

STATE OF WISCONSIN,

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Plaintiff,

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Case No.: 04 CV 1709

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v.

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ABBOTT LABORATORIES, *et. al.*,

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Defendants.

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**RESPONSES AND OBJECTIONS BY DEFENDANT SMITHKLINE BEECHAM CORPORATION, D/B/A GLAXOSMITHKLINE (“GSK”) TO PLAINTIFF’S SECOND SET OF CONSOLIDATED DISCOVERY REQUESTS TO ALL DEFENDANTS**

Pursuant to Wis. Stat. §§ 804.08, 804.09 and 804.11, defendant SmithKline Beecham Corporation, d/b/a GlaxoSmithKline (“GSK”), by its attorneys, hereby asserts the following responses and objections to the Plaintiff’s Second Set Of Consolidated Discovery Requests To All Defendants as follows:

**PRELIMINARY STATEMENT**

1. By responding to these Requests or Interrogatories, GSK does not waive or intend to waive: (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 Requests and Interrogatories; (b) the right to object on any ground to the use of the documents or information produced in response to the Requests and Interrogatories at any hearing, trial, or other point during the litigation; or (c) the right to object on any ground at any time to a demand for further responses to the Requests and Interrogatories.

2. By responding to a particular Request or Interrogatory, GSK does not assert that it has responsive documents or information or that such documents or information exist, only that it will conduct a reasonable inquiry and provide the information if it is responsive, non-objectionable, and non-privileged. No objection made herein, or lack thereof, is an admission by GSK as to the existence or non-existence of any document.

3. The Responses made herein are based on GSK's investigation to date of those sources within its control where it reasonably believes responsive documents or information may exist. GSK reserves the right to amend or supplement these Responses in accordance with the applicable law and Court orders.

4. GSK reserves the right to modify these objections and responses and to present in any proceeding and at trial any further information and documents obtained during discovery and preparation for trial.

### **GENERAL OBJECTIONS**

GSK expressly incorporates all of the General Objections set forth below into each Response to the Requests and Interrogatories. Any Specific Objections provided below are made in addition to these General Objections and failure to reiterate a General Objection below does not constitute a waiver of that or any other objection.

GSK objects generally as follows:

1. GSK objects to Plaintiff's "Definitions" and "Instructions" to the extent that they expand upon or alter GSK's obligations under applicable law and court rules. GSK will comply with the applicable law and rules in providing its Responses and Objections to Plaintiff's Consolidated Set of Requests and Interrogatories.

2. GSK objects to each and every Request and Interrogatory as irrelevant, overly broad, unduly burdensome, and not reasonably calculated to lead to admissible evidence to the extent that it purports to require production of documents or information relating to pharmaceuticals not properly placed at issue in this litigation.

3. GSK objects to each and every Request and Interrogatory to the extent that it seeks information protected by the attorney-client privilege, work-product doctrine, common-interest doctrine, privileges relating to the right to lobby, constitutional privileges, joint-defense privilege, or any other applicable privileges or protections, and to the extent these Requests or Interrogatories seek trial preparation and expert materials. GSK hereby asserts these privileges to their fullest extent and no statement or answer herein shall constitute waiver thereof. Any document subject to any such privilege that is inadvertently produced by GSK shall not constitute or be deemed a waiver of such privilege or protection, and GSK reserves its rights to demand the return of any inadvertently produced documents.

4. GSK objects to each and every Request and Interrogatory to the extent that it seeks information that was compiled for and presented during compromise negotiations. GSK hereby asserts these privileges and protections to their fullest extent and no statement or answer herein shall constitute waiver thereof. Any document subject to any such privileges and protections that is inadvertently or otherwise produced by GSK shall not constitute or be deemed a waiver of such privileges or protections, and GSK reserves its rights to demand the return of any inadvertently produced document.

5. GSK objects to each and every Request and Interrogatory to the extent that it seeks information or documents concerning a trade secret, proprietary or other confidential

information and is not otherwise subject to a protective order entered by the Court in this litigation.

6. GSK objects to each and every Request and Interrogatory to the extent that it seeks information that GSK received from third parties and cannot disclose without prior approval of the third-parties.

7. GSK objects to each and every Request and Interrogatory to the extent that it seeks information that does not currently exist at GSK.

8. GSK objects to each and every Request and Interrogatory to the extent that it purports to require GSK to create, compile, or develop information or documents not already in existence.

9. GSK objects to each and every Request and Interrogatory to the extent that it seeks production of documents or information not in GSK's custody or control, publicly available documents or information, documents or information equally available to the Plaintiff, or documents or information more appropriately sought from third-parties to whom subpoenas or requests could have been directed.

10. GSK objects to each and every Request and Interrogatory to the extent that it requests or purports to require production of documents or seek information relating to a period of time outside of any applicable statute of limitations and/or after September 6, 2002 (the date on which Plaintiffs filed the Master Consolidated Class Action Complaint in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456 (D. Mass.)).

11. GSK objects to each and every Request and Interrogatory as irrelevant, overly broad, unduly burdensome, and not reasonably calculated to lead to admissible evidence to the

extent they seek documents or information concerning divested or discontinued drugs after the date of divestiture or discontinuation, including documents and information concerning Kytril<sup>®</sup> after December 22, 2000, the date on which GSK's predecessor, SmithKline Beecham, sold Kytril<sup>®</sup> to Hoffman-La Roche Inc.

12. GSK objects to each and every Request and Interrogatory, either individually or collectively, that is overly broad, unduly burdensome, expensive, embarrassing, vexatious, or oppressive to answer on the grounds that such Request or Interrogatory exceeds the permissible scope of discovery under applicable law and court rules.

13. GSK objects to each and every Request and Interrogatory to the extent that it seeks information that is not relevant to this litigation or is not reasonably calculated to lead to the discovery of admissible evidence.

14. GSK objects to any implications and to any explicit or implicit characterization of facts, events, circumstances, or issues in the Requests or Interrogatories. Any Response by GSK is not intended to indicate that GSK agrees with any implication or any explicit or implicit characterization of facts, events, circumstances, or issues in the Requests or Interrogatories, or that such implications or characterizations are relevant to this action.

15. GSK reserves the right to withhold the production of any responsive documents, other than what it agrees to produce through these responses and during the meet and confer process, until the court has ruled on any Motion to Dismiss or Motion for Judgment on the Pleadings filed by GSK in this case.

16. Subject to and without waiving any objection set forth herein, GSK will produce non-privileged, responsive information and documents as set forth below at a time and place and in a manner to be agreed upon by the parties.

17. GSK objects to the definition of “Document” as set forth in Definition No. 1 on the grounds that it is vague and ambiguous with respect to the language “writing,” “recording of any kind,” “agendas, agreements, analyses, announcements, audits, booklets, books, brochures, calendars, charts, contracts, correspondence, electronic mail (e-mails), facsimiles (faxes), film, graphs, letters, memos, maps, minutes,” “Executive Committee meeting minutes,” “notes, notices, photographs, reports, schedules, summaries, tables, telegrams, and videotapes” “medium,” “written, graphic, pictorial, photographic, electronic, phonographic, mechanical, taped,” “saved on computer disc,” “hard drives, data tapes” and “non-identical copy.” GSK further objects to this definition to the extent that it seeks to impose discovery obligations that are broader than, or inconsistent with, GSK’s obligations under applicable law and Court Rules. GSK further objects to this definition to the extent it requires or seeks to require GSK to: (i) produce documents or data in a particular form or format; (ii) convert documents or data into a particular or different file format; (iii) produce data, fields, records, or reports about produced documents or data; (iv) produce documents or data on any particular media; (v) search for and/or produce any documents or data on back-up tapes; (vi) produce any proprietary software, data, programs, or databases; or (vii) violate any licensing agreement or copyright laws.

18. GSK objects to the definition of “Identify” as set forth in Definition No. 2 on the grounds that, taken together with the requests for production, admission, and interrogatories using this defined term, it is overly broad and unduly burdensome.

19. GSK objects to the definition of “You,” “Your,” and “Your Company” as set forth in Definition No. 3 on the grounds that it is overly broad, unduly burdensome, vague, ambiguous, confusing, seeks to invade the attorney-client and work product privileges, and/or seeks to impose on GSK any obligation in conflict with or beyond those imposed by applicable law and Court Rules.

### **SPECIFIC RESPONSES AND OBJECTIONS TO REQUESTS**

#### **CONSOLIDATED DISCOVERY REQUEST NO. 7**

**REQUEST FOR ADMISSION NO. 7:** At no time has the State of Wisconsin and you agreed on the meaning or definition of average wholesale price (“AWP”).

**RESPONSE TO REQUEST FOR ADMISSION NO. 7:** Denied.

Subject to and without waiving the Preliminary Statement and General Objections, GSK denies this Request and states that it has been widely known and understood for decades, including by GSK and other manufacturers and by state Medicaid agencies (including Wisconsin’s) and relevant state employees in the State of Wisconsin, that published AWP’s were not mathematical averages of prices paid by pharmacies but rather reimbursement benchmarks that exceeded pharmacy acquisition costs. Moreover, GSK further states that there was no requirement for GSK to enter into any agreement, either explicit or implicit, with a state, or any agency or department or employee thereof, on the “meaning or definition” of AWP.

**INTERROGATORY NO. 7:** If your response to request for admission no. 7 is anything other than an unqualified admission, state all bases for your response, including the following:

- (a) identify the definition of AWP that you contend the State of Wisconsin and you agreed on;
- (b) identify the date when you contend that the State of Wisconsin and you first agreed on the definition of AWP provided in response to subpart (a) of this interrogatory;

- (c) state whether you contend that the State of Wisconsin and you agree on the definition of AWP provided in your response to subpart (a) of this interrogatory as of the date that you answer this second set of consolidated discovery requests to all defendants;
- (d) if your answer to subpart (c) is “no,” identify the last date when you contend the State of Wisconsin and you agreed on the definition of AWP provided in response to subpart (a) of this interrogatory;
- (e) state whether you contend that the State of Wisconsin and you together developed the definition of AWP provided in response to subpart (a) of this interrogatory;
- (f) if your answer to subpart (e) is “yes,” describe in detail the manner in which the State of Wisconsin and you together developed the definition of AWP provided in response to subpart (a) of this interrogatory, including (1) the identity of each person involved in the development of the definition; (2) the role of each such person; (3) the dates of each such person’s participation in the development of the definition; and (4) the dates and substance of each communication between the State of Wisconsin and you regarding the development of the definition of AWP;
- (g) identify all documents supporting your response to request for admission no. 7;
- (h) identify all documents supporting your answer to interrogatory no. 7, including all subparts; and
- (i) identify all documents supporting any contention you provide in your answer to interrogatory no. 7, including all subparts.

**RESPONSE TO INTERROGATORY NO. 7:** In addition to its General Objections set forth above which are incorporated herein by reference, GSK objects to Interrogatory No. 7 on the grounds that it is overly broad and unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. GSK further objects to this Interrogatory on the ground that it seeks information or documents that are equally, or more readily, available to plaintiff.

Subject to and without waiving the Preliminary Statement, General Objections, and Specific Objections set forth above, GSK responds that it has been widely known and understood for decades, including by GSK and other manufacturers and by state Medicaid agencies (including Wisconsin’s) and relevant state employees in the State of Wisconsin, that published AWP’s were not mathematical averages of prices paid by pharmacies but rather reimbursement benchmarks that exceeded pharmacy acquisition costs. GSK further responds that the State’s

own documents and conduct confirm that its understanding of AWP was the same as GSK's understanding as set forth above. GSK further states that the State of Wisconsin chose and continues to choose to use AWP minus a percentage amount as a basis for reimbursement, thereby further evidencing its understanding that AWP does not represent an actual average of wholesale prices. GSK additionally states that Plaintiff is already in possession of documents from which the answer to this interrogatory may be obtained. GSK also refers Plaintiff to Defendants' briefing and attached exhibits filed in response to Plaintiff's motions for summary judgment, which contain additional information generally responsive to this interrogatory. Moreover, GSK further states that there was no requirement for GSK to enter into any agreement, either explicit or implicit, with a state, or any agency or department or employee thereof, on the "meaning or definition" of AWP.

GSK further responds that, pursuant to the Stipulation with Plaintiff and other states dated April 13, 2007 and discussions with Plaintiff's counsel, GSK has produced documents concerning AWP and the list prices reported by GSK, GSK's communicated definitions of those prices, and documents concerning how those prices were commonly defined, used, and understood -- from which information responsive to this Interrogatory may be obtained.

**REQUEST FOR PRODUCTION NO. 7:** Produce all documents identified in your response to interrogatory no. 7.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 7:** In addition to its General Objections, which are incorporated herein by reference, GSK objects to this Request on the grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to admissible evidence. GSK further objects to this Request on the ground that it seeks information or documents that are equally, or more readily, available to plaintiff.

Subject to and without waiving the Preliminary Statement, General Objections, and Specific Objections set forth above, GSK responds that, pursuant to the Stipulation with Plaintiff and other states dated April 13, 2007 and discussions with Plaintiff's counsel, GSK has produced documents concerning AWP and the list prices reported by GSK, GSK's communicated definitions of those prices, and documents concerning how those prices were commonly defined, used, and understood.

**CONSOLIDATED DISCOVERY REQUEST NO. 8**

**REQUEST FOR ADMISSION NO. 8:** At no time has the State of Wisconsin and you agreed on the meaning or definition of wholesale acquisition cost ("WAC").

**RESPONSE TO REQUEST FOR ADMISSION NO. 8:** Denied.

Subject to and without waiving the Preliminary Statement and General Objections, GSK denies this Request and states that it has long been known and understood in the industry and by relevant government agencies, including agencies of the State of Wisconsin, that WACs (and WAC-equivalents) are "list prices" to wholesalers and warehousing chains, which do *not* include discounts, rebates, or chargebacks, and this understanding was ultimately codified in federal law in 2003 at 42 U.S.C. § 1395w-3(c)(6)(B). Moreover, consistent with the understanding in the industry and in government agencies, GSK and its corporate predecessors have consistently stated in the definitions of WAC (and WAC-equivalents) that they have provided to First DataBank that its WACs (and WAC-equivalents) are "list prices" to wholesalers and warehousing chains and do not include discounts, rebates or chargebacks. The State of Wisconsin repeatedly received Medicaid reports and other documents that used this widely accepted definition of WAC, understood the term to be used in that manner and, to GSK's knowledge, never expressed any contrary understanding of the term other than in this lawsuit.

Moreover, GSK further responds that there was no requirement for GSK to enter into any agreement, either explicit or implicit, with a state, or any agency or department or employee thereof, on the “meaning or definition” of WAC.

**INTERROGATORY NO. 8:** If your response to request for admission no. 8 is anything other than an unqualified admission, state all bases for your response, including the following:

- (a) identify the definition of WAC that you contend the State of Wisconsin and you agreed on;
- (b) identify the date when you contend that the State of Wisconsin and you first agreed on the definition of WAC provided in response to subpart (a) of this interrogatory;
- (c) state whether you contend that the State of Wisconsin and you agree on the definition of WAC provided in your response to subpart (a) of this interrogatory as of the date that you answer this second set of consolidated discovery requests to all defendants;
- (d) if your answer to subpart (c) is “no,” identify the last date when you contend the State of Wisconsin and you agreed on the definition of WAC provided in response to subpart (a) of this interrogatory;
- (e) state whether you contend that the State of Wisconsin and you together developed the definition of WAC provided in response to subpart (a) of this interrogatory;
- (f) if your answer to subpart (e) is “yes,” describe in detail the manner in which the State of Wisconsin and you together developed the definition of WAC provided in response to subpart (a) of this interrogatory, including (1) the identity of each person involved in the development of the definition; (2) the role of each such person; (3) the dates of each such person’s participation in the development of the definition; and (4) the dates and substance of each communication between the State of Wisconsin and you regarding the development of the definition of WAC;
- (g) identify all documents supporting your response to request for admission no. 8;
- (h) identify all documents supporting your answer to interrogatory no. 8, including all subparts;
- (i) identify all documents supporting any contention you provide in your answer to interrogatory no. 8, including all subparts.

**RESPONSE TO INTERROGATORY NO. 8:** In addition to the General Objections set forth above, GSK objects to Interrogatory No. 8 on the grounds that it is overly broad and unduly burdensome and not reasonably calculated to lead to the discovery of admissible

evidence. GSK further objects to this Interrogatory on the ground that it seeks information or documents that are equally, or more readily, available to plaintiff.

Subject to and without waiving the Preliminary Statement and General Objections, GSK denies this Request and states that it has long been known and understood in the industry and by relevant government agencies, including agencies of the State of Wisconsin, that WACs (and WAC-equivalents) are “list prices” to wholesalers and warehousing chains, which do *not* include discounts, rebates, or chargebacks, and this understanding was ultimately codified in federal law in 2003 at 42 U.S.C. § 1395w-3(c)(6)(B). Moreover, consistent with the understanding in the industry and in government agencies, GSK and its corporate predecessors have consistently stated in the definitions of WAC (and WAC-equivalents) that they have provided to First DataBank that its WACs (and WAC-equivalents) are “list prices” to wholesalers and warehousing chains and do not include discounts, rebates or chargebacks. The State of Wisconsin repeatedly received Medicaid reports and other documents that used this widely accepted definition of WAC, understood the term to be used in that manner and, to GSK’s knowledge, never expressed any contrary understanding of the term other than in this lawsuit. GSK further states that Plaintiff is already in possession of documents from which the answer to this interrogatory may be obtained. Such documents include, but are not limited to, federal statutes, reports from various branches of the federal government and, upon information and belief, documents from the files of various agencies of the State of Wisconsin. GSK also refers Plaintiff to Defendants’ briefing and attached exhibits filed in response to Plaintiff’s motions for summary judgment, which contain additional information generally responsive to this interrogatory. Moreover, GSK further responds that there was no requirement for GSK to enter

into any agreement, either explicit or implicit, with a state, or any agency or department or employee thereof, on the “meaning or definition” of WAC.

GSK further responds that, pursuant to the Stipulation with Plaintiff and other states dated April 13, 2007 and discussions with Plaintiff’s counsel, GSK has produced documents concerning the WACs and WAC-equivalents reported by GSK, GSK’s communicated definitions of those reported prices, and documents concerning how WAC was commonly defined, used, and understood -- from which information responsive to this Interrogatory may be obtained.

**REQUEST NO PRODUCTION NO. 8:** Produce all documents identified in your Response to Interrogatory No. 8.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 8:** In addition to the General Objections set forth above, GSK objects to Request No. 8 on the grounds that it is overly broad and unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. GSK further objects to this Request on the ground that it seeks information or documents that are equally, or more readily, available to plaintiff.

Subject to and without waiving the Preliminary Statement, General Objections, and Specific Objections set forth above, GSK responds that, pursuant to the Stipulation with Plaintiff and other states dated April 13, 2007 and discussions with Plaintiff’s counsel, GSK has produced documents concerning the WACs and WAC-equivalents reported by GSK, GSK’s communicated definitions of those reported prices, and documents concerning how WAC was commonly defined, used, and understood.

Dated: August 11, 2008

Respectfully submitted,

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STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

STATE OF WISCONSIN,

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Case No.: 04 CV 1709

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Plaintiff,

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ABBOTT LABORATORIES, ET AL.,

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Defendants.

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the **RESPONSES AND OBJECTIONS BY SMITHKLINE BEECHAM CORPORATION, D/B/A GLAXOSMITHKLINE ("GSK") TO PLAINTIFF'S SECOND SET OF CONSOLIDATED DISCOVERY REQUESTS TO ALL DEFENDANTS** by SmithKline Beecham Corporation, d/b/a GlaxoSmithKline ("GSK"), to be served on counsel of record by transmission to LNFS pursuant to Order dated December 20, 2005.

Dated this 11th day of August, 2008.

/s/ Richard J. Cutler

Richard J. Cutler