

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN,)

Plaintiff,)

v.)

ABBOTT LABORATORIES, INC.,)
ET AL.,)

Defendants.)

Case No.: 05-C-0408-C

**DEFENDANT MERCK & CO., INC.'S OBJECTIONS AND RESPONSES TO
PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION OF
DOCUMENTS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and Wis. Stat. § 804.09, defendant Merck & Co., Inc. ("Merck"), hereby responds and objects to Plaintiff's First 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. For the reasons set forth in Defendants' pending Motion to Dismiss and accompanying memoranda, the First Amended Complaint lacks particularity as to the conduct or activities alleged to be at issue. The responses set forth herein are given without prejudice to Merck's right to produce evidence of any subsequently discovered facts, 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 referred-to 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, in any other action or 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, unduly burdensome or oppressive, or seek information or documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action, or to the extent they seek documents or information beyond that provided for by Rules 26 and 34 of the Federal Rules of Civil Procedure, Wis. Stat. §§ 804.01, 804.09, and other applicable state and federal laws.

2. Merck objects to the Requests to the extent they seek documents or information protected from discovery by the attorney-client privilege, work product doctrine or 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 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 "each" "any" or "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 such documents reasonably can be expected to be found.

6. Merck further objects to the Requests to the extent 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 by the Wisconsin Circuit Court for Dane County on May 11, 2005 (the "Protective Order"). 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 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 applicable in the United States

generally or to 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 other document summary that does not currently exist. Merck objects to the instruction (in the asterisked footnote on page 4 of the Requests) that documents be produced in electronic format. 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 call for documents that are unreasonably cumulative or duplicative, are publicly available, or are 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 the 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 overbreadth of the Requests at this stage in the litigation and the vague, non-specific nature of the allegations against Merck in the First Amended Complaint, it is not possible for Merck to anticipate all possible grounds for objection 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

1. Merck objects to Plaintiff's definitions to the extent they purport to expand upon or alter Merck's obligations under Rules 26 and 34 of the Federal Rules of Civil Procedure and Wis. Stat. §§ 804.01 and 804.09.

2. Merck objects to Plaintiff's definition of "**Average Manufacturer Price**" or "**AMP**" on the grounds that the phrase is vague, ambiguous and misleading in that it differs from the operative statutory and regulatory definitions. See 42 U.S.C. § 1396r-8(k)(1).

3. Merck objects to Plaintiff's definition of "**Chargeback**" on the grounds that the term is vague, ambiguous, overbroad and potentially burdensome. Merck will respond with respect to rebates and discounts.

4. Merck objects to Plaintiff's definition of "**Defined Period of Time**" on the grounds that the phrase as defined is unreasonably overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. The definition purports to require Defendants to search documents as far back as January 1, 1993, long before any event referred to in the First Amended Complaint. Merck will respond with respect to the operative limitations period, November 1, 2001 through the date of the First Amended Complaint (November 1, 2004) for discovery requests

addressed to Plaintiff's DTPA claims and November 1, 1998 to November 1, 2004 for discovery requests addressed to Plaintiff's other claims.

5. Merck objects to Plaintiff's definition of "**Document**" on the grounds that the term as defined is unreasonably overbroad, unduly burdensome, and imposes obligations broader than Rules 26 and 34 of the Federal Rules of Civil Procedure and Wis. Stat. §§ 804.01, 804.09. Merck also objects to Plaintiff's definition requesting originals and all nonidentical duplicates as not relevant and unduly burdensome. Merck also objects to this definition to the extent it requires or seeks to require Merck to: (a) produce documents or data in a particular form or format; (b) convert documents or data into a particular or different file format; (c) produce data, fields, records, or reports about produced documents or data; (d) produce documents or data on any particular media; (e) search for and/or produce any documents or data on back-up tapes; (f) produce any proprietary software, data, programs, or databases; or (g) violate any licensing agreement or copyright laws.

6. Merck objects to Plaintiff's definition of "**Incentive**" on the grounds that the term as defined is vague, ambiguous, unreasonably overbroad and unduly burdensome in purporting to require Merck to track each of the items for every customer regardless of time or relation to particular sales, and to speculate about whether something provided is of value.

7. Merck objects to Plaintiff's definition of "**National Sales Data**" on the grounds that the phrase as defined is unreasonably overbroad and unduly burdensome in purporting to require more than 20 items of information for individual sales transactions including those to customers and channels of trade not relevant to Plaintiff's case.

8. Merck objects to Plaintiff's definition of "**Pharmaceutical**" on the grounds that the term as defined would impose unreasonable burdens on Merck and that by purporting to request discovery of drugs and "other products" other than those specifically identified in the Complaint, the request seeks materials that are not relevant, and that are not reasonably calculated to lead to the discovery of admissible evidence.

9. Merck objects to Plaintiff's definition of "**Spread**" on the grounds that the term as defined is misleading, unreasonably overbroad, vague, ambiguous and potentially very burdensome. In seeking information about dissimilar sales to other purchasers, the requests incorporating this term seek materials that are not relevant, and that are not reasonably calculated to lead to the discovery of admissible evidence. Merck will respond with respect to documents discussing or referencing differences between the catalog price or actual acquisition cost and AWP.

10. Merck objects to Plaintiff's definition of "**Targeted Drugs**" on the grounds that the phrase, by purporting to encompass Merck drugs not referenced in the Complaint or its exhibits, would encompass materials that are not relevant, and that are not reasonably calculated to lead to the discovery of admissible evidence, and would impose an unreasonable burden on Merck. Merck will respond with respect to "Famotidine 10 mg./ml. NDC Code 00006-3541-14," for which Merck's brand name is Pepcid[®] I.V. (hereinafter referred to as "Pepcid[®] IV"), which is the only Merck drug referenced in the First Amended Complaint (at Exhibit B). Merck will also respond with respect to other formulations of Pepcid where the information is applicable to Pepcid[®] IV.

**RESPONSES AND OBJECTIONS TO INDIVIDUAL REQUESTS FOR
PRODUCTION OF DOCUMENTS**

Merck incorporates its General Objections and Objections to Definitions in each of the responses that follow. The specific objections set forth in each response are in addition to those objections and unless otherwise specified, Merck's responses are limited in accordance with each of its objections. 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.

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

RESPONSE:

Merck further objects that this Request is overbroad and unduly burdensome in that the Request seeks more than 20 separate items of information for each of thousands or tens of thousands of individual transactions. The requested information is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Moreover, by statute and regulation, Plaintiff may obtain such information from pharmacies, physicians and other providers that participate in the Wisconsin Medicaid program.

Subject to and without waiving the foregoing objections, Merck will produce its catalog price for Pepcid[®] IV, the terms and conditions for direct sales to wholesalers and retail pharmacies, and contracts or other documents sufficient to show the terms and incentives provided for Pepcid[®] IV.

REQUEST NO. 2: All Documents containing AMPs as reported or calculated by you for the Targeted Drugs OR a spreadsheet 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:

Merck further objects that, by statute, AMP information may be disclosed only to the Centers for Medicare and Medicaid Services of the U.S. Health and Human Services Department. Merck also objects that the requested information is not relevant and not reasonably calculated to lead to the discovery of admissible evidence.

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 the defendants' Pharmaceuticals or any Pharmaceuticals sold by other manufacturers. Documents which merely list the AWP or WAC price and the list of 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:

Merck further objects that the portion of this Request directed to other Defendants' pharmaceuticals is overbroad, unduly burdensome, and unlikely to lead to the discovery of admissible evidence.

Subject to and without waiving these objections, Merck will review the pricing and marketing files relating to Pepcid[®] IV for responsive, non-privileged documents.

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 Requests to All Defendants.

RESPONSE:

See objections to Interrogatory No. 1 and Request No. 2.

Subject to and without waiving these objections, Merck will produce the catalog prices for Pepcid[®] IV.

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

RESPONSE:

Merck further objects that that this Request is overbroad and unduly burdensome in seeking “all” documents. This Request also is overbroad and unduly burdensome to the extent it purports to include the published prices regularly transmitted from these companies to Merck and other customers.

Subject to and without waiving these objections, Merck will review the files of its employees and offices responsible for communicating with the three named publishers for responsive, non-privileged documents regarding the price of Pepcid[®] IV.

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:

Merck further objects that that this Request seeks commercial and proprietary information of IMS Health, which Merck purchased subject to contractual limitations on disclosure to others.

Subject to and without waiving these objections, Merck will search for responsive, non-privileged documents for Pepcid[®] IV and for competitors of Pepcid[®] IV to the extent contained in the files relating to Pepcid[®] IV, and will meet and confer with Plaintiff’s counsel regarding the necessary procedures.

Dated: July 20, 2005

By: _____



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