



grounded in fraud. *Id.* After availing itself of the 60 days provided by the order and an additional extension, Plaintiff filed its Second Amended Complaint on June 28, 2006. That Complaint includes in Exhibits D and E listings of drugs by manufacturer with certain pricing information. At best, Plaintiff has complied with the order only as to the listed drugs for which Plaintiff has provided the information required by the Court. Drugs not listed or listed without the required information fail to comply and should not be part of this case.

Apart from being inconsistent with the order of the Court, Plaintiff has not complied with its obligations under Wisconsin law and the June 23, 2005 Stipulation and Order of Reference to Special Discovery Master (¶ 3) to make a good faith effort to resolve discovery disputes with opposing parties prior to bringing its motion. From the text of the letter (Ex. B to Plaintiff's Motion), the particular relief Plaintiff sought with respect to the drugs in the Second Amended Complaint was not at all clear initially. Merck's counsel raised the issue with the counsel for Plaintiff with whom Merck has been dealing, by e-mail and subsequently, on August 8, by telephone.

Among other points, counsel discussed that several drugs listed as Merck's in Exhibits D and E to the Second Amended Complaint were not, in fact, Merck drugs for some or all of the period in question. For example, Prilosec<sup>®</sup> was not marketed by Merck at any point in the period at issue. Flexeril<sup>®</sup>, Vasotec<sup>®</sup>, and Vaseretic<sup>®</sup> also were divested during the time period. Further, Plaintiff had failed to provide acquisition prices for several NDCs of Merck drugs, which was one of the minimum pleading criteria set by the Court.<sup>1</sup> In addition, during discussions with Plaintiff's counsel, Merck's counsel explained that expanding the number of drugs would not advance resolution of liability but would instead substantially increase the time required for

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<sup>1</sup> In addition, certain drugs had minimal aggregate reimbursements by Wisconsin during the six-year period prior to Merck being named in the First Amended Complaint. For example, Decadron<sup>®</sup> had aggregate reimbursement of less than \$4,000 by Wisconsin Medicaid for this period.

discovery and the burden of such discovery on both parties. (A copy of a letter confirming these and other discussions is attached hereto as Exhibit A.) Plaintiff has not yet responded, and there is simply no basis for blanket denial of Merck's objections to the additional discovery burdens posed by expanding discovery still further.

2. Plaintiff's Complaints About Confidentiality Designations And Redaction Of Documents To Exclude Drugs Not At Issue Are Neither Ripe, Nor Well-Founded.

Among the redacted documents attached to Plaintiff's Motion is Exhibit A-1, a February 21, 2001 memorandum produced by Merck in this action (Bates No. MERWIS 4950). Plaintiff cites this document as an example of "improper" redacting that "unjustifiably deprive[s] plaintiff of relevant information." Pl. Mem. at 3. Plaintiff is wrong on the merits, and, again, failed to raise this issue with Merck prior to bringing its motion.

The document in question is a memorandum from Merck's Economics Affairs Department to the then-President of Merck's Human Health-Americas Division. It is an internal Merck pricing document that discusses Merck's pricing strategy for certain specific drugs. Such pricing strategy documents are intensely competitively sensitive and have restricted distribution even within Merck. Reflecting this sensitivity, the memorandum bears a contemporaneous internal stamp indicating the document is "Restricted" – "Distribute and Disclose Only On A Need To Know Basis."

Most of the redacted information relates to a Merck drug called Aggrastat<sup>®</sup>. Aggrastat<sup>®</sup> is not referenced in any of the Exhibits to the Second Amended Complaint and has never been identified by Plaintiff as a drug that is the subject or target of discovery. Moreover, although Merck has not yet received Medicaid reimbursement and utilization data from the state, the information available through the website for the U.S. Centers for Medicare and Medicaid

Service does not reflect *any* reimbursement by Wisconsin Medicaid for Aggrastat<sup>®</sup> in the November 1998 to November 2004 time period.<sup>2</sup>

For these reasons, and those set forth in other defendants' memoranda in opposition, Plaintiff's motion should be denied.

Dated this 22nd day of August 2006

Respectfully submitted,

By:



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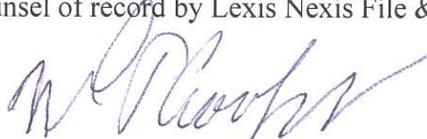
*Attorneys for Defendant Merck & Co., Inc.*

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<sup>2</sup> See <http://www.cms.hhs.gov/MedicaidDrugRebateProgram/SDUD/list.asp>.

Certificate of Service

I, Michael P. Crooks, hereby certify that on this 22nd day of August, 2006, a true and correct copy of the foregoing was served on all counsel of record by Lexis Nexis File & Serve<sup>®</sup>.

A handwritten signature in blue ink, appearing to read "M. P. Crooks", written over a horizontal line.

Michael P. Crooks