was entirely possible for the heads of a state Medicaid agency to look at the AMP data on AMP prices and at the same time look at data as to what they were reimbursing for those drugs. That was entirely possible. Right?

A: It's -- I don't know any reason why it wouldn't be possible.

Vladeck Tr. 461:12-15; 463:19-464:06.

Thomas Scully, the Administrator of CMS from May 2001 to December 2003 testified:

Q: Did you ever tell any state that they should calculate their reimbursement methodology for Medicaid taking into account AMP data?

A: No.

Q: Why not?

A: States have AMP data, and they have their own political calculations, and reasons for paying the rates they pay.

Scully Tr. 627:13-20.

Wisconsin set reimbursement rates under its Medicaid program with access to Dey's AMPs and the "spreads" between AMPs and the AWP. CMS approved Wisconsin's reimbursement rates for the Medicaid program and set reimbursement rates under the Medicare Part B program with full knowledge of Dey's AMPs and the "spreads" between the AWP and

AMPs.

Wisconsin approved the practice of drug manufacturers' reporting to First DataBank AWP that exceeded the actual averages of prices charged by wholesalers to their customers because the reimbursement methodology it set, along with its other policy decisions made in connection with determining appropriate reimbursement rates, described above, reflect and rely upon knowledge of and purposeful utilization of this precise fact. Indeed, Wisconsin has known that published AWP were not actual averages of providers' acquisition costs for the drugs and that AWP minus the applicable percentage in its reimbursement methodology exceeded providers' acquisition costs. Moreover, Wisconsin did not instruct Dey to set or report AWP in any particular manner.

Additionally, CMS explicitly approved of Wisconsin's use of an reimbursement methodology that included a percentage discount off of AWP with knowledge of the spread between the reimbursement amount and providers' acquisition costs. The Medicaid program is jointly funded by the States and the federal government, and the federal government has funded at least 50% of all expenditures of the State Medicaid programs. In order to obtain federal funds, Wisconsin was required to submit its prescription drug reimbursement methodology to CMS for approval. CMS approved Wisconsin's reimbursement methodology with knowledge: (1) of Dey's AMP as compared to Dey's AWP; (2) that the reimbursement methodology included a spread between actual acquisition cost and reimbursement amount; and (3) that Medicaid programs in other states were reimbursing at lower amounts, including any state that reimbursed at actual acquisition cost. In other words, CMS effectively approved of and ratified the spread Wisconsin incorporated into its reimbursement methodology.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 1:

Produce all documents identified in your Response to Interrogatory No. 1.

DEY'S RESPONSE AND OBJECTIONS:

Dey hereby adopts and incorporates its specific objections to Request for Admission No. 1 and Interrogatory No. 1. into its response to Request for Production of Documents No. 1. Dey further objects to Request for Production of Documents No. 1 to the extent that it demands the production of documents that Dey has produced in response to Wisconsin's prior interrogatories and requests for production, or that are otherwise already within Wisconsin's possession, custody, or control.

Subject to and without waiving the foregoing general and specific objections, Dey directs Wisconsin to the documents noted in Dey's response to Interrogatory No. 1 and its prior productions containing additional price notification letters to Wisconsin.

CONSOLIDATED DISCOVERY REQUEST NO. 2

REQUEST FOR ADMISSION NO. 2:

At no time has the State of Wisconsin, its Department of Health & Family Services, or any employee thereof, explicitly approved your practice of reporting to First DataBank suggested wholesale prices ("SWPs") for your drugs that were not the true average prices charged by wholesalers to their customers for your drugs.

DEY'S RESPONSE AND OBJECTIONS:

Dey objects to Request for Admission No. 2 on the grounds that it is vague and ambiguous, *inter alia*, because it contains terms and phrases that are themselves vague, ambiguous, undefined, and/or interpreted differently by the parties, including, but not limited to, "your practice," "reporting," "suggested wholesale prices ('SWPs')" and "true average prices." Dey further objects to this request as unduly burdensome to the extent it seeks admissions concerning matters that are not within Dey's knowledge, are already within Wisconsin's

knowledge, or are more appropriately sought from third-parties. Dey further objects to this request on the grounds that it improperly assumes facts not in evidence. Dey further objects to this request to the extent that it improperly implies that the prices Dey provided to First DataBank were false. Dey further objects to this request to the extent that it improperly implies that Dey was obligated to seek approval from Wisconsin concerning its determination of the prices Dey provided to First DataBank, or that Wisconsin had adopted statutes, regulations, or guidelines governing, or in any way controlled or sought to control, the manner in which Dey or any other drug manufacturer determined such prices. Dey further objects to this request as overly broad and unduly burdensome to the extent it seeks admissions concerning unspecified actions and/or statements taken and/or made by unspecified individuals during an unspecified period of time.

Subject to and without waiving the foregoing general and specific objections, Dey denies the matters set forth in Request for Admission No. 2.

INTERROGATORY NO. 2:

If your response to Request for Admission No. 2 is anything other than an unqualified admission, state all bases for your response, including the following:

- (a) identify whether the approval was made verbally or in writing;
- (b) identify the person(s) who approved the practice;
- (c) identify the date(s) on which the approval was made;
- (d) state whether the approval was communicated to you;
- (e) if the approval was communicated to you, state whether the communication was made verbally or in writing;
- (f) if the approval was communicated to you, identify the date of such communication(s);

- (g) if the approval was communicated to you, identify the person(s) who made the communication(s);
- (h) if the approval was communicated to you, identify the person(s) who received the communication(s);
- (i) identify all documents relating to the approval of the practice;
- (j) identify all documents relating to the communication of the approval to you.

DEY'S RESPONSE AND OBJECTIONS:

Dey incorporates herein its objections to Request for Admission No. 2.

Subject to and without waiving the foregoing general and specific objections, Dey states that, throughout the relevant time period, Dey did not report a "suggested wholesale price" or "SWP" for its drugs to First DataBank. Request for Admission No. 2 is therefore a hypothetical without factual basis.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 2:

Produce all documents identified in your Response to Interrogatory No. 2.

DEY'S RESPONSE AND OBJECTIONS:

Dey incorporates herein its objections and response to Request for Admission No. 2.

CONSOLIDATED DISCOVERY REQUEST NO. 3

REQUEST FOR ADMISSION NO. 3:

At no time has the State of Wisconsin, its Department of Health & Family Services, or any employee thereof, explicitly approved your practice of reporting to First DataBank wholesale acquisition costs ("WACs") for your drugs that were not the true average prices, net of discounts, rebates, chargebacks, and incentives, paid by wholesalers to you for your drugs.

DEY'S RESPONSE AND OBJECTIONS:

Dey objects to Request for Admission No. 3 on the grounds that it is vague and ambiguous because, *inter alia*, it contains terms and phrases that are themselves vague,

ambiguous, or undefined, including, but not limited to, “reporting,” “wholesale acquisition costs (‘WACs’),” “true average prices,” “net,” “discounts,” “rebates,” and “chargebacks.” Dey further objects to this request as unduly burdensome to the extent it seeks admissions concerning matters that are not within Dey’s knowledge, are already within Wisconsin’s knowledge, or are more appropriately sought from third-parties. Dey further objects to this request on the grounds that it improperly assumes facts not in evidence. Dey further objects to this request to the extent that it improperly implies that the WACs reported by Dey were in any way false. Dey further objects to this request to the extent that it improperly implies that Dey was obligated to seek approval from Wisconsin concerning its determination and reporting of WACs, or that Wisconsin had adopted statutes, regulations, or guidelines governing, or in any way controlled or sought to control, the manner in which Dey or any other drug manufacturer determined and reported WACs. Dey further objects to this request as overly broad and unduly burdensome to the extent it seeks admissions concerning unspecified actions and/or statements taken and/or made by unspecified individuals during an unspecified period of time.

Subject to and without waiving the foregoing general and specific objections, Dey denies the matters set forth in Request for Admission No. 3.

INTERROGATORY NO. 3:

If your response to Request for Admission No. 3 is anything other than an unqualified admission, state all bases for your response, including the following:

- (a) identify whether the approval was made verbally or in writing;
- (b) identify the person(s) who approved the practice;
- (c) identify the date(s) on which the approval was made;
- (d) state whether the approval was communicated to you;

- (e) if the approval was communicated to you, state whether the communication was made verbally or in writing;
- (f) if the approval was communicated to you, identify the date of such communication(s);
- (g) if the approval was communicated to you, identify the person(s) who made the communication(s);
- (h) if the approval was communicated to you, identify the person(s) who received the communication(s);
- (i) identify all documents relating to the approval of the practice;
- (j) identify all documents relating to the communication of the approval to you.

DEY'S RESPONSE AND OBJECTIONS:

Dey hereby adopts and incorporates its specific objections to Request for Admission No. 3 into its response to Interrogatory No. 3. Dey further objects to this interrogatory as unduly burdensome to the extent it seeks information that is: (a) not within Dey's knowledge, possession, custody, or control; (b) already within Wisconsin's knowledge, possession, custody, or control; or (c) more appropriately sought from third-parties.

Subject to and without waiving the foregoing general and specific objections, Dey states the following:

Dey states that WAC is not defined anywhere in Wisconsin's statutes or regulations and Wisconsin has never provided or directed Dey to any definition of WAC. Dey's WAC is the invoice price that Dey charges wholesalers. When each of Dey's generic drugs was launched, Dey set a WAC at a percentage below the AWP for the drug. It has been Dey's general practice to reduce its WACs for its generic drugs on a periodic basis as prices for the drug have eroded in the marketplace due to generic competition. Dey further states that Wisconsin has never understood WAC to represent an actual average of prices, net of discounts, rebates, chargebacks, and incentives, paid by wholesalers to drug manufacturers. Carrie Gray – the witness designated

by Wisconsin to testify about Wisconsin's efforts to define, calculate, determine, investigate, understand or interpret WAC – testified that she was not aware of any drug manufacturer ever representing to Wisconsin that WAC was an “actual average of wholesale acquisition cost.” Gray Dep. at 122:18-22.

Dey has explained to Medicaid officials, including officials in Wisconsin's Medicaid program, exactly what Dey's WACs represent and their relationship to the final “cost” to the purchaser. Starting in at least 2000, Dey informed Medicaid officials:

As you know, WAC is referred to by data reporting services and government agencies as an “estimate,” and Dey believes that WAC generally means the actual invoice price charged by a pharmaceutical manufacturer to its drug wholesalers. As you also know, WAC does not include the net effect of discounts from invoice price (based on volume of purchases, speed of payment and other factors), rebates, chargebacks, administration fees and other such cost adjustments which are well-known and commonplace in the pharmaceutical industry and can affect, to a greater or lesser degree, the actual “final” cost to each purchaser. These discounts may not be determined until some months after the date of invoice. Therefore, we remind you that WAC may well not be representative of actual market costs to those entities which you are reimbursing under Medicaid.

(Letter from Robert Mozak to various state Medicaid officials, including Roma Rowlands, July 18, 2000, DEY-WI-0121379-385, 380.) Despite this disclosure, Wisconsin has never objected to the manner in which Dey set its WACs prior to this lawsuit. Indeed, as far as Dey knows, Wisconsin has never even attempted to contact Dey to discuss the manner in which it sets its WACs.

During the relevant time period, Wisconsin was also aware that WAC is not equal to wholesalers' acquisition costs “net of discounts, rebates, chargebacks, and incentives, paid by wholesalers”. The federal government has advised states, including Wisconsin, that WAC does not include discounts and price reductions that may affect the price to wholesalers. (*See, e.g.*, GAO Report, “Prescription Drugs: Companies Typically Charge More in the United States Than in the United Kingdom” (January 1994), at p. 19, n.16.) Indeed, in the federal Medicare

Modernization Act of 2003 (Pub. L. 108-173), Congress defined WAC to exclude “prompt pay or other discounts, rebates or reductions in price.” *Id.* at Sec. 1847A (c)(6)(B).

This is consistent with Wisconsin’s own understanding that WAC represented an undiscounted price to a wholesaler that did not include rebates, chargebacks, and other incentives a wholesaler might receive. In a 1995 study, the Wisconsin Department of Agriculture, Trade and Consumer Protection described WAC as follows:

In general, wholesalers purchase from manufacturers at the Wholesale Acquisition Cost (WAC). Rebates or discounts from WAC, may be granted, such as those based on volume purchasing.

...

Often the Wholesale Acquisition Cost (WAC) will be above the contractual price [from the wholesaler to its customer], indicating that the wholesaler is taking a loss. However, the wholesaler does usually recover the difference between the contractual price and the WAC from the manufacturer through a process commonly referred to as a charge back. For each product sold at a contractual price, the wholesaler must file that transaction with the manufacturer to obtain a refund of the difference between WAC and the contract price.

(Wisconsin Department of Agriculture, Trade and Consumer Protection, *Wholesale Pricing of Prescription Drugs in Wisconsin* (July 28, 1995), at 18, 21(WI-Prod-AWP-106223 to 297).

James Vavra, another of Wisconsin’s designated witnesses, confirmed that this was consistent with his, and consequently Wisconsin’s, understanding of WAC. (Vavra Tr. at 133-34.)

Dey further incorporates its response to Interrogatory No. 1 herein and states that Wisconsin has had access to Dey’s AMPs and has had the ability to compare those AMPs with Dey’s WACs.

Wisconsin approved of the manner in which Dey and other drug manufacturers set their WACs at all times relevant to this action as evidenced by: (a) Wisconsin’s knowledge that WAC did not represent an average of prices, net of all discounts, rebates, and chargebacks, paid by wholesalers to manufacturers; (b) Dey’s repeated disclosures to Wisconsin that its WAC was not

net of discounts, rebates, chargebacks, and other price reductions; (c) Wisconsin's access to and knowledge of Dey's AMPs; and (d) Wisconsin's decision throughout the relevant time period not to define WAC in statute or regulation or otherwise direct Dey to set or report its WACs in any particular manner.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 3:

Produce all documents identified in your Response to Interrogatory No. 3.

DEY'S RESPONSE AND OBJECTIONS:

Dey hereby adopts and incorporates its specific objections to Request for Admission No. 3 and Interrogatory No. 3 into its response to Request for Production of Documents No. 3. Dey further objects to Request for Production of Documents No. 3 to the extent that it demands the production of documents that Dey has produced in response to Wisconsin's prior interrogatories and requests for production, or that are otherwise already within Wisconsin's possession, custody, or control.

Subject to and without waiving the foregoing general and specific objections, Dey directs Wisconsin to the documents noted in Dey's response to Interrogatory No. 3 and its prior productions containing additional price notification letters to Wisconsin.

CONSOLIDATED DISCOVERY REQUEST NO. 4

REQUEST FOR ADMISSION NO. 4:

The average wholesale prices ("AWPs") that you reported to First DataBank for your drugs were not the true average prices charged by wholesalers to their customers for your drugs. Rather, the AWPs that you reported to First DataBank for your drugs were more than the true average prices charged by wholesalers to their customers for your drugs.

DEY'S RESPONSE AND OBJECTIONS:

Dey objects to Request for Admission No. 4 on the grounds that it is vague and ambiguous because, *inter alia*, it contains terms and phrases that are themselves vague,

ambiguous, and/or undefined, including, but not limited to, “reported,” “average wholesale prices (‘AWPs’)” and “true average prices.” Dey further objects to this request on the grounds that it is premised on a definition of “average wholesale price” or “AWP” that is inconsistent with the common understanding of that term as it was used throughout the relevant time period, and therefore is not susceptible to a meaningful response. Dey further objects to this request as unduly burdensome on the grounds that it requires Dey to analyze voluminous transactional data over an unspecified period of time between wholesalers and their customers, which data: (a) is not within Dey’s possession, custody, or control; (b) is more appropriately sought from the wholesalers themselves; and (c) Wisconsin has the ability to analyze itself. Dey further objects to this request on the grounds that it is improperly compound. Dey further objects to this request to the extent that it improperly implies that the AWPs Dey provided to First DataBank were false.

Subject to and without waiving the foregoing general and specific objections, Dey denies the matters set forth in this Request to the extent the Request is based upon a definition of WAC as an “average,” which is inconsistent with the definition of that term set forth in federal statute and the common understanding of that term as it was used throughout the relevant time period. Dey further states that it is without knowledge or information sufficient to admit or deny the remaining matters set forth in Request for Admission No. 4 because Dey does not know and, upon reasonable inquiry, cannot readily obtain the average prices at which wholesalers have sold Dey’s drugs to their customers.

INTERROGATORY NO. 4:

If your response to Request for Admission No. 4 is anything other than an unqualified admission, state all bases for your response and identify all documents that support or relate to your response.

DEY'S RESPONSE AND OBJECTIONS:

Dey incorporates herein its objections to Request for Admission No. 4.

Subject to and without waiving the foregoing general and specific objections, Dey states that the AWP's it provided to First DataBank were consistent with the common understanding of that term by the parties, including Wisconsin, throughout the relevant time period and incorporates herein its response to Interrogatory No. 1. Dey further states that it does not have any knowledge of and, upon reasonable inquiry, cannot readily obtain the average prices at which wholesalers have sold Dey's drugs to their customers during the relevant time period.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 4:

Produce all documents identified in your Response to Interrogatory No. 4.

DEY'S RESPONSE AND OBJECTIONS:

Dey incorporates herein its objections and responses to Request for Admission No. 4 and Interrogatory No. 4.

CONSOLIDATED DISCOVERY REQUEST NO. 5

REQUEST FOR ADMISSION NO. 5:

The suggested wholesale prices ("SWPs") that you reported to First DataBank for your drugs were not the true average prices charged by wholesalers to their customers for your drugs. Rather, the SWPs that you reported to First DataBank for your drugs were more than the true average prices charged by wholesalers to their customers for your drugs.

DEY'S RESPONSE AND OBJECTIONS:

Dey objects to Request for Admission No. 4 on the grounds that it is vague and ambiguous because, *inter alia*, it contains terms and phrases that are themselves vague, ambiguous, undefined, and/or interpreted differently by the parties, including, but not limited to, "reported," "suggested wholesale prices ('SWPs')" and "true average prices." Dey further objects to this request as unduly burdensome to the extent it requires Dey to analyze voluminous

transactional data over an unspecified period of time between wholesalers and their customers, which data: (a) is not within Dey's possession, custody, or control; (b) is more appropriately sought from the wholesalers themselves; and (c) Wisconsin has the ability to analyze itself. Dey further objects to this request on the grounds that it is improperly compound. Dey further objects to this request on the grounds that it assumes facts not in evidence. Dey further objects to this request to the extent that it improperly implies that the prices Dey provided to First DataBank were in any way false.

Subject to and without waiving the foregoing general and specific objections, Dey denies the matters set forth in Request for Admission No. 5.

INTERROGATORY NO. 5:

If your response to Request for Admission No. 5 is anything other than an unqualified admission, state all bases for your response and identify all documents that support or relate to your response.

DEY'S RESPONSE AND OBJECTIONS:

Dey incorporates herein its objections to Request for Admission No. 5.

Subject to and without waiving the foregoing general and specific objections, Dey states that, throughout the relevant time period, Dey did not report a "suggested wholesale price" or "SWP" for its drugs to First DataBank. Request for Admission No. 5 is therefore a hypothetical without factual basis.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 5:

Produce all documents identified in your Response to Interrogatory No. 5.

DEY'S RESPONSE AND OBJECTIONS:

Dey incorporates herein its responses and objections to Request for Admission No. 5 and Interrogatory No. 5.

CONSOLIDATED DISCOVERY REQUEST NO. 6

REQUEST FOR ADMISSION NO. 6:

The wholesale acquisition costs (“WACs”) that you reported to First DataBank for your drugs were not the true average prices, net of discounts, rebates, chargebacks, and incentives, paid by wholesalers to you for your drugs. Rather, the WACs that you reported to First DataBank for your drugs were more than the true average prices, net of discounts, rebates, chargebacks, and incentives, paid by wholesalers to you for your drugs.

DEY’S RESPONSE AND OBJECTIONS:

Dey objects to Request for Admission No. 6 on the grounds that it is vague and ambiguous because, *inter alia*, it contains terms and phrases that are themselves vague, ambiguous, undefined, and/or interpreted differently by the parties, including, but not limited to, “reported,” “wholesale acquisition costs (‘WACs’)” and “true average prices.” Dey further objects to this request on the grounds that it is premised on a definition of “wholesale acquisition cost” or “WAC” that is inconsistent with the definition of that term set forth in federal statute and the common understanding of that term as it was used throughout the relevant time period, and therefore is not susceptible to a meaningful response. Dey further objects to this request as unduly burdensome on the grounds that it requires Dey to analyze voluminous transactional data over an unspecified period of time between Dey and its wholesaler customers, which data Dey has produced to Wisconsin and which Wisconsin itself has the ability to analyze. Dey further objects to this request on the grounds that it is improperly compound. Dey further objects to this request to the extent that it improperly implies that the WACs Dey provided to First DataBank were false.

Subject to and without waiving the foregoing general and specific objections, Dey denies the matters set forth in this Request to the extent that the Request states that the WACs that Dey provided to First DataBank were not Dey’s true WACs.

INTERROGATORY NO. 6:

If your response to Request for Admission No. 6 is anything other than an unqualified admission, state all bases for your response and identify all documents that support or relate to your response.

DEY'S RESPONSE AND OBJECTIONS:

Dey incorporates herein its objections to Request for Admission No. 6.

Subject to and without waiving the foregoing general and specific objections, Dey states that its WAC is the invoice price that Dey charges wholesalers and “does not include the net effect of discounts from invoice price (based on volume of purchases, speed of payment and other factors), rebates, chargebacks, administration fees and other such cost adjustments which are well-known and commonplace in the pharmaceutical industry and can affect, to a greater or lesser degree, the actual “final” cost to each purchaser.” This is consistent with the definition of “wholesale acquisition cost” set forth in 42 U.S.C. § 1395w-3a(c)(6)(B), which provides, “[t]he term ‘wholesale acquisition cost’ means, with respect to a drug or biological, the manufacturer’s list price for the drug or biological to wholesalers or direct purchasers in the United States, not including prompt pay or other discounts, rebates or reductions in price. . .” Dey further states that this definition was consistent with Wisconsin’s understanding of WAC throughout the relevant time period and incorporates herein its response to Interrogatory No. 3.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 6:

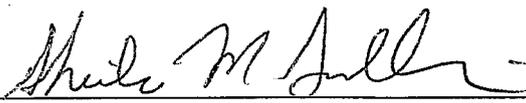
Produce all documents identified in your Response to Interrogatory No. 6.

DEY'S RESPONSE AND OBJECTIONS:

Dey incorporates herein its responses and objections to Request for Admission No. 6 and Interrogatory No. 6.

Dated: July 10, 2008

BELL, GIERHART & MOORE, S.C.

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VERIFICATION AS TO RESPONSES TO INTERROGATORIES

I, PAMELA MARRS, having first been duly sworn, hereby state that I am the Senior Vice-President and Chief Financial Officer of Dey, Inc. I have read the foregoing Responses and Objections to Plaintiff's First Set of Consolidated Discovery Requests to All Defendants and verify that the information contained in responses to the interrogatories therein is true and correct to my best knowledge, information and belief.

DEY, INC.

By: *Pamela MARRS*
Pamela Marrs

Title: Senior Vice-President and Chief Financial Officer

Sworn to and subscribed before me
this ___ day of July, 2008

See Attached

Notary Public

CALIFORNIA JURAT WITH AFFIANT STATEMENT

- See Attached Document (Notary to cross out lines 1-6 below)
- See Statement Below (Lines 1-5 to be completed only by document signer[s], *not* Notary)

1 _____
 2 _____
 3 _____
 4 _____
 5 _____
 6 _____

Signature of Document Signer No. 1 _____ Signature of Document Signer No. 2 (if any) _____

State of California

County of NAPA

Subscribed and sworn to (or affirmed) before me on this

9th day of July, 2008, by

(1) Pamela MARRS
Name of Signer

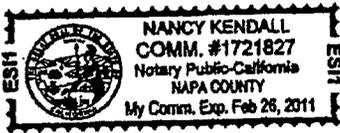
proved to me on the basis of satisfactory evidence to be the person who appeared before me (.) (.)

(and

(2) none
Name of Signer

proved to me on the basis of satisfactory evidence to be the person who appeared before me.)

Signature Nancy Kendall
Signature of Notary Public



Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Further Description of Any Attached Document

Title or Type of Document: WI Verification

Document Date: _____ Number of Pages: 1

Signer(s) Other Than Named Above: none

RIGHT THUMBPRINT OF SIGNER #1
Top of thumb here

RIGHT THUMBPRINT OF SIGNER #2
Top of thumb here