
STATE OF WISCONSIN,)	
)	
Plaintiff,)	Case No.: 04-CV-1709
)	
v.)	
)	
AMGEN INC., et. al.,)	
)	
Defendants.)	
)	

**RESPONSES AND OBJECTIONS OF DEFENDANT BMS TO PLAINTIFF’S
THIRD SET OF INTERROGATORIES AND FOURTH REQUEST
FOR PRODUCTION OF DOCUMENTS TO ALL DEFENDANTS**

Pursuant to the Wisconsin Rule of Civil Procedure Sections 804.01, 804.08, and 804.09, defendant Bristol-Myers Squibb Company (“BMS”), by its attorneys, objects and responds to Plaintiff’s Third Set of Interrogatories and Fourth Request for Production (“Plaintiff’s Requests”) as follows:

PRELIMINARY STATEMENT

1. These responses and objections are made solely for the purposes of this action. Each response is subject to all objections as to competence, relevance, materiality, propriety, and admissibility, and to any and all other objections on any grounds that would require the exclusion of any statements contained herein if such Plaintiff’s Requests were asked of, or statements contained herein were made by, a witness present and testifying in Court, all of which objections and grounds are expressly reserved and may be interposed at the time of trial.

2. BMS’s responses shall not be deemed to constitute admissions:
- a. that any particular document or thing exists, is relevant, non-privileged, or admissible in evidence; or

b. that any statement or characterization in Plaintiff's Requests is accurate or complete.

3. BMS's responses are made based upon reasonable and diligent investigation conducted to date. Discovery and investigation in this matter are ongoing and BMS reserves the right to amend its responses and to raise any additional objections it may have in the future. These responses are made based upon the typical or usual interpretation of words contained in Plaintiff's Requests, unless a specific definition or instruction has been provided and/or agreed upon.

4. Any statement by BMS contained in these objections and responses that non-privileged documents or information will be produced in response to a specific Interrogatory or 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.

5. BMS's responses to Plaintiff's Requests contain information subject to the Protective Order in this matter and must be treated accordingly.

6. BMS's responses to Plaintiff's Requests are submitted without prejudice to BMS's right to produce evidence of any subsequently discovered fact. BMS accordingly reserves its right to provide further responses and answers as additional facts are ascertained.

GENERAL OBJECTIONS

BMS objects generally to Plaintiff's Requests as follows:

1. BMS objects to Plaintiff's "Definitions" to the extent Plaintiff intends to expand upon or alter BMS's obligations under the Wisconsin Rules of Procedure, in responding to Plaintiff's Requests. BMS will comply with the Wisconsin Rules of Civil Procedure in providing its responses to Plaintiff's Requests.

2. BMS objects to the definition of the word "Document(s)" on the grounds

that it is vague and ambiguous and to the extent that it seeks to impose obligations beyond those imposed by the applicable Wisconsin Rules of Civil Procedure. BMS further objects to this definition to the extent that it purports to require BMS to identify or produce documents or data in a particular form or format, to convert documents or data into a particular file format, to produce documents or data on any particular media, to search for and/or produce or identify documents or data on back-up tapes, to produce any proprietary software, data, programs or databases, to violate any licensing agreement or copyright laws, or to produce data, fields, records, or reports about produced documents or data. The production of any documents or data or the provision of other information by BMS as an accommodation to Plaintiff shall not be deemed to constitute a waiver of this objection.

3. BMS objects to Plaintiff's Requests to the extent they call for the identification or production of documents or information not relevant to the issues in this action or not reasonably calculated to lead to the discovery of admissible evidence.

4. BMS objects to Plaintiff's Requests to the extent they are vague and ambiguous, overly broad or unduly burdensome.

5. BMS objects to Plaintiff's Requests to the extent they seek documents and information that are privileged or otherwise protected from disclosure by the work product doctrine, attorney-client privilege, accountant-client privilege, consulting expert privilege, investigative privilege, any common interest or joint defense agreement, or any other applicable privilege or protection. To the extent that any such protected documents or information are inadvertently produced in response to Plaintiff's Requests, the production or information shall not constitute a waiver of BMS'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

BMS's counsel immediately upon discovery thereof.

6. BMS objects to Plaintiff's Requests to the extent they call for documents or information not within BMS's possession, custody or control or are more appropriately sought from third parties to whom requests have been made or may be directed. In responding to Plaintiff's Requests, BMS has undertaken or will undertake a reasonably diligent and reasonable search of documents and information within BMS's current possession, custody or control.

7. BMS objects to Plaintiff's Requests to the extent they call for information that is confidential, commercially sensitive, proprietary, a trade secret and/or a trade secret of a third-party or is protected from disclosure by an agreement with a third-party.

8. BMS objects to Plaintiff's Requests to the extent they seek disclosure of information that is a matter of public record, is equally available to the Plaintiff, or is already in the possession of the Plaintiff.

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

10. BMS expressly incorporates the above Preliminary Statement and General Objections into each specific response to Plaintiff's Requests set forth below as if set forth in full therein. A response to Plaintiff's Requests shall not operate as a waiver of any applicable specific or general objection.

ANSWERS AND OBJECTIONS TO INTERROGATORIES

INTERROGATORY NO. 6:

With respect to any allegation of the Amended Complaint which you denied in your Answer state each fact that supports each such denial.

ANSWER: BMS objects to Interrogatory No. 6 on the grounds that it is overly broad and unduly burdensome. BMS further objects to this Interrogatory to the extent it seeks information protected by the work-product doctrine. BMS also objects to this Interrogatory to the extent it seeks information related to BMS's denials that are based in whole or part on the application of applicable laws or legal conclusions. Moreover, BMS objects to this Interrogatory to the extent that it seeks information relating to Plaintiff's Amended Complaint, which BMS did not answer. BMS also objects to this Interrogatory as premature because BMS has not yet fully identified all facts that may support its denials since investigation and discovery remain ongoing. BMS also objects to this Interrogatory to the extent it essentially would require BMS to identify facts and information designed to prove a negative.

Notwithstanding BMS's general and specific objections, and without waiving them, BMS answers that, based upon diligent review and investigation to date, the following facts, among others, generally support its denials to the allegations of Plaintiff's Second Amended Complaint:

1. BMS did not engage in conduct that was improper, fraudulent, or unlawful as alleged in Plaintiff's Second Amended Complaint.
2. BMS has never reported AWP's; rather BMS has always reported wholesale list prices ("WLP's") most of which reflect the actual prices that appear on invoices to wholesalers and are the prices at which BMS achieves substantial proportions of its revenues.
3. The majority of claims against BMS in the action relate to sales of self-administered drugs that pharmacies acquire at or above WLP; therefore, plaintiffs cannot claim that BMS has created any actionable "spread" as to those drugs.

4. BMS does not control the calculation or dissemination of AWP by industry publications, and to the extent that such publications have increased AWP as a result of increases in BMS's list prices, BMS only increased those list prices when it believed it could (and did) obtain sales at the increased list prices.
5. BMS sales representatives for self-administered drugs sold through pharmacies did not discuss the prices of BMS drugs or "spreads" with the physicians or pharmacies they called on. To the extent that BMS oncology sales representatives discussed the "spreads" with customers, those discussions involved nothing more than conveying truthful information in response to customer questions.
6. BMS does not have a policy encouraging or supporting the marketing or manipulating of the spread between the published average wholesale price ("AWP") and the actual acquisition costs ("AAC") for its products. Instead, BMS's policies provide that its products should be marketed based on their clinical efficacy and other product attributes. *See* Ed Penick Memorandum to all U.S. Sales and Marketing Personnel (AWP MDL PX 223).
7. It was commonly known within certain governmental agencies and within the pharmaceutical industry and by those involved with reimbursement that there was a mark-up between the wholesale acquisition costs ("WAC") (or in the case of BMS, the WLP) and the published AWP.
8. It was commonly known within certain governmental agencies and within the pharmaceutical industry and by those involved with reimbursement that published AWP did not represent actual averages of wholesale prices.
9. Plaintiff, including the Secretary of the Department of Health and Family Services ("DHFS"), Division of Health Care Financing, Governor's Office, Legislative Fiscal Bureau, Joint Committee on Finance, and Department of Administration, was aware that published AWP did not represent actual averages of wholesale prices for BMS's products.
10. Since at least 1989, Plaintiff has received directives and/or reports from the federal government that AWP does not represent the actual average of wholesale prices.
11. Plaintiff has periodically considered, and rejected, alternative pharmaceutical reimbursement methodologies, including methodologies that were not AWP-based.
12. In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access.

13. Plaintiff continues to reimburse providers, who participate in its Medicaid program, for pharmaceuticals based on AWP.
14. BMS did not misrepresent or inflate the WLP or AWP for its products.
15. BMS operates in a competitive environment as a result of which contracts and pricing terms are properly protected confidential business information.
16. As a matter of company policy, BMS does not encourage or support the use of free drugs or grants as a means of discounting the overall price of its products.
17. Plaintiff was free at all times to change its pharmaceutical reimbursement under its Medicaid program to a non-AWP-based methodology.
18. BMS is unaware of Plaintiff ever enacting a statutory or regulatory definition of AWP.
19. Plaintiff was free at all times to require pharmaceutical manufacturers to provide it with their Best Price and/or AMP data as a condition of preferred access to their drugs by Medicaid beneficiaries.
20. BMS did not know or intend for the published AWPs to reflect the actual averages of wholesale prices for its products.
21. BMS never affirmatively represented to Plaintiff that the AWP published for its products represented an actual average of wholesale prices.
22. Plaintiff was aware that pharmaceutical manufacturers provided discounts to customers.

BMS expressly reserves the right to supplement this Interrogatory Answer in the future.

INTERROGATORY NO. 7:

Identify each document that supports each such denial.

ANSWER: BMS objects to Interrogatory No. 7 on the same grounds as those set forth in its Answer to Interrogatory No. 6 and incorporates those objections herein. In addition, BMS objects to this Interrogatory because it is overly broad and unduly burdensome. BMS also

objects to Interrogatory No. 7 to the extent it seeks information that is publicly available or outside BMS's possession, custody and control.

Notwithstanding BMS's general and specific objections, and without waiving them, BMS answers that, based upon diligent review and investigation to date, the following categories of documents, among others, generally support its denials to the allegations of Plaintiff's Second Amended Complaint:

1. Documents BMS has produced various documents and depositions in response to Wisconsin's Requests for Production and Interrogatories including, but not limited to, the following:
 - Communications with the pricing compendia;
 - Sales, Medicaid rebate and other data;
 - Communications between sales representatives and customers;
 - Customer contracts;
 - Pricing committee documents;
 - Marketing strategy documents;
 - Sworn depositions, written and oral trial testimony and trial exhibits in AWP MDL; and
 - Other documents.

2. Documents in the possession, custody and control of Plaintiff and other documents generated, obtained and reviewed by Plaintiff, based upon information obtained from Plaintiff's document production and other documents to date and depositions of its employees, including, but not limited to, the following:
 - Documents referring to proposed changes to Wisconsin Medicaid's pharmaceutical reimbursement methodology;
 - Documents referring to pharmacists' profits on the sale of products reimbursed by Wisconsin Medicaid;
 - Documents referring to provider participation in Wisconsin's Medicaid program and its relationship to provider reimbursement for pharmaceutical products;
 - Studies conducted by Wisconsin Department of Agriculture, Trade and Consumer Protection, the University of Wisconsin, Congressman Tom Barrett, the Federal Trade Commission, HCFA, Dr. David Kreling, and various other consultants and entities concerning pharmaceutical pricing and reimbursement;
 - Governor's budget proposals related to Medicaid and documents analyzing those proposals;

- Issue papers written by the Legislative Fiscal Bureau and the Department of Health Family Services (“DHFS”) on pharmaceutical reimbursement;
 - OIG, GAO, CBO, and other governmental reports provided to Plaintiff concerning pharmaceutical reimbursement and any responses thereto;
 - Communications between DHFS and providers, pharmacies, or trade associations regarding pharmaceutical reimbursement and/or costs;
 - Communications between DHFS and other states or the federal government regarding pharmaceutical reimbursement and/or costs;
 - Issues, briefing, and concept papers on pharmaceutical reimbursement and costs by the Office of Strategic Finance;
 - Written testimony of DHFS Secretary concerning pharmaceutical reimbursement;
 - Emails between DHFS and the Governor’s office concerning pharmaceutical reimbursement;
 - Wholesaler data from state-run entities that purchase drugs directly from wholesalers;
 - Documents comparing prices paid by Wisconsin Medicaid to those paid by other State entities;
 - Information from CMS concerning AWP, EAC, or changes in pharmaceutical reimbursement;
 - Documents related to the Governor’s Pharmacy Reimbursement Commission;
 - Budget documents from the Department of Administration related to pharmaceutical reimbursement;
 - Audits of Wisconsin’s Medicaid program;
 - Communications between EDS (or one of its subcontractors) and Plaintiff concerning cost containment measures for pharmaceutical reimbursement; and
 - Media articles discussing pharmaceutical reimbursement;
3. Documents received, or expected to be received, from third-parties including, but not limited to, the following:
- Federal government;
 - Other states;
 - Third-parties subpoenaed in this case; and
 - Wholesaler data produced by third-parties.

BMS expressly reserves the right to supplement this Interrogatory Answer in the future.

INTERROGATORY NO. 8:

With respect to each affirmative defense you assert in your Answer to the Amended Complaint state the facts which support that defense.

ANSWER: BMS objects to Interrogatory No. 8 on the grounds that it is overly broad and unduly burdensome. BMS further objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege or work-product doctrine. BMS also objects to this Interrogatory to the extent it seeks information related to BMS's denials that are based in whole or part on the application of applicable laws or legal conclusions. Moreover, BMS objects to this Interrogatory to the extent that it seeks information relating to Plaintiff's Amended Complaint, which BMS did not answer. BMS also objects to this Interrogatory as premature because BMS has not yet fully identified all facts that may support its denials since investigation and discovery remain ongoing. BMS also objects to this Interrogatory to the extent it essentially would require BMS to identify facts and information designed to prove a negative.

Notwithstanding BMS's general and specific objections, and without waiving them, BMS answers that, based upon diligent review and investigation to date, the following facts, among others, generally support BMS's Affirmative Defenses, as set forth in its Answer to Plaintiff's Second Amended Complaint:

Affirmative Defenses Nos. 1, 17, 21-25

- Since at least 1975, Plaintiff was aware that the published AWP's did not represent actual averages of wholesale prices for BMS's products.
- Since at least 1989, Plaintiff has received directives and/or reports from the federal government that AWP does not represent the actual average of wholesale prices.
- Plaintiff was free at all times to change its pharmaceutical reimbursement methodology under Medicaid to a system not based on AWP.
- Plaintiff continues to reimburse providers, who participate in its Medicaid program, for pharmaceuticals based on published AWP's.
- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access.

- It was commonly known within certain governmental agencies, the pharmaceutical industry and by those involved in reimbursement that published AWP's did not represent actual averages of wholesale prices.
- BMS did not know or intend for the published AWP's to reflect actual averages of wholesale prices for its products.
- BMS has never reported AWP's; rather BMS has always reported WLP's most of which reflect the actual prices that appear on invoices to wholesalers and are the prices at which BMS achieves substantial proportions of its revenues.
- The majority of claims against BMS in the action relate to sales of self-administered drugs that pharmacies acquire at or above WLP; therefore, plaintiffs cannot claim that BMS has created any actionable "spread" as to those drugs.
- BMS does not control the calculation or dissemination of AWP's by industry publications, and to the extent that such publications have increased AWP's as a result of increases in BMS's list prices, BMS only increased those list prices when it believed it could (and did) obtain sales at the increased list prices.
- Plaintiff cannot establish it complied with Wis. Stat. § 165.25(1) or Wis. Stat. § 100.18(11)(d).
- BMS did not cause providers to make false statements to Plaintiff.
- The Attorney General is not authorized to seek forfeitures under Wis. Stat. § 100.26(4) and § 100.264(2).
- Plaintiff was aware that pharmaceutical manufacturers provided discounts to customers.
- Plaintiff cannot establish that BMS's discounts to providers had the effect of injuring competition.
- Plaintiff did not confer any benefit on BMS.

Affirmative Defense No. 2

- Plaintiff cannot establish it complied with Wis. Stat. § 165.25(1) or Wis. Stat. § 100.18(11)(d).

Affirmative Defense Nos. 2-5, 7-8, 11, 15-17, 19-20, 22-25, 29-30, 33, 36-38

- These defenses are purely legal in nature and thus, require no reference to facts for support.

Affirmative Defense No. 4

- The reimbursement rates set for Wisconsin's Medicaid program and Medicare Part B are lawful, government-set rates.

Affirmative Defense No. 6

- To the extent that BMS has engaged in lobbying or related efforts before Congress and/or other regulatory agencies, such conduct is protected by the First Amendment and *Noerr-Pennington*.

Affirmative Defense No. 7:

- Plaintiff submitted state plans and state plan amendments to the federal government concerning the rate at which it would reimburse pharmaceuticals under its Medicaid Program. These plans were reviewed and approved by the federal government.

Affirmative Defenses Nos. 8, 28, 31:

- Since at least 1975, Plaintiff was aware that the published AWP's did not represent actual averages of wholesale prices for BMS's products.
- Since at least 1989, Plaintiff has received directives and/or reports from the federal government that AWP does not represent the actual average of wholesale prices.
- Plaintiff was free at all times to change its pharmaceutical reimbursement methodology under Medicaid to a non-AWP-based system.
- Plaintiff continues to reimburse providers, who participate in its Medicaid program, for pharmaceuticals based on AWP.
- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access.

Affirmative Defense No. 9 (Cites below are from the trial record in the MDL AWP trial.)

- BMS cannot market its drugs unless they are listed in one or more industry compendia, commonly known as RedBook, First DataBank and MediSpan (the “Publications”). (Kaszuba Aff. ¶ 5; Kaszuba 11/13/06 Tr. 125-26; Ihling Dep. Tr. 124-25; Szabo Aff. ¶ 13; PX 188 at 00337640.) That is because the electronic claims processing systems used by government programs like Medicare and Medicaid and private third-party payors use the Publications to identify the drugs for which they will pay. (Kaszuba Aff. ¶ 5; Kaszuba 11/13/06 Tr. 125-26; Ihling Dep. Tr. 124-125; Szabo Aff. ¶¶ 6, 13.) Thus, since the early 1970s, BMS has reported prices and product descriptions to the Publications. (Rogers Aff. ¶¶ 1-2; Szabo Aff. ¶ 6; Ihling Dep. Tr. 89, 97; *see also* Kaszuba Aff. ¶ 3; Kaszuba 11/13/06 Tr. 55, 109.)
- BMS has never reported AWP to the Publications. (Kaszuba Aff. ¶ 6; Kaszuba 11/13/06 Tr. 110, 113; DX 2595; DX 2650; Szabo Aff. ¶ 6; Rogers Aff. ¶ 2; Ihling Dep. Tr. 93.) Rather, it has always reported its list prices. (Kaszuba Aff. ¶ 3; Kaszuba 11/13/06 Tr. 52, 58, 109; Rogers Aff. ¶¶ 1-2; Szabo Aff. ¶ 6; Ihling Dep. Tr. 89, 97.) Those list prices were, for the most part, the list prices that appeared on invoices to wholesalers. (Szabo Aff. ¶ 7; Rogers Aff. ¶ 4.)
- The Publications have historically applied a mark-up factor of 20.5% or 25% to BMS’s list prices to calculate average wholesale prices or “AWPs.” (Kaszuba 11/13/06 Tr. 59, 120-21; DX 2611 at BMS/AWP/000186646, 000186649; DX 2616; Szabo Aff. ¶ 6; Ihling Dep. Tr. 96-97.) This practice existed long before AWP became the benchmark for reimbursement in Medicare. (DX 1275 (Berndt Report) ¶ 22; Bell 12/08/06 Tr. 46.) The Publications represented to BMS that the mark-up factor they apply for BMS drugs was based on surveys they had made of drug wholesalers as to the list prices that *wholesalers* provide to *their* customers. (Kaszuba 11/13/06 Tr. 58-59, 114-16.) That this was BMS’s understanding of the Publications’ process is supported by both internal BMS documents (DX 2554), documents internal to the Publications that were copied to BMS employees (DX 2553), and by First DataBank’s explanation of AWP as “an average price which a *wholesaler* would charge a pharmacy” in 1991 (PX 4075).
- BMS recognized, as a matter of history and industry practice that, if it reported a particular list price, the Publications would return an AWP that was 20% or 25% higher, depending on the particular BMS drug and the Publication in question. (Marre Aff. ¶ 10; Pasqualone 12/06/06 Tr. 12-13; Kaszuba 11/13/06 Tr. 59; DX 2611 at BMS/AWP000186649; DX 2616; Ihling Dep. Tr. 88-89; Szabo Aff. ¶ 6.) It was the Publications, and not

BMS, that had exclusive control over any mark-up factor applied to the BMS WLP, as well as control over the very name of the resulting price calculation: “AWP”.

- From 1991 through 2005, one employee at BMS, Denise Kaszuba, had primary responsibility for BMS’s communications with the Publications. (Szabo Aff. ¶ 6; Kaszuba Aff. ¶ 3; Kaszuba 11/13/06 Tr. 52.) Ms. Kaszuba testified that the Publications determine AWP’s, and BMS cannot control that process. (Kaszuba Aff. ¶ 6; Kaszuba 11/13/06 Tr. 58, 110-13.) A witness from First DataBank made the same point. (Morgan Dep. Tr. 229-230; *see also* Pasqualone Aff. ¶ 26; Pasqualone 12/06/06 Tr. 12; DX 1137.) In addition, there were numerous documents, created in the regular course of business, which explicitly stated that BMS did not control AWP’s. *See* DX 1522; DX 2545; DX 2554; DX 2585 at BMS/AWP/001510398; DX 2588/PX 187 at BMS/AWP/01109782; DX 2587/PX 196 at BMS/AWP/00442095; DX 2589/PX 189 at BMS/AWP/01088211; DX 2595 at BMS/AWP/00059757.
- On one occasion, BMS suggested a change in the mark-up factor to the Publications. This request arose from the fact that, after the Bristol-Myers and Squibb merger, the Publications applied different mark-up factors to different BMS oncology drugs based on whether the drug had been a Bristol-Myers or Squibb drug. (Kaszuba Aff. ¶¶ 12, 13; Kaszuba 11/13/06 Tr. 72, 117-19; Pasqualone Aff. ¶ 26; Pasqualone 12/06/06 Tr. 12; DX 2545.) To eliminate that anomaly, in 1992 Ms. Kaszuba requested that all BMSO drugs carry the same mark-up factor of 25%. (Kaszuba 11/13/06 Tr. 60, 114; Pasqualone Aff. ¶ 26; Pasqualone 12/6/06 Tr. 12; Szabo Aff. ¶ 6; DX 2552.) RedBook agreed; First Data Bank and MediSpan did not, further demonstrating BMS’s lack of control over the Publications. (Kaszuba Aff. ¶ 13; Kaszuba 11/13/06 Tr. 60, 114; DX 2553; DX 2554; Szabo Aff. ¶ 6.) This is the only time BMS ever suggested to the Publications what the mark-up factor should be. (Kaszuba Aff. ¶ 6; Kaszuba 11/13/06 Tr. 60, 117, 131; Szabo Aff. ¶ 6; *see also* Pasqualone Aff. ¶ 26; DX 2554; DX 2650.) There were no oral discussions between BMS and the Publications on this subject. (DX 2650.)
- BMS’s lack of control over AWP’s is also demonstrated by documents in BMS’s files from the 2002 time period when First DataBank unilaterally changed its mark-up factor on hundreds of drugs of scores of manufacturers, including but not limited to the factor it previously applied to certain of the BMS drugs. (DX 2588 at BMS/AWP /01109782; DX 2589 at BMS/AWP/01088206; *see also* Kaszuba Aff. ¶ 15.) It appears that certain BMS employees were tasked with analyzing how and why such a change could be made by First DataBank without notice to BMS. These documents are also consistent with BMS’s position that it does not control the Publications’ AWP’s.

- In addition, beginning in 1999, BMS included in its communications to the Publications a statement that its list prices did not include discounts. (Kaszuba Aff. ¶ 7; Kaszuba 11/13/06 Tr. 127-28; Szabo Aff. ¶ 6; DX 2627 at FDB-AWP-18630.) This had no impact on the way the Publications calculated AWP. (Kaszuba Aff. ¶ 7; Kaszuba 11/13/06 Tr. 127-28; Szabo Aff. ¶ 6.)
- It was commonly known and widely understood that AWP did not represent the actual averages of wholesale prices.

Affirmative Defense No. 10

- Since at least 1975, Plaintiff was aware that the published AWP did not represent the actual averages of wholesale prices for BMS's products.
- Since at least 1989, Plaintiff has received directives and/or reports from the federal government that AWP does not represent the actual average of wholesale prices.
- Plaintiff was free at all times to change its pharmaceutical reimbursement methodology under Medicaid to a system not based on AWP.
- Plaintiff continues to reimburse providers, who participate in its Medicaid program, for pharmaceuticals based on AWP.
- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further the Medicaid program goals, including ensuring access.
- It was commonly known within certain governmental agencies, the pharmaceutical industry and by those involved with reimbursement that published AWP did not represent actual averages of wholesale prices.
- BMS did not know or intend for the published AWP to reflect actual averages of wholesale prices for its products.
- BMS has never reported AWP; rather BMS has always reported WLPs most of which reflect the actual prices that appear on invoices to wholesalers and are the prices at which BMS achieves substantial proportions of its revenues.
- The majority of claims against BMS in the action relate to sales of self-administered drugs that pharmacies acquire at or above WLP; therefore, plaintiffs cannot claim that BMS has created any actionable "spread" as to those drugs.

- BMS does not control the calculation or dissemination of AWP by industry publications, and to the extent that such publications have increased AWP as a result of increases in BMS's list prices, BMS only increased those list prices when it believed it could (and did) obtain sales at the increased list prices.
- BMS did not cause providers to make false statements to Plaintiff.
- Plaintiff cannot establish that BMS's discounts to providers had the effect of injuring competition.
- Plaintiff did not confer any benefit on BMS.

Affirmative Defense No. 12

- The Medicare Prescription Drug, Improvement and Modernization Act of 2003, 42 U.S.C. § 1395, changed pharmaceutical reimbursement under Medicare from an AWP-based system to an ASP-based system.

Affirmative Defense No. 13

- Plaintiff has not named as defendants parties who received the alleged "excessive" reimbursements.
- BMS's conduct and activities are distinct from and independent of the conduct and activities of the other defendants named in this action.

Affirmative Defenses Nos. 14, 18

- Plaintiff cannot establish that it was damaged by BMS's conduct. Plaintiff adopted the reimbursement methodology to further its Medicaid objectives, including ensuring access.
- Plaintiff cannot establish that any increase in BMS's market share was attributable to BMS's allegedly unlawful conduct as opposed to other factors.
- Plaintiff cannot establish that any increase in BMS's market share was the result of Plaintiff's payments as opposed to payments from Medicare or private payors.

Affirmative Defense No. 18

- Plaintiff continues to reimburse providers, who participate in the Medicaid program, for pharmaceuticals based on AWP.
- Plaintiff has not proven that it was damaged by BMS's conduct.
- Since at least 1975, Plaintiff was aware that the published AWP's did not represent actual averages of wholesale prices for BMS's products.
- Since at least 1989, Plaintiff has received directives and/or reports from the federal government that AWP does not represent the actual average of wholesale prices.
- Plaintiff was free at all times to change its pharmaceutical reimbursement methodology under Medicaid to a reimbursement system not based on AWP.
- Plaintiff continues to reimburse providers, who participate in its Medicaid program, for pharmaceuticals based on AWP.
- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access.

Affirmative Defenses Nos. 26:

- Based upon Plaintiff's production to date, it appears that Plaintiff undertook little, if any, studies to determine EAC.

Affirmative Defense No. 27

- Plaintiff did not confer a benefit on BMS.
- Any increased sales and/or market share BMS received during the relevant time period was not the result of unlawful conduct.
- Plaintiff cannot establish that any increase in BMS's market share was attributable to BMS's allegedly unlawful conduct as opposed to other factors.
- Plaintiff cannot establish that any increase in BMS's market share was the result of Plaintiff's payments as opposed to payments from Medicare or private payors.

- Since at least 1975, Plaintiff was aware that the published AWP's did not represent actual averages of wholesale prices for BMS's products.
- Since at least 1989, Plaintiff has received directives and/or reports from the federal government that AWP does not represent the actual average of wholesale prices.
- Plaintiff was free at all times to change its pharmaceutical reimbursement methodology under Medicaid to reimbursement system not based on AWP.
- Plaintiff continues to reimburse providers, who participate in its Medicaid program, for pharmaceuticals based on AWP.
- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further Medicaid goals, including ensuring access.
- Plaintiff is entitled to receive certain rebates under the Medicaid rebate drug agreement between BMS and the Secretary of the Department of Health and Human Services ("HHS") on behalf of HHS and the states which was entered into pursuant to 42 U.S.C. § 1396r-8.
- Plaintiff cannot establish it complied with Wis. Stat. § 165.25(1).

Affirmative Defense No. 32, 39

- Plaintiff cannot establish it complied with Wis. Stat. § 100.18(11)(d).

Affirmative Defense No. 33

- BMS's products are sold in interstate commerce.

Affirmative Defense No. 34

- Plaintiff has provided no particularized allegations (the "who, what, when, and where") describing BMS's allegedly fraudulent conduct.

Affirmative Defense No. 35

- BMS has never represented that the AWP's published by the pricing compendia represent actual averages of wholesale prices for its products.
- BMS did not know or intend for the published AWP's to reflect the actual averages of wholesale prices for its products.
- It was commonly known within certain governmental agencies, the pharmaceutical industry and by those involved with reimbursement that published AWP's did not represent actual averages of wholesale prices.
- Since at least 1975, Plaintiff was aware that the published AWP's did not represent actual averages of wholesale prices for BMS's products.
- Since at least 1989, Plaintiff has received directives and/or reports from the federal government that AWP does not represent the actual average of wholesale prices.
- Plaintiff was free at all times to change its pharmaceutical reimbursement methodology under Medicaid to a non-AWP-based system.
- Plaintiff continues to reimburse providers, who participate in its Medicaid program, for pharmaceuticals based on AWP.
- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access.

Affirmative Defense Nos. 29-30

- Any and all applicable facts asserted by any other defendant not otherwise asserted herein.

BMS expressly reserves the right to supplement this Interrogatory Answer in the future.

INTERROGATORY NO. 9:

Identify each document that supports the facts upon which you base each such affirmative defense.

ANSWER: BMS objects to Interrogatory No. 9 on the same grounds as those set forth in its Answer to Interrogatory No. 8 and incorporates these objections herein. In addition,

BMS objects to this Interrogatory to the extent it seeks information that is publicly available or outside BMS's possession, custody and control.

Notwithstanding BMS's general and specific objections, and without waiving them, BMS answers that, based upon diligent review and investigation to date, the following categories of documents, among others, generally support the Affirmative Defenses asserted in BMS's Answer to Plaintiff's Second Amended Complaint:

1. BMS has produced various documents and depositions in response to Wisconsin's Requests for Production and Interrogatories including, but not limited to, the following:
 - Communications with the pricing compendia;
 - Sales, Medicaid rebate and other data;
 - Communications between sales representatives and customers;
 - Customer contracts;
 - Pricing committee minutes;
 - Marketing strategy documents;
 - Sworn depositions, written and oral trial testimony and trial exhibits in AWP MDL; and
 - Other documents.

2. Documents in the possession, custody and control of Plaintiff and other documents generated, obtained and reviewed by Plaintiff, based upon information obtained from Plaintiff's document production and other documents to date and depositions of its employees, including, but not limited to, the following:
 - Documents referring to proposed changes to Wisconsin Medicaid's pharmaceutical reimbursement methodology;
 - Documents referring to pharmacists' profits on the sale of products reimbursed by Wisconsin Medicaid;
 - Documents referring to provider participation in Wisconsin's Medicaid program and its relationship to provider reimbursement for pharmaceutical products;
 - State plans and state plan amendments;
 - Studies conducted by Wisconsin Department of Agriculture, Trade and Consumer Protection, the University of Wisconsin, Congressman Tom Barrett, the Federal Trade Commission, HCFA, Dr. David Kreling and various other consultants and entities concerning pharmaceutical pricing and reimbursement;
 - Governor's budget proposals related to Medicaid and documents analyzing those proposals;

- Issue papers written by the Legislative Fiscal Bureau and DHFS on pharmaceutical reimbursement;
 - OIG, GAO, CBO, and other governmental reports provided to Plaintiff concerning pharmaceutical reimbursement and any responses thereto;
 - Communications between DHFS and providers, pharmacies, or trade associations regarding pharmaceutical reimbursement and/or costs;
 - Communications between DHFS and other states or the federal government regarding pharmaceutical reimbursement and/or costs;
 - Issues, briefing, and concept papers on pharmaceutical reimbursement and costs by the Office of Strategic Finance;
 - Written testimony of DHFS Secretary concerning pharmaceutical reimbursement;
 - Emails between DHFS and the Governor's office concerning pharmaceutical reimbursement;
 - Wholesaler data from state-run entities that purchase drugs directly from wholesalers;
 - Documents comparing prices paid by Wisconsin Medicaid to those paid by other State entities;
 - Information from CMS concerning AWP, EAC, or changes in pharmaceutical reimbursement;
 - Documents related to the Governor's Pharmacy Reimbursement Commission;
 - Budget documents from the Department of Administration related to pharmaceutical reimbursement;
 - Audits of Wisconsin's Medicaid program;
 - Communications between EDS (or one of its subcontractors) and Plaintiff concerning cost containment measures for pharmaceutical reimbursement; and
 - Media articles discussing pharmaceutical reimbursement.
3. Documents received, or expected to be received, from third-parties including, but not limited to, the following:
- Federal government;
 - Other states;
 - Third-parties subpoenaed in this case; and
 - Wholesaler data produced by third-parties.

BMS expressly reserves the right to supplement this Interrogatory Answer in the future.

INTERROGATORY NO. 10:

Have you ever communicated directly with any official of the State of Wisconsin about the prices of any of your drugs, including AWP, WACs, or any other prices irrespective of the nomenclature used?

ANSWER: BMS objects to Interrogatory No. 10 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. BMS further objects to this Interrogatory because “any official of the State” is vague and undefined and because this Interrogatory is not limited by timeframe.

Notwithstanding BMS’s general and specific objections, and without waiving them, BMS answers that, based upon its review and investigation to date, other than communications with Provider Synergies regarding placement on Wisconsin’s Preferred Drug List, it is unaware of any communications directly with the State concerning the pricing of BMS’s products. However, BMS expressly reserves the right to supplement this Interrogatory Answer in the future.

INTERROGATORY NO. 11:

If the answer to Interrogatory No. 10 is yes, identify all such communications by date, time, and purpose, the persons who communicated this information, the persons to whom this information was communicated, who said what to whom or who wrote what to whom, and identify any documents containing or describing the information communicated to Wisconsin officials.

ANSWER: BMS objects to Interrogatory No. 11 on the ground that it is overly broad and unduly burdensome. BMS further objects to this Interrogatory on the ground that it is not limited by timeframe.

Notwithstanding BMS’s general and specific objections, and without waiving them, BMS agrees to produce business records, in a manner to be negotiated and agreed upon between the parties, from which the answer to Interrogatory No. 11 may be obtained.

RESPONSES AND OBJECTIONS TO REQUEST FOR PRODUCTION

REQUEST NO. 12:

Produce each document identified in response to Interrogatory Nos. 7, 9 and 11.

RESPONSE: BMS objects to Request No. 12 on the ground that it is overly broad and unduly burdensome. BMS further objects to this Interrogatory to the extent it seeks documents that are publicly available or outside BMS's possession, custody and control.

Notwithstanding BMS's general and specific objections, and without waiving them, BMS agrees to produce non-privileged documents identified in its Answers to Interrogatory No. 11 in a manner to be negotiated and agreed upon between the parties. For documents identified in answer to Interrogatory Nos. 7 and 9, BMS directs Plaintiff to the documents it has produced in response to prior Requests for Production and Interrogatories. BMS also directs Plaintiff to the productions by third-parties.

REQUEST NO. 13:

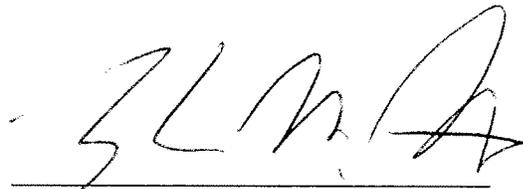
Produce any documents commenting on, concerning or about how or to what extent wholesalers mark up drugs for resale including, but not limited to, any documents relating to the case of Brand Name Prescription Drugs Antitrust Litigation, 94 C 897 (N.D. Ill.)

RESPONSE: BMS objects to Request No. 13 on the ground that it is overly broad and unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence because (i) it purports to require information relating to "drugs" without specification as to which "drugs," thus including drugs that are not manufactured, marketed, or distributed by BMS and/or drugs not at issue in this litigation, and (ii) to the extent it purports to require BMS to produce all documents "relating to the case of Brand Name Prescription Drugs Antitrust Litigation, 94 C 897 (N.D. Ill.)" regardless of whether such documents relate to any issues in this case, belong to BMS, or are otherwise protected from disclosure pursuant to

applicable privileges or work-product doctrine. In addition, BMS objects to this Request because it is duplicative of Request No. 3 in Plaintiff's First Set of Requests for Production of Documents in response to which BMS produced documents. BMS further objects to this Request to the extent it seeks information in the possession of Plaintiff or more appropriately sought from third parties.

Notwithstanding BMS's general and specific objections, and without waiving them, BMS refers Wisconsin to the documents BMS has produced in response to Wisconsin's prior Requests for Production and Interrogatories. As to the documents BMS produced in the Brand Name Prescription Drugs Antitrust Litigation, to the extent that such documents are reasonably available, BMS will produce for inspection by Plaintiff non-privileged documents which may contain responsive documents.

Dated: March 15, 2007



Daniel T. Flaherty
GODFREY & KAHN
One East Main Street
P.O. Box 2719
Madison, WI 53701-2719
(608) 257-3911 (phone)
(608) 257-0609 (fax)

Steven M. Edwards
Lyndon M. Tretter
Thomas J. Sweeney, III
HOGAN & HARTSON, LLP
875 Third Ave.
New York, NY 10022
212-918-3000 (phone)
212-918-3100 (fax)

*Attorneys for Defendant Bristol-Myers
Squibb Co.*

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

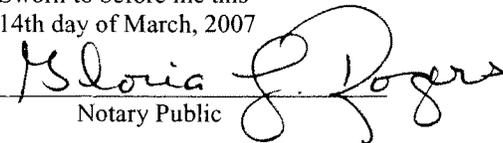
Nadine Flynn, being duly sworn, deposes and says:

I am the Assistant Secretary for Defendant Bristol-Myers Squibb Company. I have read the Responses and Objections of Defendant BMS to Plaintiff's Third Set of Interrogatories and Fourth Request for Production of Documents to All Defendants, dated March 15, 2007, and am aware of their contents. I do not have personal knowledge of all of the facts contained therein. They were prepared with the assistance and advice of counsel and employees of the corporation on whose advice and assistance I have relied. I have been informed and believe that the Interrogatory Answers are true and/or that they are based on the corporation's business records which are believed to be accurate. The Interrogatory Answers are subject to inadvertent error or undiscovered errors, and are based on and therefore limited by records and information presently recollected and thus far discovered in the course of the preparation of these Interrogatory Answers. I therefore reserve the right to make any changes in the Interrogatory Answers if it appears at any time that omissions or errors have been made therein or that more accurate information is available. Subject to these limitations, I hereby verify that the Interrogatory Answers are true and correct to the best of my knowledge, information and belief.



Nadine Flynn

Sworn to before me this
14th day of March, 2007



Notary Public

GLORIA J. ROGERS
Notary Public, State of New York
No. 01RO3325885
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires Sept. 30, 2009

Certificate of Service

I, Lyndon Tretter, hereby certify that on this 15th day of March 2007, a true and correct copy of **BMS RESPONSES AND OBJECTIONS OF DEFENDANT BMS TO PLAINTIFF'S THIRD SET OF INTERROGATORIES AND FOURTH REQUEST FOR PRODUCTION OF DOCUMENTS TO ALL DEFENDANTS** was served on all counsel of record by Lexis Nexis File & Serve®.



Lyndon M. Tretter