

STATE OF WISCONSIN

Plaintiff,

v.

AMGEN, INC., *et al.*,

Case No. 04-CV-1709

Defendants.

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**STATE OF WISCONSIN'S AMENDED RESPONSE TO DEFENDANT MERCK & CO.,  
INC.'S FIRST SET OF INTERROGATORIES TO THE STATE OF WISCONSIN**

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Pursuant to the Wisconsin Rules of Civil Procedure, the State of Wisconsin, by and through its undersigned counsel, respond to **Defendant Merck & Co., Inc.'s First Set Of Interrogatories To The State Of Wisconsin** as follows:

**GENERAL OBJECTIONS**

Plaintiff expressly incorporates all of the General Objections set forth below into each response to each Interrogatory. Any specific objections provided below are made in addition to these General Objections and a failure to reiterate a General Objection below does not constitute a waiver or limitation of that or any other objection.

A. By responding to these Interrogatories, the Plaintiff does not waive or intend to waive: (i) any objections as to the competence, relevancy, materiality, or admissibility as evidence, for any purpose, of any documents or information produced in response to these Interrogatories; (ii) the right to object on any ground to the use of the documents or information produced in response to these Interrogatories at any hearing or trial; (iii) the right to object on any ground at any time to a demand for further responses to these Interrogatories; or (iv) the

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

B. By responding to these Interrogatories, the Plaintiff does not waive or intend to waive any privilege, for any purpose, of any documents or information produced in response to these Interrogatories, and, in particular, the Plaintiff OBJECTS to each Interrogatory to the extent that it purports to seek information protected by the attorney-client privilege, work-product doctrine, common-interest doctrine, joint-defense privilege, or any other applicable privileges or protections.

C. By responding that it will produce documents in response to a particular Interrogatory, the Plaintiff does not assert that it has responsive materials or that such materials exist, only that it will conduct a reasonable search and make available responsive, nonprivileged documents. No objection, or lack thereof, is an admission as to the existence or non-existence of any documents.

D. This response is based on Plaintiff's investigation to date of those sources within its control where it reasonably believes responsive documents or information may exist. The Plaintiff reserves the right to amend or supplement these responses in accordance with the applicable rules and Court orders with additional information, documents, or objections that may become available.

E. Plaintiff OBJECTS to Merck's "Definitions," and "Instructions" to the extent that they purport to expand upon or alter Plaintiff's obligations under the Federal Rules of Civil Procedure.

F. Plaintiff OBJECTS to Merck's use of the discovery rules beyond what itself has limited its Response to Plaintiff's First Set of Interrogatories or Requests for Production of Documents.

G. Plaintiff OBJECTS to these Interrogatories to the extent that they seek information not contained in documents that currently exists within the State and purport to require the Plaintiff create, compile or develop new documents.

H. Plaintiff OBJECTS to these Interrogatories to the extent that they seek production of documents or information not in the State's custody or control, publicly available documents or information equally available to Merck or documents or information more appropriately sought from third parties to whom subpoenas or Interrogatories could be or have been directed.

I. Plaintiff OBJECTS to the "definitions" to the extent that Merck's "definitions" deviate from the ordinary and accepted English language meaning of the term. In particular, the Plaintiff specifically OBJECTS to the following "definitions."

1. Plaintiff OBJECTS to definition B ("AWP" or "Average Wholesale Price") on the ground that the definition suggested by Merck is inconsistent with ordinary usage and the term "any figure or amount so categorized by any entity or periodically published by one or more pharmaceutical industry compendia" is vague, ambiguous and overly broad.
2. Plaintiff OBJECTS to definition "C" ("Beneficiary") on the ground that the definition suggested by the Merck is vague and ambiguous to the extent that it seeks to include as a "beneficiary" a person or entity outside of the Medicaid or Medicare Programs.

3. Plaintiff OBJECTS to definition “D” (“Direct Price”) to the extent that the term direct price is inconsistent with ordinary usage. Plaintiff further OBJECTS on the grounds that the direct prices that Merck submitted to First DataBank, Red Book and Medispán represented inflated direct prices that did not reflect true net prices charged to Merck’s direct customers.
4. Plaintiff OBJECTS to definition “I” (“Provider”) on the ground that the definition suggested by Merck is vague and ambiguous to the extent that it seeks to include as a “provider” a person or entity outside of the Medicaid or Medicare Programs

J. Plaintiff OBJECTS to those Interrogatories that seek documents or information dated prior to January 1, 1993. Because records prior to 1993 are outside the scope of this lawsuit, and because of logistical difficulties retrieving information or knowledge back beyond that period of time, those Interrogatories are overbroad and producing responsive information is unduly burdensome.

K. Plaintiff OBJECTS to paragraph A of the general instructions on the ground that the Interrogatory demands a search be made of every part of the State’s executive branch and by the Legislative branch and is thus over burdensome and not likely to lead to the discovery of relevant and admissible information. There are literally thousands of offices within the State, including Boards, Commissions, Bureaus and Panels. It is not possible to assume that inquiry can be made of every part of Wisconsin government in the absence of a specific direction as such.

L. Plaintiff OBJECTS to these Interrogatories to the extent they demand information predicated on what the Plaintiff “knew,” or “relied on,” or documents about when the Plaintiff

became “aware” of an act, event, fact or occurrence or when and/or why the Plaintiff did not become “aware” of something or some event, on the ground that all Interrogatories asked in that regard demand irrelevant information, are unduly burdensome and are not likely to lead to the discovery of relevant and admissible evidence. Furthermore, the State of Wisconsin is not a person so as to facilitate the determination of what it “knew” or did not “know.” Not only is this purported “knowledge” of the government not relevant, but it is not identifiable. Notwithstanding this objection, the Plaintiff has made relevant inquiries and will endeavor to provide responses to the Interrogatories below.

## **INTERROGATORIES**

### **Interrogatory No. 1**

Do You accept the definition of Direct Price as set forth in the Definitions section of these Interrogatories? If You do not accept that definition, please set forth here Your definition of “Direct Price” that the State accepts and answer the Interrogatories that follow consistently with Your definition.

**Response:** Subject to the objections set forth above and without waiving them, prior to April 1, 2000, Plaintiff reimbursed providers who dispensed Merck drugs at the “Direct Price” provided to Plaintiff by First DataBank. It is the Plaintiff’s understanding that the “Direct Price” reported to Plaintiff by First DataBank meant the list or catalogue price at which Merck offered its drugs for sale to Providers. Plaintiff affirmatively alleges that discovery has revealed that “Direct Prices” were only offered to various large volume Providers who were able to meet minimum order requirements. Plaintiff has also learned that Merck’s

“Direct Prices” were inflated and did not represent the net direct price to those Providers who were able to meet minimum order requirements. Plaintiff also affirmatively alleges that Plaintiff has no independent definition for “Direct Price” beyond the term’s plain English language definition. Direct Price is a term created and used by Merck and other defendants.

**Interrogatory No. 2**

Separately as to each Interrogatory to Admit that Plaintiff does not wholly and unequivocally admit:

- a. state the basis for any denial or failure to admit;
- b. identify any Person with knowledge of the facts relevant to the denial or failure to admit and describe the facts of which they have knowledge;
- c. describe the reasonable inquiry you undertook to gain information to admit or deny the matter;

**Response:** See individual responses to Requests To Admit.

**Interrogatory No. 3**

Do You assert that Wisconsin Medicaid reimbursed Providers for Merck Subject Drugs based on AWP prior to the Second Quarter of 2000?

**Response:** No.

**Interrogatory No. 4**

For each calendar quarter prior to Second Quarter of 2000, please identify the basis or bases upon which You reimbursed Providers for each of the Merck Subject Drugs.

**Response:** The Plaintiff reimbursed providers at the lower of the Direct Price reported by First DataBank or the provider’s usual and customary charge.

**Interrogatory No. 5**

Are You asserting claims for Merck Subject Drugs that were reimbursed based on Direct Price, rather than AWP?

If so,

- a. state the basis for such claims;
- b. describe Your understanding of the meaning of “Direct Price,” including any changes in your understanding over time;
- c. identify any person with knowledge of the basis for Your understanding; and
- d. identify any documents or communications that reflect the basis for Your understanding.

**Response:** Yes. Merck’s Direct Prices that Merck reported to First DataBank which were in turn reported to Plaintiff were inflated by Merck, thus creating a spread between what the Plaintiff actually paid providers and what the Plaintiff should have paid providers had Plaintiff known what providers’ true acquisition costs were for Merck’s drugs. See also Response to Interrogatory No. 1 above.

**Interrogatory No. 6**

Why did You stop using Direct Price as the basis for reimbursing Merck Subject Drugs?

**Response:** As of April 1, 2000, the Plaintiff believed that AWP-10% was a more accurate estimation of the acquisition price generally and readily available to Providers.

**Interrogatory No. 7**

For any Merck Subject Drug for which You assert any claim other than for reimbursement of a Provider by Wisconsin Medicaid, state the basis for each such claim, identify

the Merck Subject Drugs to which the claim applies, and identify any person with knowledge of the factual basis for the claim.

**Response:** The Plaintiff seeks penalties, fines and forfeitures as required by Wis.Stat. §§ 100.26(4) and 100.264(2) for every overpayment made on a Medicare Part B drug claim made by a Wisconsin Provider caused by Merck reporting a false and inflated AWP, DP or other phony price.

Dated this 9th day of March 2007.

By: \_\_\_\_\_ /s/  
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**Certificate of Service**

I, P. Jeffrey Archibald, hereby certify that on this 9<sup>th</sup> day of March, 2007, a true and correct copy of the foregoing STATE OF WISCONSIN'S RESPONSE TO DEFENDANT MERCK & CO., INC.'S FIRST SET OF INTERROGATORIES was served on all counsel of record by Lexis Nexis File & Serve®.

\_\_\_\_\_/s/\_\_\_\_\_  
P. Jeffrey Archibald