

STATE OF WISCONSIN,

Plaintiff,

Case No.: 04-CV-1709

v.

AMGEN INC., et al.,

Defendants.

**DEFENDANT SICOR INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFF
STATE OF WISCONSIN'S SECOND SET OF CONSOLIDATED DISCOVERY
REQUESTS TO ALL DEFENDANTS**

Pursuant to Wisconsin Statutes §§ 804.01, 804.08, 804.09, 804.11 and Wisconsin Rule of Civil Procedure 804.04, Defendant Sicor Inc. ("Sicor") hereby responds and objects to Plaintiff State of Wisconsin's ("Plaintiff", "Wisconsin" or "State") Second Set of Consolidated Discovery Requests to All Defendants (the "Requests") as follows:

GENERAL OBJECTIONS

Sicor incorporates all of the General Objections set forth below into its responses to each Request. Any Specific Objections provided are made in addition to these General Objections, and the failure to restate a General Objection below does not constitute a waiver of that or any other objection.

1. These responses are made without in any way waiving or intending 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 these Requests; (b) the right to object on any ground to the use of any documents or information

produced in response to these Requests at any hearings or at trial; or (c) the right to object on any ground at any time to a demand for further responses to these Requests and Interrogatories.

2. Sicor reserves the right at any time to revise, correct, add to, supplement, or clarify any of the responses contained herein.

3. Sicor has not completed its investigation and discovery in this case. Accordingly, the documents and information produced in response to these Requests are based upon, and necessarily limited by, information now available to Sicor.

4. Sicor states that its responses are subject to the Protective Order entered in this case.

5. Sicor objects to these Requests to the extent they demand the production of documents or information containing trade secrets, or proprietary, commercially sensitive, or other confidential information.

6. Sicor 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 Sicor 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 law and the Protective Order entered in this case.

7. Sicor objects to these Requests to the extent they purport to impose duties and obligations on Sicor beyond the duties and obligations under the Wisconsin Rules of Civil Procedure and the applicable local rules. Sicor will comply with its duties and obligations under the Wisconsin Rules of Civil Procedure and the applicable local rules.

8. Sicor states that the information and documents produced in response to these Requests are for use in this litigation and for no other purpose.

9. Sicor objects to these Requests to the extent they seek information that is neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence, or are overly broad, unduly burdensome, ambiguous, or vague.

10. Sicor objects to these Requests to the extent they seek information protected by the attorney-client privilege, the work product doctrine, or any other immunity, privilege, or exemption from discovery recognized by any applicable law or rule. To the extent any such protected information is disclosed in response to these Requests, the production of such information is inadvertent and shall not constitute a waiver of Sicor's right to assert the applicability of any privilege or immunity, and any such information and documents shall be returned to Sicor's counsel immediately upon discovery thereof, and any and all copies of the same shall be contemporaneously destroyed.

11. Sicor objects to these Requests to the extent they seek any information beyond Sicor's possession, custody, or control.

12. Sicor objects to these Requests to the extent they call for information that is more appropriately sought from third parties to whom requests have been or may be directed.

13. Sicor objects to these Requests to the extent they call for the production of publicly available documents or documents that could be obtained from Plaintiff's own files or other sources.

14. Sicor objects to these Requests to the extent they explicitly or implicitly characterize facts, events, circumstances, or issues relating to the subject of this litigation.

15. Sicor's responses to these Requests shall not be construed in any way as an admission that any definition provided by Plaintiff is either factually or legally binding upon Sicor. Neither the fact that an objection is interposed to a particular Request nor the fact that no objection is interposed necessarily means that responsive information exists. Sicor's undertaking to furnish information responsive to these Requests is subject to the general provision that Sicor only agrees to provide information to the extent it can be identified on the basis of reasonable diligence.

16. Sicor objects to these Requests to the extent they demand the production of documents or information from outside of the statute of limitations timeframe applicable to the Plaintiff's claims in this action, or beyond the time period relevant to this action. Sicor further objects to these Requests as irrelevant, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent they purport to require production of documents or seek information relating to a period of time outside the bounds ordered by the Court in this case.

17. Sicor objects to these Requests to the extent they demand production of documents or information relating to Sicor's activities that are outside the scope of the Second Amended (or any subsequently amended) Complaint.

18. Sicor objects to these Requests to the extent they demand production of documents or information relating to Sicor's activities other than those which concern the State of Wisconsin, on the grounds that such documents or information are neither relevant to the

subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence.

19. Sicor objects to these Requests to the extent they call for Sicor to restore and produce archived data that presently exists on media no longer used by Sicor and which requires the use of equipment and/or software no longer used or maintained by Sicor, on the grounds that the request is overly broad, unduly burdensome, duplicative, and not reasonably calculated to lead to the discovery of admissible evidence. Sicor further objects to these Requests to the extent they seek production of any data that does not reside in complete form in an active and readily accessible format, is presently unreadable or unusable, or cannot be verified as accurate.

20. Sicor objects to Plaintiff's definition of "You," "Your," and "Your Company" on the grounds that it is overly broad and unduly burdensome. Sicor further objects to this definition to the extent that it purports to include entities and persons that are not parties to this action. Moreover, while Sicor intends to conduct a reasonable search for responsive documents, it hereby states that it will not take any responsibility to search for documents in the possession or control of other persons, including separate corporate entities, on the bases that these documents are beyond Sicor's possession, custody, and control, as well as neither relevant to the subject matter of this litigation nor reasonably calculated to lead to the discovery of admissible evidence.

21. Sicor objects to Plaintiff's definition of "Document" on the grounds that it is vague, ambiguous, and overly broad. Sicor further objects to this definition to the extent that it includes documents that are protected by the attorney-client privilege, the work product doctrine, or any other immunity, privilege, or exemption from discovery recognized by any applicable law

or rule. Sicor further objects to this definition to the extent that it seeks to impose obligations on Sicor that are greater than, or inconsistent with, Sicor's obligations under the Wisconsin Rules of Civil Procedure and the applicable local rules. Sicor further objects to this definition to the extent that it purports to include within its scope documents or information containing or consisting of proprietary information, trade secrets, or information of a competitively sensitive nature.

22. Sicor objects to Plaintiff's definitions generally as vague, ambiguous, and contrary to Plaintiff's own document productions, and as unduly burdensome.

23. Sicor objects to the instructional paragraphs preceding the specific Requests on the grounds that these instructions are vague, ambiguous, and overly broad. Sicor further objects to these instructions as overly burdensome insofar as they purport to impose on Sicor obligations inconsistent with, or greater than, Sicor's obligations under the Wisconsin Rules of Civil Procedure and the applicable local rules.

24. Sicor reserves the right at any time to assert additional objections to these Requests as appropriate, and to amend or supplement its responses based on the results of its continuing investigation.

25. Sicor hereby incorporates by reference as if fully set forth herein any objection or reservation of rights made by any defendant in this action to the extent such objection or reservation of rights is not inconsistent with Sicor's position in this litigation.

26. Sicor objects to these Requests to the extent Sicor has already produced documents to Plaintiff that are fully responsive to these Requests. Sicor hereby expressly incorporates this objection into each and every response to the specific Requests below.

SPECIFIC RESPONSES AND OBJECTIONS

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: Sicor objects that this Request is overly broad, unduly burdensome, and duplicative of Plaintiff’s previous discovery requests. Sicor further objects that this Request seeks information already within Plaintiff’s possession, custody, or control. Sicor further objects that the phrases “agreed,” “meaning” and “definition” are vague and ambiguous and subject to differing interpretations. Sicor further objects to this Request to the extent it assumes Sicor was under an obligation or duty to enter in any sort of agreement — express or tacit — with the State as to the “meaning or definition” of AWP. In addition, Sicor states that it discontinued transmitting AWP’s to First DataBank and other compendia in or before 2004, and thus objects to this Request to the extent that it implies anything to the contrary.

Subject to and without waiving the foregoing objections, Sicor DENIES Request for Admission No. 7 on the grounds that it has been widely known for decades, including by both state Medicaid agencies such as the State of Wisconsin Medicaid Department, and the federal government, that published AWP’s are not and never were intended to be actual mathematical averages of prices paid by pharmacies, and Wisconsin Medicaid expressly and affirmatively adopted and promulgated reimbursement formulas reflecting knowledge of, acceptance of, and approval of that practice. Nor is Sicor aware of any correspondence or any communication from or by the state of Wisconsin to Sicor expressing a differing understanding of the term 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: In addition to its General Objections, which are incorporated herein by reference, Sicor objects that this Interrogatory is overly broad, unduly burdensome, and duplicative of Plaintiff’s previous discovery requests. Sicor further objects that this Interrogatory seeks information already within Plaintiff’s possession, custody, or control. Sicor further objects that Plaintiff’s requests that Sicor “state all bases” and “identify all documents” are harassing, overly broad, unduly burdensome, and duplicative of Plaintiff’s previous discovery requests.

Subject to and without waiving the foregoing objections, Sicor refers Plaintiff to Sicor’s response to Request for Admission No. 7, *supra*, incorporated herein by reference. Sicor further

states that the documents and information responsive to this Interrogatory are in the possession of the Plaintiff.

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

RESPONSE: In addition to its General Objections, which are incorporated herein by reference, Sicor objects that Plaintiff's Request is duplicative of Plaintiff's previous discovery requests and that the documents responsive to this Request are in the possession, custody, or control of the Plaintiff.

Subject to and without waiving the foregoing objections, Sicor states that documents relating to its communications with the State and the Wisconsin Department of Human Services regarding the Sicor NDCs listed in Plaintiff's Target Drug List and reimbursed by Wisconsin Medicaid in Wisconsin during the applicable time period have been or will be produced.

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: DENIED.

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.

ANSWER: In addition to its General Objections, which are incorporated herein by reference, Sicor objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and duplicative of Plaintiff’s previous discovery requests. Sicor further objects that this Interrogatory seeks information already within Plaintiff’s possession, custody, or control. Sicor further objects that Plaintiff’s requests that Sicor “state all bases” and “identify all documents” are harassing, overly broad, unduly burdensome, and duplicative of Plaintiff’s previous discovery requests. Sicor objects that this Request seeks information that is neither relevant to the subject matter of this litigation, nor is it reasonably calculated to lead to the discovery of admissible evidence, because the State of Wisconsin’s Medicaid program did not use WAC as a basis for reimbursement during the applicable time period. Sicor further objects that the phrases “explicitly approved,” “true average prices,” and “paid by wholesalers” are vague and ambiguous and subject to differing interpretations.

Subject to and without waiving the foregoing objections, Sicor states that the term “Wholesale Acquisition Cost” is defined within the statutes governing the Medicaid program as “the manufacturer’s list price for the drug . . . to wholesalers or direct purchasers in the United States, *not including prompt pay or other discounts, rebates or reductions in price.*” 42 U.S.C. § 1395w-3a(c)(6)(B) (emphasis supplied) (incorporated by reference in 42 U.S.C. 1396r–8). In

addition, Sicor states that Wisconsin Medicaid expressly and affirmatively adopted and promulgated reimbursement formulas reflecting knowledge of, acceptance of, and approval of industry pricing practices. Nor is Sicor aware of any correspondence or any communication from or by the state of Wisconsin to Sicor expressing a differing understanding of the term WAC. Finally, the information responsive to this Interrogatory is in the possession of the Plaintiff.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 8: Produce all documents identified in your response to interrogatory no. 8.

RESPONSE: In addition to its General Objections, which are incorporated herein by reference, Sicor objects that Plaintiff's Request is duplicative of Plaintiff's previous discovery requests and that the documents responsive to this Request are in the possession, custody, or control of the Plaintiff or third parties. Subject to and without waiving the foregoing objections, Sicor states that documents relating to its communications with the State and the Wisconsin Department of Human Services regarding the Sicor NDCs listed in Plaintiff's Target Drug List and reimbursed by Wisconsin Medicaid in Wisconsin during the applicable time period have been or will be produced.

DATED: August 11, 2008

AS TO ALL OBJECTIONS:



Lester Pines
CULLEN WESTON PINES & BACH LLP
122 West Washington Avenue
Ninth Floor
Madison, WI 53703-2718
Tel: (608) 251-0101
Fax: (608) 251-2883

Attorney for Defendant Sicor Inc.

Of Counsel

Jay P. Lefkowitz (admitted *pro hac vice*)
Jennifer G. Levy (admitted *pro hac vice*)
John K. Crisham (admitted *pro hac vice*)
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
Tel: (202) 879-5000
Fax: (202) 879-5200

CERTIFICATE OF SERVICE

I, Lester Pines, hereby certify that on this 11th day of August, 2008, a true and correct copy of the foregoing was served on all counsel of record by Lexis Nexis File & Serve®.



Lester Pines