

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

Branch 7

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04CV1709

ABBOTT LABORATORIES, ET AL.,

Unclassified Civil: 30703

Defendants.

**DEFENDANT BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.'S
RESPONSES AND OBJECTIONS TO PLAINTIFF'S REQUESTS FOR PRODUCTION**

Under Wis. Stat. § 804.09, Defendant Boehringer Ingelheim Pharmaceuticals, Inc. ("BIPI"), by its attorneys, hereby asserts the following objections to the First Set of Requests for Production of Documents to All Defendants submitted by the State of Wisconsin ("the State") as follows:

PRELIMINARY STATEMENT

BIPI objects to providing discovery at this time in this matter due to the uncertain landscape for this litigation. A Motion to Dismiss is pending that details the severe deficiencies in plaintiff's First Amended Complaint, which makes the ultimate scope of this case uncertain. Given this context, and the burdens imposed upon BIPI by these document requests, requiring BIPI to respond at this time is inefficient, unduly burdensome and will likely yield information and documents that will not lead to the discovery of admissible evidence in this case. Depending upon how the Court's ruling on that Motion is handled, BIPI will respond as appropriate.

RESERVATION OF RIGHTS

As to all matters referred to in these objections and responses to the First Set of Requests for Production of Documents to All Defendants, BIPI's investigation and discovery continues. The specific responses set forth below and any production made consistent with the accompanying interrogatories are based upon, and necessarily limited by, information now available to BIPI. BIPI 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. Furthermore, any statement by BIPI contained in these objections and responses to the First Set of Requests for Production of Documents to All Defendants that non-privileged documents or information will be produced in response to a specific Request does not mean that any such documents or information actually, exist, but only that they will be produced to the extent that they exist.

OBJECTIONS TO DEFINITIONS

1. The term "Average Manufacturer Price" or "AMP" means the price you report or otherwise disseminate as the average manufacturer price for any Pharmaceutical that you report for purposes of the Medicaid program, pursuant to 42 U.S.C. § 1396r-8.

OBJECTION: BIPI objects to the definition of "Average Manufacturer Price" and "AMP" as set forth in Definition No. 1 on grounds that it is vague and ambiguous with respect to the language "the price you report or otherwise disseminate as the average manufacturer price for any Pharmaceutical that you report." BIPI incorporates by reference its objection to the definition of the term "Pharmaceutical." BIPI further objects to this definition to the extent that it purports to set an accurate or legally significant definition of AMP.

2. The term “Chargeback” means any payment, credit or other adjustment you have provided to a purchaser of a drug to compensate for any difference between the purchaser’s acquisition cost and the price at which the Pharmaceutical was sold to another purchaser at a contract price.

OBJECTION: BIPI objects to the definition of “Chargeback” as set forth in Definition No. 2 on grounds that it is vague, ambiguous, and confusing with respect to the language “payment, credit or other adjustment you have provided to a purchaser of a drug to compensate for any difference between the purchaser’s acquisition cost and the price at which the Pharmaceutical was sold to another purchaser at contract price.” BIPI further objects to the lack of definition of the term “contract price.” BIPI incorporates by reference its objection to the definition of the term “Pharmaceutical.”

3. The term “Defined Period of Time” means from January 1, 1993 to the present and Documents relating to such period even though created before that period.

OBJECTION: BIPI objects to the definition of “Defined Period of Time” as set forth in Definition No. 3 on grounds that it is overly broad, unduly burdensome, vague, and ambiguous, particularly with respect to the language “Documents relating to such period,” and incorporates by reference its objection to the definition of the term “Document.” BIPI objects to this definition to the extent that it seeks information from outside the statute of limitations applicable to the claims in this litigation, or years beyond a reasonable time period relevant to this litigation.

4. The term “Document” means any writing or recording of any kind, including, without limitation, agendas, agreements, analyses, announcements, audits, booklets, books, brochures, calendars, charts, contracts, correspondence, facsimiles (faxes), film, graphs,

letters, memos, maps, minutes (particularly Board of Directors and/or Executive Committee meeting minutes), notes, notices, photographs, reports, schedules, summaries, tables, and telegrams, in any medium, whether written, graphic, pictorial, photographic, electronic, emails, phonographic, mechanical, taped, saved on computer disc, hard drives, data tapes, or otherwise, and every non-identical copy. Different versions of the same Document, such as different copies of a written record bearing different handwritten notations, are different Documents within the meaning of the term as used. In case originals or original non-identical copies are not available, "Document" includes copies of originals or copies of non-identical copies as the case may be.

OBJECTION: BIPI objects to the definition of "Document" as set forth in Definition No. 4 on grounds that it is vague and ambiguous with respect to the language "writing," "recording," "any kind," "agendas, agreements, analyses, announcements, audits, booklets, books, brochures, calendars, charts, contracts, correspondence, facsimiles (faxes), film, graphs, letters, memos, maps, minutes," "Executive Committee meeting minutes," "notes, notices, photographs, reports, schedules, summaries, tables, and telegrams," "medium," "written, graphic, pictorial, photographic, electronic, emails, phonographic, mechanical, taped," "hard drives, data tapes" and "non-identical copy." BIPI further objects to this definition to the extent that it seeks to impose discovery obligations that are broader than, or inconsistent with, BIPI's obligations under Wisconsin Statutes and the rules of this Court. BIPI further objects to this definition to the extent it requires or seeks to require BIPI 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.

5. The term “Incentive” means anything of value provided to a customer which would lower the consideration paid for a drug, regardless of the time it was provided (for example, at the time of invoicing, shipment, or payment, or monthly, quarterly, annually, or at any other time or on any other basis) and regardless of its name. The term “Incentive” therefore includes, but is not limited to, payments or proposed payments in cash or in kind, Chargebacks, credits, discounts such as return to practice discounts, prompt pay discounts, volume discounts, on-invoice discounts, off-invoice discounts, rebates such as market share rebates, access rebates, or bundled drug rebates, free goods or samples, credits, administrative fees or administrative fee reimbursements, marketing fees, stocking fees, conversion fees, patient education fees, off-invoice pricing, educational or other grants, research funding, payments for participation in clinical trials, honoraria, speaker’s fees or payments, patient education fees or consulting fees.

OBJECTION: BIPI objects to the definition of “Incentive” as set forth in Definition No. 5 on grounds that it is overly broad, unduly burdensome, ambiguous, and vague, particularly with respect to the language “anything of value,” “provided,” “customer,” “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.” BIPI incorporates by

reference its objections to the definitions of the term “Chargeback.” BIPI further objects to this definition to the extent it seeks information from beyond the time period relevant to this litigation.

6. The term “National Sales Data” means data sufficient to identify for each sales transaction involving the Targeted Drugs the following information:

- a. transaction date;
- b. transaction type;
- c. your product number;
- d. product description;
- f. NDC;
- g. NDC unit quantity;
- h. NDC unit invoice price;
- i. NDC unit WAC (assigned by you)
- j. contract price;
- k. invoice price;
- l. customer name, identification number, address and class of trade;
- m. all paid or distributed Incentives;
- n. all accrued Incentives calculated at any time identifying the amount of the accrual, its nature or type, the date of the accrual, and other information sufficient to identify as particularly as possible each sales transaction giving rise to the accrual.

OBJECTION: BIPI objects to the definition of “national Sales Data” in Definition No. 6 on grounds that is overly broad and unduly burdensome. BIPI further

objects on grounds that this definition is vague and ambiguous with respect to the language “data sufficient to identify for each sales transaction,” “transaction type,” “product number,” “product description,” “NDC,” “NDC unit quantity,” “NDC unit invoice price,” “package description,” “WAC,” “you,” “contract price,” “invoice price,” “identification number,” “paid or distributed Incentives,” “accrued Incentives,” “calculated at any time” and “other information sufficient to identify as particularly as possible each sales transaction giving rise to the accrual.” BIPI incorporates by reference its objections to the definitions of the term “Incentives.” BIPI objects to this definition to the extent that it refers to information not relevant to the State’s claims, which are limited to Wisconsin. BIPI further objects to this definition to the extent it seeks information from beyond the time period relevant in this litigation, or information about drugs not named in the Complaint on grounds that such information is neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

7. The term “Pharmaceutical” means any drug or other product, whether sold by you, or any other manufacturer, which requires a physician’s or other prescriber’s prescription, including, but not limited to, “biological” products such as hemophilia factors and intravenous solutions.

OBJECTION: BIPI objects to the definition of “Pharmaceutical” in Definition No. 7 on grounds that it is overly broad, unduly burdensome, vague and ambiguous, particularly with respect to the language “any drug,” “other product,” “you,” “any other manufacturer,” “prescription,” “hemophilia factors,” “biological products,” and “intravenous solutions.” BIPI objects to this Definition to the extent that it refers to information not relevant to the State’s claims, which are limited to Wisconsin. BIPI

further objects to this definition to the extent it seeks information from beyond the time period relevant in this litigation, or information about drugs not named in the Complaint on grounds that such information is neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

8. The term “Spread” is used to refer to the difference between the actual acquisition cost or purchase price of a Pharmaceutical (paid by purchasers of the Pharmaceuticals) and the reimbursement rate paid by third party payors (to purchasers of the Pharmaceuticals) for the Pharmaceutical. Third party payors include the Medicare program, Medicaid program, and private insurance. Thus, the Spread is the gross profit actually or potentially realized by the purchasers of the Pharmaceuticals for those Pharmaceuticals ultimately paid for by third party payors.

OBJECTION: BIPI objects to the definition of “Spread” as set forth in Definition No. 8 on grounds that it is overly broad, unduly burdensome, vague and ambiguous, particularly with respect to the language “actual acquisition cost,” “purchase price,” “third party payors,” “gross profit actually or potentially realized,” and “purchasers.” BIPI incorporates by reference its objection to the definition of the term “Pharmaceutical.”

9. The term “Targeted Drugs” means those drugs manufactured by you which have total utilization under the Medicaid and Medicare Part B programs exceeding \$10,000 during the Defined Period of Time in the state of Wisconsin.

OBJECTION: BIPI objects to the definition of “Targeted Drugs” in Definition No. 9 on grounds that it is overly broad and unduly burdensome. BIPI further objects to this definition on grounds that it is vague and ambiguous, particularly with

respect to the language “you” and “total utilization.” BIPI incorporates by reference its objections to the definitions of the terms “Defined Period of Time” and “Pharmaceutical.” BIPI objects to this definition to the extent that it refers to information not relevant to the State’s claims, which are limited to Wisconsin. BIPI further objects to this definition to the extent it seeks information from beyond the time period relevant in this litigation, or information about drugs not named in the Complaint on grounds that such information is neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

GENERAL OBJECTIONS

INTRODUCTION

BIPI generally objects to the broad and sweeping nature of Plaintiff’s Production Requests. Plaintiff’s Production Requests repeatedly require BIPI to ascertain and provide information that is not kept by BIPI, relates to companies or entities other than BIPI, does not concern Plaintiff’s claim regarding AWP information, and otherwise imposes an obligation on BIPI to survey each and every employee of the Company to identify documents responsive to these Production Requests.

1. BIPI reincorporates its Objections, as set forth above to Plaintiff’s Definitions as objections to each of the following Production Requests that incorporates or uses these Definitions.

2. BIPI’s responses are made without in any way waiving or intending to waive: (i) any objections as to the competency, relevancy, materiality, privilege, or admissibility as evidence, for any purpose, information or documents produced in response to these Requests;

(ii) the right to object on any ground to the use of the documents or information produced in response to the Requests at any hearings or at trial; (iii) the right to object on any ground at any time for further responses to the Requests; or (iv) the right at any time to revise, correct, add to, supplement, or clarify any of the responses contained herein.

3. The information supplied herein is for use in this litigation and for no other purpose.

4. BIPI further objects to the following Production Requests to the extent they seek BIPI's trade secret, proprietary, commercially sensitive, or other confidential information. BIPI will not produce any responsive information, including confidential business, trade secret or proprietary information until an adequate Protective Order protecting this information from unnecessary or improper disclosure has been entered in this case.

5. BIPI objects to each Production Request to the extent it is unreasonably cumulative or duplicative, unduly burdensome, harassing and/or oppressive, or purports to impose obligations upon BIPI beyond those imposed by Wis. Stat. § 804.09.

6. BIPI objects to each Production Request to the extent it may be construed to request disclosure of information that was prepared in anticipation of litigation, constitutes attorney work product, discloses the mental impressions, conclusions, opinions or legal theories of any attorneys, constitutes privileged attorney-client communications, constitutes confidential and/or proprietary information, or is otherwise protected from disclosure under applicable privileges, laws, or rules.

BIPI does not agree to produce such documents protected from discovery, and it will respond only to the extent privileged or otherwise protected documents are not required and to the extent that the Production Request is not otherwise objectionable. To the extent that any

such protected documents or information are inadvertently produced in response to these Production Requests, the production of such documents or information shall not constitute a waiver of BIPI's right to assert the applicability of any privilege or immunity to the documents or information, and any such documents or information shall be returned to BIPI's counsel immediately upon discovery thereof.

7. BIPI objects to each Production Request to the extent it calls for BIPI to provide documents not relevant to the subject matter involved in the pending action, or that is not reasonably calculated to lead to the discovery of admissible evidence.

8. BIPI objects to each Production Request insofar as it is vague, ambiguous and/or cannot be adequately understood without clarification or definition of the vague and/or ambiguous words or phrases.

9. BIPI objects to each Production Request insofar as the documents sought may be obtained from another source and the burden of obtaining the documents is substantially the same for the plaintiff as it is for BIPI.

10. BIPI objects to each Production Request to the extent that it seeks documents and information not within BIPI's possession, custody, or control.

11. BIPI objects to any implications and to any explicit or implicit characterization of facts, events, circumstances, or issues in these Requests. BIPI's response that it will produce documents in connection with a particular Production Request, or that it has no responsive document, is not intended to indicate that BIPI agrees with any implication or any explicit or implicit characterization of facts, events, circumstances, or issues in the Production Requests or that such implications or characterizations are relevant to this action.

12. BIPI reserves the right to withhold the production of responsive, but potentially unnecessary, information until the court has ruled on Defendants' Motion to Dismiss in this case.

13. These General Objections are incorporated into the responses to each and every Production Request, and no answer to any individual Production Request is a waiver of the General Objections.

14. BIPI objects to the production of documents that the State has already received, or shall or may receive, from the Texas Attorney General's office.

SPECIFIC OBJECTIONS TO DOCUMENTS REQUESTED

REQUEST NO. 1: All National Sales Data for each Targeted Drug during the Defined Period of Time.*

RESPONSE TO REQUEST NO. 1:

In addition to the General Objections set forth above, BIPI objects to Production Request No. 1 on grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The Plaintiff's Motion to Dismiss is pending before the Court and rests significantly on the ground that the Amended Complaint has failed to plead with sufficient particularity. BIPI also objects to this Production Request on grounds that it is vague and ambiguous with respect to the language "all." BIPI incorporates by reference its objections to the State's definitions of the terms "National Sales Data," "Targeted Drug," and "Defined Period of Time." BIPI objects to this Production Request to the extent it seeks information not relevant to the State's claims, which are limited to Wisconsin. BIPI objects to this Production Request to the extent it seeks information subject to the attorney-client privilege, the work product

doctrine, or other applicable privilege or protection from discovery. BIPI further objects to this Production Request to the extent it seeks confidential business, trade secret or proprietary information.

BIPI also incorporates by reference its objections to the State's instruction regarding producing documents in electronic format.

REQUEST NO. 2: All Documents containing AMPs as reported or calculated by you for the Targeted Drugs OR a spread sheet or database showing all reported and calculated AMPs for each Targeted Drug over the Defined Period of Time which lists when such AMPs were reported or calculated, and the quarter to which each AMP applies.*

RESPONSE TO REQUEST NO. 2:

In addition to the General Objections set forth above, BIPI objects to Production Request No. 2 on grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. BIPI objects to this Production Request on grounds that it is vague and ambiguous with respect to the language "all," "reported or calculated," "you," "spread sheet" and "database." BIPI incorporates by reference its objections to the State's definitions of the terms "Document," "AMPs," "Targeted Drug" and "Defined Period of Time." BIPI objects to this Production Request to the extent it seeks information not relevant to the State's claims, which are limited to Wisconsin and to AWP. AMPs have been available to the State of Wisconsin for years from data provided to it by the federal government. BIPI objects to this Production Request to the extent it seeks information subject to the attorney-client privilege, the work product doctrine, or other applicable privilege or protection from discovery. BIPI further

objects to this Production Request to the extent it seeks confidential business, trade secret, proprietary information, or information protected under 42 U.S.C. § 1396r-8(b)(3)(D).

BIPI also incorporates by reference its objections to the State's instruction regarding producing documents in electronic format.

REQUEST NO. 3: All Documents created by you, or in your possession, that discuss or comment on the difference (or Spread) between any Average Wholesale Price or Wholesale Acquisition Cost and the list or actual sales price (to any purchaser) of any of defendants' Pharmaceuticals or any Pharmaceuticals sold by other manufacturers. Documents which merely list the AWP or WAC price and the list or actual sales price without further calculation of the difference, or without other comment or discussion of or about the spread between such prices are not sought by this request.

RESPONSE TO REQUEST NO. 3:

In addition to the General Objections set forth above, BIPI objects to Production Request No. 3 on grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. BIPI objects to this request on grounds that it is vague and ambiguous with respect to the language "all," "created," "you," "in your possession," "list or actual sales price," "Pharmaceuticals sold by other manufacturers," "calculation of the difference," and "without other comment or discussion of or about the spread between such prices." BIPI incorporates by reference its objections to the State's definitions of the terms "Document," "Spread," "Pharmaceuticals," and "Defined Period of Time." BIPI objects to this Production Request to the extent it seeks information not relevant to the State's claims, which are limited to Wisconsin, or to the relevant time period involving the State's claims. BIPI

objects to this Production Request to the extent it seeks information subject to the attorney-client privilege, the work product doctrine, or other applicable privilege or protection from discovery. BIPI further objects to this Production Request to the extent it seeks confidential business, trade secret or proprietary information.

REQUEST NO. 4: All Documents containing an average sales price or composite price identified by you in response to Interrogatory No. 1 of Plaintiff's First Set of Interrogatories to All Defendants.*

RESPONSE TO REQUEST NO. 4:

In addition to the General Objections set forth above, BIPI objects to Production Request No. 4 on grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. BIPI objects to this request on grounds that it is vague and ambiguous with respect to the language "all," "average sales price," "composite price." BIPI incorporates by reference its objections to the State's definitions of the terms "Document" and "Targeted Drugs." BIPI objects to this Production Request to the extent it seeks information not relevant to the State's claims, which are limited to Wisconsin. BIPI objects to this Production Request to the extent it seeks information subject to the attorney-client privilege, the work product doctrine, or other applicable privilege or protection from discovery. BIPI further objects to this Request to the extent it seeks confidential business, trade secret or proprietary information.

Subject to and without waiver of these objections, BIPI incorporates its Response to Interrogatory No. 1. BIPI also incorporates by reference its objections to the State's instruction regarding producing documents in electronic format.

REQUEST NO. 5: All documents sent to or received from First DataBank, Redbook and Medi-span regarding the price of any Targeted Drug.

RESPONSE TO REQUEST NO. 5:

In addition to the General Objections set forth above, BIPI objects to Production Request No. 5 on grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. BIPI objects to this request on grounds that is vague and ambiguous with respect to the language “all,” “received,” “regarding” and “price.” BIPI incorporates by reference its objections to the Stat’s definitions of the terms “Document,” “Targeted Drug,” and “Defined Period of Time.” BIPI objects to this Production Request to the extent it seeks information not relevant to the State’s claims, which are limited to Wisconsin, or to the time period relevant to this litigation. BIPI objects to this Production Request on grounds that it assumes that BIPI communicated with “First DataBank, Redbook or Medi-Span.” BIPI objects to this Production Request to the extent it seeks information subject to the attorney-client privilege, the work product doctrine, or other applicable privilege or protection from discovery. BIPI further objects to this Request to the extent it seeks confidential business, trade secret or proprietary information.

REQUEST NO. 6: All Documents in your possession prepared by IMS Health regarding a Targeted Drug or the competitor of a Targeted Drug regarding pricing, sales or market share.

RESPONSE TO REQUEST NO. 6:

In addition to the General Objections set forth above, BIPI objects to Production Request No. 6 on grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. BIPI objects to this Production Request on grounds that it is vague and ambiguous with respect to the language “all,” “in your possession,” “prepared,” “IMS Health,” “regarding,” “competitor,” “pricing, sales or market share.” BIPI incorporates by reference its objections to the State’s definitions of the terms “Documents,” “Targeted Drug,” and “Defined Period of Time.” BIPI objects to this Production Request to the extent it seeks information not relevant to the State’s claims, which are limited to Wisconsin, or to the time period relevant to this litigation. BIPI objects to this Production Request to the extent it seeks documents that are not within BIPI’s possession, custody or control or are more appropriately sought from third parties, including other drug manufacturers, including other defendants, to whom requests may be directed. BIPI objects to this Production Request to the extent it seeks information subject to the attorney-client privilege, the work product doctrine, or other applicable privilege or protection from discovery. BIPI further objects to this Request to the extent it seeks confidential business, trade secret or proprietary information belonging to another and for which the burdens of production are the same for BIPI as they are for the State.

*Documents are to be produced in electronic format with all documentation required to identify files and fields by name, content, and format, and explanations for all coded data. Acceptable electronic format for documents which in their native form are organized as word processing documents, or printed documents other than tabular reports, (documents comprised principally of

text, or of a combination of text and graphics) is searchable Adobe Acrobat portable document format (.pdf). Acceptable electronic format for documents which in their native form are organized as spreadsheets is Microsoft Excel format (.xls). Acceptable electronic format for documents which in their native form are comprised principally of tabular data, or tabular reports with fixed column widths or field lengths is fixed-field ASCII text (.txt). Acceptable electronic format for documents which in their native form are comprised principally of electronic data in one or more data tables, files, or other data entities, is delimited to ASCII text (.csv).

OBJECTION: BIPI objects to this instruction to the extent that it imposes discovery obligations that are in conflict with or beyond BIPI's obligations under Wisconsin law. BIPI incorporates by reference its objections to the definition of the term "Document." BIPI states that it will comply with this instruction as mandated by applicable Wisconsin law.

As to objections:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendant
BIPi's Responses to Plaintiff's First Set of Requests for Production of Documents was
served via overnight carrier and e-mail, this 15th day of July, 2005, upon the following:

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