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THE STATE OF WISCONSIN

Plaintiff,

CASE NO. 04-1709

v.

ABBOTT LABORATORIES, INC., et al.

Defendants.

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**DEFENDANT DEY, INC.'S RESPONSES AND OBJECTIONS  
TO PLAINTIFF STATE OF WISCONSIN'S INTERROGATORIES  
NO. 3 (TO ALL DEFENDANTS) AND REQUEST FOR PRODUCTION  
OF DOCUMENTS NO. 4 (TO ALL DEFENDANTS)**

TO: The State of Wisconsin

Pursuant to Wisconsin Statutes §§ 804.01, 804.08, and 804.09 Defendant Dey, Inc. ("Dey"), by its undersigned counsel, asserts the following responses and objections to Plaintiff State of Wisconsin's Interrogatories No. 3 (To All Defendants) (the "Interrogatories") and Request for Production of Documents No. 4 (To All Defendants) (the "Document Requests"), dated January 12, 2007, and propounded by Plaintiff State of Wisconsin ("Plaintiff," the "State," or "Wisconsin"), as follows:

**GENERAL OBJECTIONS AND RESERVATION OF RIGHTS**

1. Dey objects to the Interrogatories and Document Requests to the extent they seek to impose duties and obligations on Dey greater than Dey's duties and obligations under the Wisconsin Rules of Civil Procedure and any applicable local rules. Dey will comply with its duties and obligations under the Wisconsin Rules of Civil Procedure and any applicable local rules.

2. Dey provides its responses subject to the Protective Order, entered on November 29, 2005, in this action.

3. Dey objects to the Interrogatories and Document Requests to the extent they are premature, vague, ambiguous, unduly burdensome, overbroad, oppressive or duplicative, and not limited to the discovery of information which is relevant to the subject matter of this litigation or reasonably calculated to lead to the discovery of admissible evidence.

4. Dey objects to the extent that any of Plaintiffs Interrogatories and Document Requests seek documents or information not limited to sales in the State of Wisconsin on the grounds that such Interrogatories and Document Requests are overly broad, unduly burdensome, and do not seek the discovery of admissible evidence.

5. Dey objects to the Interrogatories and Document Requests as overly broad, unduly burdensome, and not reasonably calculated to lead to discovery of admissible evidence to the extent they seek documents or information concerning pharmaceutical products not at issue in this litigation. Dey will provide information relating only to pharmaceutical products identified in the Second Amended Complaint.

6. Dey objects to the Interrogatories and Document Requests on the grounds that they are unduly burdensome to the extent that they purport to require Dey to compile, analyze, compute, and/or summarize voluminous data or information that Plaintiff has the ability to create or analyze by reviewing the documents, information, or data that Dey has produced or will produce.

7. Dey objects to the Interrogatories and Document Requests to the extent they demand the production of documents or information that are privileged or otherwise protected

against discovery pursuant to the attorney-client privilege, the work product doctrine, the joint defense privilege, the consulting expert rule, the common interest doctrine, or any other legally recognized privilege, immunity, or exemption from discovery. To the extent any such protected documents or information are inadvertently produced in response to the Interrogatories and Document Requests, the production of such documents or information shall not constitute a waiver of Dey'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 Dey's counsel immediately upon discovery thereof.

8. Dey objects to the Interrogatories and Document Requests to the extent that they demand the production of documents or information containing trade secrets, or proprietary, commercially sensitive or other confidential information.

9. Dey objects to the disclosure, under any circumstance, of trade secret information where the probative value in this litigation is greatly exceeded by the potential harm to Dey if the information were to fall into the hands of its competitors, and further asserts each and every applicable privilege and rule governing confidentiality to the fullest extent provided by the law.

10. Dey objects to these Interrogatories and Document Requests to the extent they seek documents or information already in Plaintiff's knowledge, possession and/or control, or information to which Plaintiff has equal access.

11. Dey objects to the Interrogatories and Document Requests to the extent that they demand the production of documents or information: (a) not within the knowledge, possession, custody, or control of Dey, their agents, or their employees; (b) publicly available; or (c) more appropriately sought from third parties to whom requests have been or may be directed.

12. These responses and objections are made without waiving or intending to waive, but to the contrary intending to preserve and preserving: (a) any objections as to the competency, relevancy, materiality, privilege, or admissibility as evidence, for any purpose, of any documents or information produced to respond to the Interrogatories and Document Requests; (b) the right to object on any ground to the use of documents or information produced in response to the Interrogatories and Document Requests at any hearing, trial, or other point during this action; (c) the right to object on any ground at any time to a demand for further responses to the Interrogatories and Document Requests; or (d) the right at any time to revise, correct, add to, supplement, or clarify any of the responses or objections contained herein.

13. The documents or information supplied herein are for use in this action and for no other purpose.

14. No response or objection made herein, or lack thereof, is an admission by Dey as to the existence or non-existence of any documents or information.

15. Dey objects to the Interrogatories and Document Requests to the extent that they demand the production of documents or information from outside of the statute of limitations applicable to the State's claims in this action, or beyond the time period relevant to this action. Dey objects to the Interrogatories and Document Requests as irrelevant, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that they purport to require production of documents or seek information relating to a period of time after the filing of the Complaint on or around June 3, 2004.

16. Dey objects to the Interrogatories and Document Requests to the extent that they demand the production of proprietary documents or information of third parties.

17. Dey objects to any implications and to any explicit or implicit characterization of facts, events, circumstances, or issues in the Interrogatories and Document Requests. Any response by Dey that it will produce documents or information in connection with a particular Interrogatory, or that it has no responsive documents or information, is not intended to indicate that Dey agrees with any implication or any explicit or implicit characterization of facts, events, circumstances, or issues in the Interrogatories and Document Requests, or that such implications or characterizations are relevant to this action.

18. Dey objects to the Interrogatories and Document Requests as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent they seek documents concerning any discontinued product dated after the date of such product's discontinuation.

19. Dey objects to the Interrogatories and Document Requests to the extent they seek information or documents relating to Dey's activities that are outside the scope of the allegations in the Second Amended Complaint.

20. Dey objects to the Interrogatories and Document Requests to the extent they demand production of documents or information relating to Dey's activities other than those which concern the State, on the grounds that such documents or information are neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence.

21. Dey reserves the right to assert additional objections to these Interrogatories and Document Requests as appropriate and to amend or supplement these objections and responses in accordance with the applicable rules and court orders and based on results of its continuing investigation.

## **OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS**

Dey objects to Plaintiffs definition of "You", "Your" and "Your Company" on the grounds that it is overly broad and unduly burdensome. Dey further objects to this definition to the extent it includes entities and persons that are not parties to this action.

1. Dey objects to Plaintiffs definition of "Document" and "Documents" on the grounds that it is vague, ambiguous, and overbroad. Dey further objects to this definition to the extent it includes documents that are protected by the attorney-client privilege, the work product doctrine, or any other applicable doctrine or privilege. Dey further objects to this definition to the extent it seeks to impose obligations on Dey that are greater than, or inconsistent with, Dey's obligations under the Wisconsin Rules of Civil Procedure and any applicable local rules. Dey further objects to this definition to the extent it purports to include within its scope documents or information containing or consisting of proprietary information, trade secrets, or information of a competitively sensitive nature.

2. Dey objects to the instructional paragraphs preceding the individual Document Requests (the "Instructions") on the grounds that the Instructions are vague, ambiguous, and overly broad. Dey further objects to the Instructions as unduly burdensome to the extent they seek to impose on Dey obligations inconsistent with, or greater than, Dey's obligations under the Wisconsin Rules of Civil Procedure and any applicable local rules.

## **SPECIFIC RESPONSES AND OBJECTIONS TO INTERROGATORIES**

The General Objections and Reservations of Rights and the Objections to Definitions stated above apply to and are incorporated into each and every individual response to the individual Interrogatories set forth below, whether or not expressly incorporated by reference

in any individual response. Dey also responds and objects specifically to the individual Interrogatories as follows:

INTERROGATORY No. 6:

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

DEY'S RESPONSE AND OBJECTIONS

Dey objects to this Interrogatory on the grounds that it is vague, ambiguous, overly broad, and fails to identify with sufficient particularity the information sought. Dey further objects to this Interrogatory on the grounds that it purports to impose obligations that exceed those imposed by the Wisconsin Rules of Civil Procedure and applicable local rules. Dey further objects to this Interrogatory as premature. Discovery is in the early stages and evidence that refutes the State's allegations includes materials in the possession of the State, the federal government, and third parties.

Subject to and without waiving the foregoing general and specific objections, Dey states as follows:

a. Dey has not engaged in conduct that was improper, fraudulent, or unlawful as alleged in Plaintiff's Second Amended Complaint.

b. Claims for reimbursement under the Medicaid and Medicare programs are filed by providers, not Dey, and Dey has never caused any provider to file a false claim. Wisconsin pays Medicaid reimbursements directly to Medicaid providers, not to Dey. The federal government pays Medicare reimbursements directly to Medicare providers, not to Dey. Dey has not received any money from any Medicaid reimbursement payment made by Wisconsin. Dey has not received any portion of any co-payment made by a Medicare beneficiary.

c. Dey has never reported "false" or "inflated" Average Wholesale Prices or AWP's. AWP is not defined anywhere in Wisconsin or federal statutes or regulations and Wisconsin and the federal government (collectively the "Government") have never provided or directed Dey to any definition of AWP. Thus, there can be no basis for characterizing an AWP as "true" or "false" and no basis for the alleged injuries the State or Medicare beneficiaries allegedly suffered due to Dey's alleged reporting of AWP's. The AWP that Dey sets when it launches a generic drug is its genuine AWP, established by reference to the corresponding brand name therapeutically equivalent product. It is Dey's practice to set an AWP for a generic drug, before the drug is ever sold, at a percentage amount below the AWP of the corresponding brand name drug. Once Dey sets an AWP for one of its generic drugs, Dey typically has not subsequently changed the AWP. Dey has only changed AWP's for its generic drugs on isolated occasions. Dey's practice of setting AWP's for its generic products at a percentage lower than the therapeutically equivalent brand name AWP's is consistent with industry practice. Dey's AWP's for its brand name drugs at issue in this action have been increased in response to market and competitive conditions as Dey's WAC's have increased. This practice is also consistent with industry practice.

d. Wholesale Acquisition Cost or WAC is not defined anywhere in Wisconsin's statutes or regulations and Wisconsin has never provided or directed Dey to any definition of WAC. Dey's WAC is the invoice price that Dey charges wholesalers for its products. Dey's WAC does not include the net effect of discounts from the invoice price (based on volume of purchases, speed of payment and other factors), rebates, chargebacks, administrative fees and other costs adjustments. Dey sets the WAC at a percentage below the AWP for the drug. It is Dey's general practice to reduce WAC's for its generic drugs on a periodic basis in response to

market and competitive conditions. For its brand name products, Dey sets WAC at a percentage below the AWP for the drug at launch and increases WAC in later periods as market conditions permit.

e. During the relevant time period, Dey reported AWP and WACs to First Data Bank and other pricing compendia. First Data Bank has publicly stated that it reported its own AWP and WAC prices after making its own determination concerning the reported values.

f. For Dey's products to be eligible for Medicaid coverage, federal law requires Dey to enter into a Rebate Agreement with the Secretary of the Department of Health and Human Services, who enters into the agreement on behalf of states with Medicaid programs, including Wisconsin. *See* 42 U.S.C. § 1396r-8(a)(1). The Rebate Agreement requires Dey to pay rebates to Wisconsin based on the Average Manufacturer Price ("AMP") for its products. *See* 42 U.S.C. § 1396r-8(b)(1)(A). The Rebate Agreement requires Dey to provide to Centers for Medicare and Medicaid Services ("CMS") on a quarterly basis the AMP for its products that are reimbursed by Medicaid. *See* 42 U.S.C. § 1396r-8(b)(3). Both federal statute and the Rebate Agreement define AMP as the average unit price paid to Dey by wholesalers for drugs distributed to the retail pharmacy class of trade. *See* 42 U.S.C. § 1396r-8(k)(1). Under the Rebate Agreement, Dey must include in its AMP calculation certain discounts and other price reductions which reduce the price paid for Dey's products. While the federal government has maintained AMPs as confidential during the relevant time period, Wisconsin Medicaid officials had the necessary information to determine the AMP for each of Dey's generic products by performing a simple arithmetic calculation, i.e., dividing the Unit Rebate Amount by 11%, the current rebate percentage. *See* 42 U.S.C. § 1396r-8(c)(3)(A-B). (Prior to January 1, 1994, the rebate percentage was 10%. *See* 42 U.S.C. § 1396r-8(c)(3)(A-B).) Wisconsin Medicaid officials never

asked Dey to report its AMPs directly to Wisconsin. Dey has paid rebates to Wisconsin, further lowering Wisconsin's costs.

g. During the relevant time period, federal statute and the Medicaid Rebate Agreement only obligated Dey to report AMP and Best Price information, not AWP or WAC.

h. During the relevant time period, the Government has been aware that AWP and WAC do not accurately reflect providers' acquisition costs. Wisconsin has received directives and/or reports from the federal government that AWP does not reflect the cost to providers for Dey's drugs. Indeed, any suggestion by Wisconsin that AWP should represent what providers pay for drugs is contradicted by the State's own Medicaid reimbursement methodology. If AWPs were the same as providers' acquisition costs, a provider could not accept payment at below AWP without losing money on every transaction. Likewise, the Health Care Financing Administration ("HCFA") (now CMS) has advised the States that WAC is not equal to providers' acquisition cost. Since that time, Wisconsin has received directives and/or reports from the federal government that WAC does not include discounts and price reductions that may affect the net price. The federal government recently defined WAC in the Medicare Reform Act, as follows: "The term `wholesale acquisition cost' means, with respect to a drug or biological, the manufacturer's list price for the drug or biological to wholesalers or direct purchasers in the United States, *not including prompt pay or other discounts, rebates or reductions in price*, for the most recent month for which the information is available, as reported in wholesale price guides or other publications of drug or biological pricing data." 42 U.S.C. § 1395w-3a(c)(6)(B) (emphasis added).

i. Dey has not represented to the Government that the AWP published for its products represented actual costs or average wholesale prices paid by anyone or that WAC

included all price discounts. On the contrary, Dey has written to Wisconsin Medicaid officials explaining what its AWP and WACs are. In these letters, Dey informed Wisconsin that AWP does not represent "actual wholesale prices which will be charged or paid" for its drugs and that it was Dey's practice to set an AWP before a product was first sold and to not subsequently change the AWP. Dey's understanding and explanation of its AWP to the Government is consistent with the industry understanding of AWP. Dey also informed the Government that its WAC was the invoice price generally charged to wholesalers and did not include the "net effect of discounts from the invoice price (based on volume of purchases, speed of payment and other factors), rebates, chargebacks, administrative fees and other costs adjustments which are well known and commonplace in the industry."

j. Contrary to the allegations, reimbursement payments made by Wisconsin Medicaid and the Medicare Part B program were often not based on published AWP for Dey's drugs. Since 1990, Wisconsin has reimbursed at the lowest of four possible numbers: (1) the drug's AWP less a certain percentage; (2) the Medicaid provider's reported "usual and customary" charge for the drug; (3) a drug's Federal Upper Limit ("FUL"), a maximum reimbursement rate for a drug set by the federal government; or (4) Maximum Allowable Cost ("MAC"), a maximum reimbursement rate for a drug set by Wisconsin. Under the methodology used by Medicare Part B to calculate reimbursement and co-payment amounts for multiple-source drugs, the AWP used for reimbursement for a Dey drug may not be the AWP reported by Dey. Reimbursement is based on either the AWP of the therapeutically equivalent brand name drug, which cannot be Dey's AWP, or the median of the AWP of the therapeutically equivalent generic drugs.

k. Federal law requires that Wisconsin's Medicaid payments "are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A). Participation by providers in the Wisconsin Medicaid program is voluntary. To ensure that its Medicaid beneficiaries have adequate access to medical care, the Wisconsin Medicaid program uses the "spread" or margin in its AWP-based reimbursement methodology to provide an economic incentive for providers' participation. In so doing, Wisconsin balances the interests of three constituencies: the beneficiaries (to whom Wisconsin was obligated to maintain access), the providers (who need an economic incentive to serve Wisconsin Medicaid clients), and the taxpayers (to whom the State was accountable for costs.)

l. The Government has never limited Medicaid and Medicare reimbursement payments to a provider's acquisition cost for a product by its use of AWP. Rather, Wisconsin Medicaid and the Medicare Part B program have used AWP as a benchmark price to ensure providers cover their costs and receive a profit and beneficiaries have access to medical care. Reimbursement for prescription drugs is intended to cover the ingredient cost of the drug, the costs incurred by a provider in dispensing the product, and a reasonable profit to the provider. Wisconsin's dispensing fees do not cover dispensing costs incurred by providers, much less provide a profit. As a result, Wisconsin has used, and continues to use, an AWP-based reimbursement methodology to compensate for this shortfall in dispensing fees and to ensure that providers earn a profit on Medicaid transactions. Wisconsin was free at all times to change its pharmaceutical reimbursement under its Medicaid program to a non-AWP-based methodology. In fact, Wisconsin has periodically considered, and rejected, alternative pharmaceutical reimbursement methodologies, including methodologies that were not based on

AWP. Meanwhile, when the federal government switched Medicare reimbursement from an AWP-based system to a system based on Average Sales Price, it significantly increased dispensing fees. For example, CMS increased the dispensing fee for albuterol from \$5 to \$57.

m. Through its AWP-based reimbursement methodology, Wisconsin's Medicaid program knowingly provides larger "spreads" for generic drugs than for brand-name drugs in order to provide an incentive for pharmacies to dispense lower-cost generic drugs. Generic drugs are typically less costly than brand-name drugs. Therefore, even though Wisconsin's reimbursement for a generic drug may give a provider a larger "spread" than reimbursement for a brand name drug, the total reimbursement payment for the generic drug will still be lower than that for a brand-name drug, thereby saving Wisconsin money. As "spreads" for generic drugs increase, Wisconsin benefits, because the larger spreads increase incentives for providers to dispense generic drugs. Moreover, contrary to Wisconsin's claims, Dey does not benefit from increased spreads. Since Dey does not generally adjust its AWP for generics, a growing Medicaid reimbursement "spread" indicates that Dey is lowering its sales prices, and consequently, its profit margins are decreasing.

n. As Wisconsin's own claims data will confirm, prices charged in market transactions by providers, wholesalers and others exceed the AWPs of generic products, including Dey's products.

INTERROGATORY No. 7:

Identify each document that supports each such denial.

DEY'S RESPONSE AND OBJECTIONS

Dey; refers to and incorporates herein its objections and responses to Plaintiff's Interrogatory No. 6. Additionally, Dey objects to Interrogatory No. 7 to the extent that it seeks information that is publicly available or outside Dey's possession, custody and control.

Subject to and without waiving the foregoing general and specific objections, Dey states that, based upon a diligent review and investigation to date, the following categories of documents, among others, generally support its denials to allegations of Plaintiff's Second Amended Complaint:

Documents Dey has produced, or will produce, in response to Wisconsin's requests for documents, including, but not limited to, the following:

- (i) Correspondence with the pricing compendia;
- (ii) Sales transactional data;
- (iii) Correspondence with Wisconsin and the federal government;
- (iv) Customer contract files;
- (v) AMP and Best Price information;
- (vi) Medicaid Rebate invoices and payments; and
- (vii) Other documents.

b. 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 and depositions of its employees, including, but not limited to, the following:

- (i) Documents referring to proposed changes to Wisconsin's Medicaid's pharmaceutical reimbursement methodology;
- (ii) Documents referring to providers' profits on the sale of products reimbursed by Wisconsin;
- (iii) Documents referring to provider participation in Wisconsin's Medicaid program and its relationship to provider reimbursement for pharmaceutical products;
- (iv) Studies conducted by the 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;
- (v) Governor's budget proposals related to Medicaid and documents analyzing those proposals;
- (vi) Issue papers written by the Legislative Fiscal Bureau and the Department of Health Family Services ("DHFS") on pharmaceutical reimbursement;
- (vii) OIG, GAO, CBO, and other governmental reports provided to Plaintiff concerning pharmaceutical reimbursement and any responses thereto;
- (viii) Communications between DHFS and providers, pharmacies, or trade associations regarding pharmaceutical reimbursement and/or costs;
- (ix) Communications between DHFS and other states or the federal government regarding pharmaceutical reimbursement and/or costs;
- (x) Issues, briefing, and concept papers on pharmaceutical reimbursement and costs by the Office of Strategic Finance;
- (xi) Written testimony of DHFS Secretary concerning pharmaceutical reimbursement;
- (xii) Emails between DHFS and the Governor's office concerning pharmaceutical reimbursement;
- (xiii) Wholesaler data from state-run entities that purchase drugs directly from wholesalers;
- (xiv) Documents comparing prices paid by Wisconsin Medicaid to those paid by other State entities;
- (xv) Information from CMS concerning AWP, EAC, or changes in pharmaceutical reimbursement;

- (xvi) Documents related to the Governor's Pharmacy Reimbursement Commission;
- (xvii) Budget documents from the Department of Administration related to pharmaceutical reimbursement;
- (xviii) Audits of Wisconsin's Medicaid program;
- (xix) Communications between EDS (or one of its subcontractors) and Plaintiff concerning cost containment measures for pharmaceutical reimbursement; and
- (xx) Media articles discussing pharmaceutical reimbursement.

c. Documents received, or expected to be received, from third-parties including, but not limited to, the following:

- (i) Federal government;
- (ii) Other states;
- (iii) Third-parties subpoenaed in this case; and
- (iv) Wholesaler data produced by third-parties.

d. Documents obtained or produced by other defendants.

#### INTERROGATORY NO. 8

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

#### DEY'S RESPONSE AND OBJECTIONS

Dey objects to this Interrogatory on the grounds that it is vague, ambiguous, overly broad, and fails to identify with sufficient particularity the information sought. Dey further objects to this Interrogatory on the grounds that it purports to impose obligations that exceed those imposed by the Wisconsin Rules of Civil Procedure and the applicable local rules.

Subject to and without waiving the foregoing general and specific objections, Dey states as follows:

Dey's First, Second, Seventh, Eighteenth, Twentieth, Twenty-First, Twenty-Third, Twenty-Fourth, Twenty-Ninth, Thirty-Third, Thirty-Ninth, Forty-Fourth, Forty-Eighth, Fifty-Seventh, Sixty-First, and Sixty-Fourth Affirmative Defenses are legal in nature and therefore require no reference to facts for support.

For its Third and Forty-Third Affirmative Defenses, Dey adopts the facts set forth in subparagraphs a through n of its response to Plaintiff's Sixth Interrogatory.

Dey's Fourth Affirmative Defense is legal in nature. Moreover, tolling of the applicable statutes of limitations is not appropriate for the reasons set forth in subparagraphs f, h, i, k, l, and m of its response to Plaintiff's Sixth Interrogatory.

a. For its Fifth, Sixth, Eighth, Eleventh, Twelfth, Sixteenth, and Nineteenth Affirmative Defenses, Dey adopts the facts set forth in subparagraphs f, h, i, k, l, and m of its response to Plaintiff's Sixth Interrogatory.

b. For its Ninth Affirmative Defense, Dey adopts the facts set forth in subparagraph j of its response to Plaintiff's Sixth Interrogatory.

c. For its Tenth Affirmative Defense, Dey adopts the facts set forth in subparagraphs b, e, g, h, i, j, k, l, and m of its response to Plaintiff's Sixth Interrogatory.

d. For its Thirteenth Affirmative Defense, Dey adopts the facts set forth in subparagraphs a, c; d, e, and f of its response to Plaintiff's Sixth Interrogatory.

e. For its Fourteenth Affirmative Defense, Dey adopts the facts set forth in subparagraphs a, c, d, and f of its response to Plaintiff's Sixth Interrogatory.

f. For its Fifteenth Affirmative Defense, Dey adopts the facts set forth in subparagraphs b, e, f, h, i, k, l, and m of its response to Plaintiff's Sixth Interrogatory.

g. For its Seventeenth Affirmative Defense, Dey states that Wisconsin's Medicaid program is jointly funded by Wisconsin and the federal government. The federal government's portion of the funding varies from year to year but is always at least 50% of Wisconsin's total Medicaid expenditure.

h. For its Twenty-Second Affirmative Defense, Dey adopts the facts set forth in subparagraphs f, h, and i of its response to Plaintiffs Sixth Interrogatory.

i. For its Twenty-Fifth and Thirty-Fourth Affirmative Defenses, Dey states that its products are sold in interstate commerce. Dey is permitted by law to set prices within the exercise of its business judgment. For the purposes of this lawsuit, Plaintiff seeks to retroactively impose definitions of the terms AWP and WAC contrary to the existing, industry-wide understanding of those terms. State and federal agencies, along with private third-party payors and other entities throughout the nation, have established payment methodologies which use AWP and WAC as pricing benchmarks. In some cases, these payment methodologies are memorialized in statutes, regulations, rules, contracts and insurance policies. If Dey is forced to modify its AWPs and WACs to conform to the meanings which Plaintiff now seeks to impose, the payment methodologies currently used by government agencies and other entities will be substantially affected, thereby placing an undue burden on commerce throughout the nation.

j. For its Twenty-Sixth and Fifty-Third Affirmative Defense, Dey states that Plaintiff alleges to have suffered damage by allegedly relying on prices allegedly provided by Dey to First DataBank and allegedly published in public sources made available by First DataBank. At all times, Dey had the right to provide these prices to First DataBank for publication in publicly available sources.

k. For its Twenty-Seventh and Twenty-Eighth Affirmative Defenses, Dey adopts the facts set forth in subparagraphs b and e of its response to Plaintiff's Sixth Interrogatory.

l. For its Thirtieth, Thirty-Sixth, and Sixty-Second Affirmative Defenses, Dey adopts the facts set forth in subparagraphs k, l, and m of its response to Plaintiff's Sixth Interrogatory.

m. For its Thirty-First Affirmative Defense, Dey adopts the facts set forth in subparagraphs a, b, c, d, and e of its response to Plaintiff's Sixth Interrogatory.

n. For its Thirty-Second Affirmative Defense, Dey states that the reimbursement methodologies, which set the amount the providers received for claims submitted under the Medicare and Medicaid programs, were established through a political process with varying political goals, including the goals that providers volunteer to participate in the programs and that such participating providers earn a profit on the drugs dispensed or administered under the programs. Indeed, the Government knowingly set a reimbursement methodology based upon AWP which would provide for the so-called "spread" — alleged by Plaintiff to be the difference between a provider's acquisition cost for a drug and the amount of reimbursement the provider is paid for that drug. This "spread" created by the Medicare and Medicaid programs is an integral element in maintaining the viability of the programs, particularly in light of the inadequate dispensing fees provided for under such programs. Upon information and belief, Plaintiff and other payors have long been aware of the existence of the "spread" and have managed, maintained and used the "spread" they created to ensure adequate access to pharmaceuticals for the indigent and other customer groups and to adequately reimburse providers.

o. For its Thirty-Fifth Affirmative Defense, Dey adopts the facts set forth in subparagraphs a through g of its response to Plaintiff's Sixth Interrogatory.

p. For its Thirty-Seventh, Thirty-Eighth, and Fiftieth Affirmative Defenses, Dey adopts the facts set forth in subparagraphs j, k, l, m, and n of its response to Plaintiff's Sixth Interrogatory.

q. For its Fortieth Affirmative Defense, Dey states that the reimbursement rates set for Wisconsin's Medicaid program and the Medicare Part B program are government-set rates.

r. Dey's Forty-First and Fifty-Ninth Affirmative Defenses are legal in nature. Moreover, Dey states that Plaintiff has not proven it complied with Wis. Stat. § 165.25(1) or Wis. Stat. § 100.18(11)(d).

s. For its Forty-Second Affirmative Defense, Dey states that the Medicare Prescription Drug, Improvement and Modernization Act of 2003, changed pharmaceutical reimbursement under Medicare from an AWP-based system to an ASP-based system.

t. For its Forty-Fifth Affirmative Defense, Dey adopts the facts set forth in subparagraph b of its response to Plaintiff's Sixth Interrogatory.

u. For its Forty-Sixth and Forty-Seventh Affirmative Defenses, Dey adopts any and all applicable facts asserted by any other defendant not otherwise asserted herein.

v. For its Forty-Ninth Affirmative Defense, Dey states that, based upon Plaintiff's production to date, it appears that Plaintiff undertook few, if any, studies to determine EAC.

w. For its Fifty-First and Fifty-Second Affirmative Defenses, Dey adopts the facts set forth in subparagraphs c and d of its response to Plaintiff's Sixth Interrogatory and further states that the public disclosure of Dey's wholesale prices, net of all cash discounts and other price reductions, would place Dey at a competitive disadvantage, as it would expose Dey's pricing to Dey's competitors. During the relevant time period, the federal government required

CMS to maintain reported AMPs as confidential by statute. Dey has complied with its AMP reporting obligations and the terms of the Rebate Agreement.

x. For its Fifty-Fourth affirmative defense, Dey states that its conduct and activities, along with the allegations of Dey's conduct and activities, are distinct from and independent of the conduct and activities of the other defendants named in this action.

y For its Fifty-Fifth affirmative defense, Dey states that Wisconsin submitted its reimbursement plans to the federal government. The plans were reviewed and approved by the federal government.

z. For its Fifty-Sixth affirmative defense, Dey states that, to the extent that it has engaged in lobbying or related efforts before Congress and/or other regulatory agencies, such conduct is protected by the First Amendment and the *Noerr-Pennington* doctrine.

aa. For its Fifty-Eighth Affirmative Defense, Dey adopts the facts set forth in subparagraphs c and d of its response to Plaintiff's Sixth Interrogatory.

bb. For its Sixtieth Affirmative Defense, Dey states that a written rebate agreement exists between Dey and the Secretary of HHS, on behalf of HHS and certain States, including Wisconsin, which was entered into pursuant to 42 U.S.C. § 1396r-8. The Rebate Agreement requires Dey to pay rebates to Wisconsin based on the AMPs and Best Prices for its products. The Rebate Agreement requires Dey to provide to CMS the AMP and Best price information for its products that are reimbursed by Medicaid. The Rebate Agreement circumscribes all of Dey's price-reporting obligations to Wisconsin.

cc. For its Sixty-Third Affirmative Defense, Dey states that its conduct was justified by legitimate, pro-competitive business concerns and that it has not engaged in any conduct that has restrained competition.

INTERROGATORY NO. 9

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

DEY'S RESPONSE AND OBJECTIONS

Dey refers to and incorporates herein its objections and responses to Plaintiff's Interrogatory No. 8. Additionally, Dey objects to Interrogatory No. 9 to the extent that it seeks information that is 'publicly available or outside Dey's possession, custody and control.

Subject to and without waiving the foregoing general and specific objections, Dey states that, based upon a diligent review and investigation to date, the following categories of documents, among others, generally support its denials to allegations of Plaintiff's Second Amended Complaint:

Documents Dey has produced, or will produce, in response to Wisconsin's requests for documents, including, but not limited to, the following:

- (i) Correspondence with the pricing compendia;
- (ii) Sales transactional data;
- (iii) Correspondence with Wisconsin and the federal government;
- (iv) Customer contract files;
- (v) AMP and Best Price information;
- (vi) Medicaid Rebate invoices and payments; and

(vii) Other documents.

b. 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 and depositions of its employees, including, but not limited to, the following:

- (i) Documents referring to proposed changes to Wisconsin's Medicaid's pharmaceutical reimbursement methodology;
- (ii) Documents referring to providers' profits on the sale of products reimbursed by Wisconsin;
- (iii) Documents referring to provider participation in Wisconsin's Medicaid program and its relationship to provider reimbursement for pharmaceutical products;
- (iv) Studies conducted by the 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;
- (v) Governor's budget proposals related to Medicaid and documents analyzing those proposals;
- (vi) Issue papers written by the Legislative Fiscal Bureau and the Department of Health Family Services ("DHFS") on pharmaceutical reimbursement;
- (vii) OIG, GAO, CBO, and other governmental reports provided to Plaintiff concerning pharmaceutical reimbursement and any responses thereto;
- (viii) Communications between DHFS and providers, pharmacies, or trade associations regarding pharmaceutical reimbursement and/or costs;
- (ix) Communications between DHFS and other states or the federal government regarding pharmaceutical reimbursement and/or costs;
- (x) Issues, briefing, and concept papers on pharmaceutical reimbursement and costs by the Office of Strategic Finance;

Written testimony of DHFS Secretary concerning pharmaceutical reimbursement;

- (xii) Emails between DHFS and the Governor's office concerning pharmaceutical reimbursement;

- (xiii) Wholesaler data from state-run entities that purchase drugs directly from wholesalers;
- (xiv) Documents comparing prices paid by Wisconsin Medicaid to those paid by other State entities;
- (xv) Information from CMS concerning AWP, EAC, or changes in pharmaceutical reimbursement;
- (xvi) Documents related to the Governor's Pharmacy Reimbursement Commission;
- (xvii) Budget documents from the Department of Administration related to pharmaceutical reimbursement;
- (xviii) Audits of Wisconsin's Medicaid program;
- (xix) Communications between EDS (or one of its subcontractors) and Plaintiff concerning cost containment measures for pharmaceutical reimbursement; and
- (xx) Media articles discussing pharmaceutical reimbursement.

c. Documents received, or expected to be received, from third-parties including, but not limited to, the following:

- (i) Federal government;
- (ii) Other states;
- (iii) Third-parties subpoenaed in this case; and
- (iv) Wholesaler data produced by third-parties;

d. Documents obtained or produced by other defendants.

**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 AWPs, WACs, or any other prices irrespective of the nomenclature used.

DEY'S RESPONSE AND OBJECTIONS

Dey objects to this Interrogatory on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. Dey further objects to this Interrogatory on the grounds that it contains terms that are themselves vague, ambiguous, overbroad, or undefined, including "communicated," "official," "AWPs," "WACs," and "other prices irrespective of the nomenclature used". Dey further objects to this Interrogatory to extent it seeks information concerning pharmaceutical products not at issue in this litigation. Dey further objects to this Interrogatory to the extent it purports to require Dey to identify information that is already within Plaintiffs possession, custody, or control.

Subject to and without waiving the foregoing general and specific objections, Dey states that, beginning in early 1999, Dey sent price notification letters to Wisconsin Medicaid officials that explained what Dey's AWP and WAC represented. With respect to AWP, Dey informed Wisconsin Medicaid officials:

As you know, the AWP listed here does not represent the actual price, which will be or has been charged or paid for this product. Dey believes this to be clearly understood by state and federal Medicaid regulators.

With respect to WAC, Dey informed Medicaid officials:

As you know, WAC is referred to by data reporting services and government agencies as an "estimate," and Dey believes that WAC generally means the actual invoice price charged by a pharmaceutical manufacturer to its drug wholesalers. As you also know, WAC does not include the net effect of discounts from invoice price (based on volume of purchases, speed of payment and other factors), rebates, chargebacks, administration fees and other such cost adjustments which are well-known and commonplace in the pharmaceutical industry and can affect, to a greater or lesser degree, the actual "final" cost to each purchaser. These discounts may not be determined until some months after the date of invoice. Therefore, we remind you that WAC may well not be representative of actual market costs to those entities which you are reimbursing under Medicaid.

In addition, Dey's productions include additional price notification letters, contract files and sales account call records that may be responsive to this Interrogatory.

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.

DEY'S RESPONSE AND OBJECTIONS

Dey objects to this Interrogatory on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. Dey further objects to this Interrogatory on the grounds that it contains terms that are themselves vague, ambiguous, overbroad, or undefined, including "communications," and "Wisconsin officials". Dey further objects to this Interrogatory to the extent it seeks information not in Dey's possession, custody, or control. Dey further objects to this Interrogatory to the extent it purports to require Dey to identify information that is already within Plaintiffs possession, custody, or control. Dey further objects to this Interrogatory to the extent it seeks information concerning pharmaceutical products not at issue in this litigation. Dey further objects to this Interrogatory to the extent it purports to require Dey to identify information or documents that are already within Plaintiffs possession, custody, or control.

Subject to and without waiving the foregoing general and specific objections, Dey refers Plaintiff to Response to Interrogatory No. 10 and the price notification letters, contract files and sales account call records which have been, or will be, produced.

**SPECIFIC RESPONSES AND OBJECTIONS TO DOCUMENT REQUESTS**

**DOCUMENT REQUEST No. 12**

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

**DEY'S RESPONSE AND OBJECTIONS**

Dey refers to and incorporates herein its objections and responses to Plaintiff's interrogatories numbered 7, 9, and 11.

Subject to and without waiving the foregoing general and specific objections, Dey states that it will produce communications between Dey and the State of Wisconsin, if any, that may be responsive to this Request that relate to pharmaceutical products at issue in this action.

**DOCUMENT 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.)

**DEY'S RESPONSE AND OBJECTIONS**

Dey objects to this Document Request on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. Dey further objects to this Document Request as overbroad and unduly burdensome because, *inter alia*, it seeks information for an unspecified period of time. Dey further objects to this Document Request on the grounds that it contains terms that are themselves vague, ambiguous, overbroad, or undefined, including "wholesalers," "drugs," "resale," and "Brand Name Prescription Drugs Antitrust Litigation". Dey further objects to this Document Request to the extent it seeks documents not in Dey's possession, custody, or control. Dey further objects to this Document Request to the extent it seeks documents that are protected by protective orders in other actions. Dey further objects to this Document Request to the extent it seeks documents containing confidential or proprietary information. Dey further objects to

this Document Request to extent it seeks information concerning pharmaceutical products not at issue in this litigation.

Dated: April 4, 2007.

**AS TO ALL OBJECTIONS AND THE PORTION OF RESPONSE TO INTERROGATORY NO. 6 CONTAINED IN SUBPARAGRAPHS (a), (f)-(h) AND (j)-(m); RESPONSE TO INTERROGATORY NO. 7; THE PORTION OF THE RESPONSE TO INTERROGATORY NO. 8 THAT ADOPTS FACTUAL STATEMENTS FROM THE RESPONSE TO INTERROGATORY NO. 6 LISTED ABOVE, AND THE PORTION OF RESPONSE TO INTERROGATORY NO. 8 CONTAINED IN SUBPARAGRAPHS (a),(c),(m),(q),(t)-(v),(x), (y), (bb), (cc), AND (ee); RESPONSE TO INTERROGATORY NO. 9; RESPONSE TO INTERROGATORY NO. 11; RESPONSE TO REQUESTS FOR DOCUMENTS NOS. 12 AND 13:**

By:   
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