
STATE OF WISCONSIN,)	
)	
Plaintiff,)	No. 04 CV 1709
)	
v.)	
)	
AMGEN INC., <i>et al.</i> ,)	
)	
Defendants.)	
)	

**RESPONSES AND OBJECTIONS OF DEFENDANT MERCK & CO., INC. TO
PLAINTIFF STATE OF WISCONSIN’S FIFTH SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS TO ALL DEFENDANTS**

Pursuant to Sections 804.01 and 804.09 of the Wisconsin Statutes, defendant Merck & Co., Inc. (“Merck”), hereby responds and objects to Plaintiff’s Fifth Set of Requests for Production of Documents (“the Requests”) as follows:

Merck is presently pursuing its investigation and analysis of the facts and law relating to this case and has not completed discovery or preparation for trial. The responses set forth herein are given without prejudice to Merck’s right to produce evidence of any subsequently discovered facts or documents, or interpretations thereof, or to modify, change, or amend its responses. The information set forth herein is true and correct to Merck’s best knowledge as of this date and is subject to correction for errors, mistakes, or omissions. The within responses are based on documents and information currently available to Merck.

Reference in a response to a precedent or subsequent response incorporates both the information and the objections set forth in the referenced response. Merck reserves the right to introduce at trial, or in support of or in opposition to any motion in this or any other proceeding,

any and all documents heretofore or hereafter produced by the parties in this action or in any other action, or produced by any third person. Identification or production of certain documents is done without prejudice to establish at a later date any additional facts that may be contained within or discovered as a result of any subsequent review of such documents or additional investigation and discovery.

GENERAL OBJECTIONS

1. Merck objects to the Requests to the extent that they are vague, ambiguous, argumentative, duplicative, overly broad, and unduly burdensome or oppressive; to the extent that they seek documents or information that are not relevant to the claims or defenses of any party or to the subject matter involved in this action; and to the extent they seek documents or information beyond that provided for by Wisconsin Statutes §§ 804.01 and 804.09 and other applicable state and federal laws.

2. Merck objects to the Requests to the extent that they seek documents or information protected from discovery by the attorney-client privilege, work product doctrine, or any other privilege, or that are otherwise immune or protected from disclosure. Merck does not intend to waive any applicable protections or privileges through the production of documents or the supplying of information in response to the Requests. On the contrary, Merck specifically intends to preserve any and all applicable protections or privileges.

3. Inadvertent production of any document shall not constitute a waiver of any privilege or any other ground for objecting to discovery with respect to such document or any other document, or with respect to the subject matter thereof or the information contained therein, nor shall such inadvertent production waive Merck's right to object to the use of the document or the information contained therein during this or any subsequent proceeding.

4. Merck objects to the Requests to the extent they seek information or documents generated or compiled in the course of the defense of this action or any other AWP litigation. Merck will not produce such information or documents.

5. Merck objects to the Requests as overly broad and unduly burdensome to the extent that they call for the production of “all” documents when all relevant facts can be obtained from fewer than “each,” “any,” or “all” documents or information. Merck objects to the Requests to the extent they seek documents other than those that can be located upon a search of files where one could reasonably expect to find such documents.

6. Merck objects to the Requests to the extent that they seek any other confidential or proprietary information or trade secrets. Merck will only produce such information subject to and in reliance on the Protective Order entered on November 29, 2005. The information and documents provided are for use in this litigation and for no other purpose.

7. Merck objects to the Requests to the extent that they call for information or documents relating to Merck’s business or practices that are inapplicable to the providers reimbursed by Plaintiff. Unless otherwise specified, Merck’s responses will be limited to information and documents about its business or practices in the United States generally or in Wisconsin in particular and with respect to the types of providers that are reimbursed by the State of Wisconsin under Medicaid.

8. Merck objects to the Requests to the extent that they purport to require Merck to provide a compilation, abstract, audit, and/or document summary that does not currently exist. Merck will make available for inspection copies of responsive, non-privileged documents at a mutually convenient date, time, and location.

9. Merck objects to the Requests to the extent that they are unreasonably cumulative or duplicative and to the extent that they call for documents that are publicly available or obtainable from some other source that is more convenient, less burdensome, or less expensive.

10. Merck objects to the Requests to the extent that they are unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

11. Merck is responding to the Requests without waiving or intending to waive, but on the contrary, preserving and intending to preserve: (a) the right to object on any proper grounds to the use of such documents or information for any purpose, in whole or in part, in any subsequent proceedings in this action or in any other action; (b) the right to object on all grounds, at any time, to interrogatories, requests, or other discovery procedures involving or relating to the subject of the Requests to which Merck has responded herein; and (c) the right at any time to revise, correct, add to, or clarify any of the responses made herein.

12. Because of the over breadth of the Requests and the vague, non-specific nature of the allegations against Merck in the Second Amended Complaint, it is not possible for Merck to anticipate all possible grounds for objection at this stage in the litigation with respect to the particular Requests set forth herein. Merck reserves the right to supplement or correct these responses and to raise any additional objections deemed necessary and appropriate in light of the results of any further review.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

1. Merck objects to Plaintiff's Definitions and Instructions to the extent they purport to expand upon or alter Merck's obligations under Wisconsin Statutes §§ 804.01 and 804.09.

2. Merck objects to Plaintiff's definition of "you," "your," or "your company" as vague, ambiguous, overbroad, and unduly burdensome to the extent it purports to refer to all defendants, rather than just Merck, and to the extent it purports to encompass Merck's "subsidiaries, divisions, predecessors, officers, [and] agents" other than those involved in the pricing and marketing of the Merck drugs referenced in the exhibits to the Second Amended Complaint as further limited by the parties' discussions (hereinafter "Merck drugs at issue"). Merck further objects to the foregoing and to the portion of the definition encompassing "all other persons acting or purporting to act on behalf of defendants" as vague, ambiguous, and overbroad, as requiring Merck to speculate, and as imposing obligations beyond those set forth in Wis. Stat. Chapter 804.

3. Merck objects to Plaintiff's definition of "document" or "documents" as vague, ambiguous, overbroad, and unduly burdensome, and incorporates its objections to the definition of "Document" set forth in Merck's Objections and Responses to Plaintiff's First Set of Requests for Production of Documents as if fully set forth herein.

4. Merck objects to the time period in the instructions as overbroad, unduly burdensome, and not relevant. Merck will respond as to the time period November 1998 to November 2004.

RESPONSES AND OBJECTIONS TO INDIVIDUAL DOCUMENT REQUESTS

Merck incorporates its General Objections and Objections to Definitions and Instructions set forth into each of Merck's responses. The specific objections set forth in each response below are in addition to those objections and unless otherwise specified, Merck's responses are limited in accordance with each of its objections, including its objections to the time frame of the requests. To the extent that Merck provides or offers to produce confidential information, Merck

will do so only subject to and in reliance on the Protective Order entered by the Court on November 29, 2005.

REQUEST NO. 14: All documents relating to lobbying efforts of you, or any individual or entity acting on your behalf (including but not limited to third-party lobbyists or lobbyist organizations such as the Pharmaceutical Research and Manufacturers of America), with regard to:

- (a) the Wisconsin Medicaid program's reimbursement for prescription drugs;
- (b) other state Medicaid programs' reimbursement for prescription drugs; and
- (c) the federal Medicare program's reimbursement for prescription drugs.

Document sought by this request include, but are not limited to:

- (a) communications with the State of Wisconsin, the Wisconsin Department of Health & Family Services, and the Wisconsin legislature (including any legislative committee or individual state legislator);
- (b) communications with other states, other Medicaid programs, and other state legislatures (including any legislative committee or individual state legislator);
- (c) internal communications within your company;
- (d) communications between you and external third-party lobbyists or lobbyist organizations such as the Pharmaceutical Research and Manufacturers of America; and
- (e) documents identifying, describing, or relating to the amount of money spent on lobbying efforts regarding these issues.

RESPONSE:

Merck further objects to this Request on the grounds that it is overly broad and unduly burdensome and that the phrases "lobbying efforts," "third-party lobbyists," "lobbyist organizations," and "external third-party lobbyists" are vague, ambiguous, and undefined. Merck also objects to the extent the Request seeks the production of documents that are protected by the attorney-client privilege and/or work product doctrine. Merck objects to subparts (b) and (c) as not relevant and as not reasonably calculated to lead to the discovery of admissible evidence. Merck also objects to the extent this Request seeks to burden Merck's exercise of its rights to petition the government under the federal and Wisconsin constitutions.

Subject to and without waiving its objections, Merck agrees to undertake a reasonable search for responsive, non-privileged documents relating to Merck's communications with Wisconsin Medicaid regarding the reimbursement of the Merck drugs at issue.

REQUEST NO. 15: Documents identifying, describing, or relating to your internal code of conduct or other policy relating to the ethical standards applicable to your employees.

RESPONSE:

Merck further objects to this Request on the grounds that it is overly broad and unduly burdensome and that the phrases "internal code of conduct," "other policy," and "ethical standards applicable to your employees" are vague, ambiguous, and undefined. Merck also objects to the extent the Request seeks the production of documents that are protected by the attorney-client privilege and/or work product doctrine. Merck further objects that the Request seeks documents not relevant to Plaintiff's claims and is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 16: Documents relating to your compliance policy or other policies designed to ensure adherence to applicable statutes, regulations and requirements for pharmaceutical manufacturers in connection with the Medicare and Medicaid programs.

RESPONSE:

Merck further objects to this Request on the grounds that it is overly broad and unduly burdensome and that the phrases "compliance policy," "other policies," and "applicable statutes, regulations and requirements for pharmaceutical manufacturers in connection with the Medicare and Medicaid programs" are vague, ambiguous, and undefined. Merck also objects to the extent the Request seeks the production of documents that are protected by the attorney-client privilege and/or work product doctrine.

Subject to and without waiving its objections, Merck agrees to undertake a reasonable search for responsive, non-privileged documents, if any, that relate to reimbursement of the Merck drugs at issue by Wisconsin Medicaid.

REQUEST NO. 17: Documents relating to any policy relating to the use or promotion of, or reference to, the spread of a drug in connection with the sales or marketing of that drug including, but not limited to:

- (a) documents that relate to or describe the policy, including consequences for violation of the policy;
- (b) documents that identify the date that the policy was established and/or became effective;
- (c) documents identifying, describing, or relating to the reason(s) for establishment of the policy;
- (d) documents identifying, describing, or relating to the distribution and dissemination of the policy to your employees;
- (e) documents identifying, describing, or relating to training provided to your employees regarding the policy; and
- (f) documents relating to any actual or potential violations of the policy, including any investigation, determination, and action taken by your company related to any such actual or potential violation.

RESPONSE:

Merck further objects to this Request on the grounds that it is overly broad and unduly burdensome and that the phrases “policy relating to the use or promotion of, or reference to, the spread of a drug” and “in connection with the sales or marketing of that drug” are vague, ambiguous, and undefined. Merck also objects to the extent the Request seeks the production of documents that are protected by the attorney-client privilege and/or work product doctrine.

Subject to and without waiving its objections, Merck agrees to undertake a reasonable search for responsive, non-privileged documents, if any, that relate to the sales or marketing of the Merck drugs at issue for the types of providers reimbursed by Wisconsin Medicaid.

REQUEST NO. 18: Documents identifying or describing the reimbursement formula for prescription drugs used by the Wisconsin Medicaid Program, including but not limited to its formula for estimating acquisition cost or its use of AWP.

RESPONSE:

Merck further objects to this Request on the grounds that it is overly broad and unduly burdensome and that it seeks public information and information already in the possession of the Plaintiff. Merck also objects to the extent the Request seeks documents obtained by Merck's counsel in the course of investigating the claims in this or similar lawsuits on the grounds that the materials are protected by the work product doctrine.

Subject to and without waiving its objections, Merck agrees to undertake a reasonable search for non-privileged documents responsive to this Request, if any, sufficient to show the information available to Merck concerning the reimbursement formula used by the Wisconsin Medicaid program.

REQUEST NO. 19: All documents relating to the National Pharmaceutical Council, including but not limited to the following:

- (a) documents relating to your membership in the National Pharmaceutical Council;
- (b) all correspondence between you and the National Pharmaceutical Council;
- (c) all annual publications of the National Pharmaceutical Council entitled "Pharmaceutical Benefits Under State Medical Assistance Programs."

RESPONSE:

Merck further objects to this Request on the grounds that it is overly broad and unduly burdensome and that it seeks information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Merck also objects that subpart C of the Request seeks publications that are available to the public.

Dated: July 27, 2007

Respectfully submitted,

By: /s/ Robert B. Funkhouser

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