

STATE OF WISCONSIN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ABBOTT LABORATORIES, ET AL., )  
 )  
 Defendants. )

Case No.: 04 CV 1709

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**RESPONSES AND OBJECTIONS BY SMITHKLINE BEECHAM CORPORATION, D/B/A GLAXOSMITHKLINE (“GSK”) TO PLAINTIFF’S THIRD SET OF INTERROGATORIES AND FOURTH SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

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Pursuant to Fed. R. Civ. P. 33 and 34, and Wisconsin Rule of Civil Procedure 804.08, defendant SmithKline Beecham Corporation, d/b/a GlaxoSmithKline (“GSK”), by its attorneys, hereby asserts the following responses and objections to Plaintiff State of Wisconsin’s (“Plaintiff’s” or the “State’s”) Interrogatories No. 3 and Request for Production No. 4 as follows:

**PRELIMINARY STATEMENT**

1. By responding to these Interrogatories and Requests for Production, GSK does not waive or intend to waive: (a) any objections as to the competency, relevancy, materiality, privilege, or admissibility as evidence, for any purpose, of any documents or information produced in response; (b) the right to object on any ground to the use of the documents or information produced in response at any hearing, trial, or other point during the litigation; or (c) the right to object on any ground at any time to a demand for further responses to the Interrogatories and/or Requests.

2. By responding to a particular Interrogatory or Request, GSK does not assert that it has responsive information or that such information exists, only that it will conduct a reasonable inquiry if such information is not known and provide the information if it is responsive, non-objectionable and non-privileged. No objection made herein, or lack thereof, is an admission by GSK as to the existence or non-existence of any information.

3. The Responses made herein are based on GSK's investigation to date of those sources within its control where it reasonably believes responsive information may exist. GSK reserves the right to amend or supplement these Responses in accordance with applicable law and Court orders in this action.

4. GSK reserves the right to modify these objections and responses and to present in any proceeding and at trial any further information and documents obtained during discovery and preparation for trial.

### **GENERAL OBJECTIONS**

GSK expressly incorporates all of the General Objections set forth below into each Response to the Interrogatories and Requests. Any Specific Objections provided below are made in addition to these General Objections and failure to reiterate a General Objection below does not constitute a waiver of that or any other objection.

GSK objects generally as follows:

1. GSK objects to Plaintiff's "Definitions" and "Instructions" to the extent that they expand upon or alter GSK's obligations under applicable law and court rules. GSK will comply with the applicable law and rules in providing its Responses and Objections.

2. GSK objects to each and every Interrogatory and Request to the extent that it is irrelevant, overly broad, unduly burdensome, and not reasonably calculated to lead to admissible

evidence to the extent that it purports to require production of documents or information relating to pharmaceuticals not properly placed at issue in this litigation.

3. GSK objects to each and every Interrogatory and Request to the extent that it seeks information protected by the attorney-client privilege, work-product doctrine, common-interest doctrine, joint-defense privilege, the right to privacy, or any other applicable privileges or protections, and to the extent these instructions, Interrogatories or Requests seek trial preparation and expert materials. GSK hereby asserts these privileges to their fullest extent and no statement or answer herein shall constitute waiver thereof. Any information subject to any such privilege that is inadvertently produced by GSK shall not constitute or be deemed a waiver of such privilege or protection, and GSK reserves its rights to demand the return of any inadvertently produced information.

4. GSK objects to each and every Interrogatory and Request to the extent that it seeks information that was compiled for and presented during compromise negotiations, including the court-ordered mediation in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456 (D. Mass.). GSK hereby asserts these privileges and protections to their fullest extent and no statement or answer herein shall constitute waiver thereof. Any information subject to any such privileges and protections that is inadvertently or otherwise produced by GSK shall not constitute or be deemed a waiver of such privileges or protections, and GSK reserves its rights to demand the return of any inadvertently produced information.

5. GSK objects to each and every Interrogatory and Request to the extent that it seeks information concerning a trade secret, proprietary or other confidential information and is not otherwise subject to a protective order entered by the Court in this litigation.

6. GSK objects to each and every Interrogatory and Request to the extent that it seeks information that GSK licensed or received from third parties and cannot disclose without prior approval of the third-parties.

7. GSK objects to each and every Interrogatory and Request to the extent that it seeks information that does not currently exist at GSK.

8. GSK objects to each and every Interrogatory and Request to the extent that it purports to require GSK to create, compile, or develop information or documents not already in existence.

9. GSK objects to each and every Interrogatory and Request to the extent that it seeks production of documents or information not in GSK's custody or control, publicly available documents or information, documents or information equally available to the Plaintiff, or documents or information more appropriately sought from third-parties to whom subpoenas or requests could have been directed.

10. GSK objects to each and every Interrogatory and Request as irrelevant, overly broad, unduly burdensome, and not reasonably calculated to lead to admissible evidence to the extent that it purports to require production of documents or seek information relating to a period of time prior to June 3, 1998 (which is outside of any applicable statute of limitations) and/or after September 6, 2002 (the date on which Plaintiffs filed the Master Consolidated Class Action Complaint in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456 (D. Mass.)).

11. GSK objects to each and every Interrogatory and Request as irrelevant, overly broad, unduly burdensome, and not reasonably calculated to lead to admissible evidence to the extent they seek documents or information concerning Kytril® after December 22, 2000, the date

on which GSK's predecessor, SmithKline Beecham, sold Kytril® to Hoffman-La Roche Inc.

12. GSK objects to each and every Interrogatory and Response to the extent that it seeks information that is not relevant to this litigation or is not reasonably calculated to lead to the discovery of admissible evidence.

13. GSK objects to any implications and to any explicit or implicit characterization of facts, events, circumstances, or issues in the Interrogatories and Requests. Any Response by GSK is not intended to indicate that GSK agrees with any implication or any explicit or implicit characterization of facts, events, circumstances, or issues in the Interrogatories, or that such implications or characterizations are relevant to this action.

14. Subject to and without waiving any objection set forth herein, GSK will produce non-privileged, responsive information and documents as set forth below at a time and place and in a manner to be agreed upon by the parties.

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

16. GSK objects to the definition of "you," "your" and "your company" as set forth in Definition No. 1 on the grounds that it is vague, ambiguous and overbroad.

17. GSK objects to the definition of "Document" as set forth in Definition No. 2 on the grounds that it is vague, ambiguous and overbroad.

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

Notwithstanding GSK's general and specific objections, and without waiving them, GSK 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. GSK did not engage in conduct that was improper, fraudulent, or unlawful as alleged in Plaintiff's Second Amended Complaint.
2. GSK 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, GSK's policies provide that its products should be marketed based on their clinical efficacy and other product attributes.
3. GSK did not publish the AWP's for its products. The AWP's for GSK's products were published by the pricing compendia.

4. 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”) and the published AWP.
5. 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.
6. 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 GSK’s products.
7. 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.
8. Plaintiff has periodically considered, and rejected, alternative pharmaceutical reimbursement methodologies, including methodologies that were not AWP-based -- and has also adopted non-AWP-based reimbursement methodologies (e.g. the use of “Maximum Allowable Costs,” or MACs, for multisource drugs).
9. In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access to care by Medicaid beneficiaries.
10. Plaintiff continues to reimburse providers who participate in its Medicaid program for single-source pharmaceuticals based on AWP, despite knowledge that AWP do not reflect average pharmacy acquisition costs, for policy reasons.
11. GSK did not misrepresent or inflate the wholesale acquisition cost (“WAC”) or AWP for its products. GSK’s reported WACs, WPPs and NWP were, in fact, true list prices to wholesalers and for all but a small number of GSK products were close to the price at which GSK sold its products on average to the retail pharmacy class of trade.
12. A written rebate agreement exists between GSK and the Secretary of the Department of Health and Human Services (“HHS”), on behalf of HHS and certain States, entitled, “Rebate Agreement Between the Secretary of Health and Human Services and the Manufacturer Identified in Section XI of this Agreement”, which was entered into pursuant to 42 U.S.C. § 1396r-8.

13. GSK has provided rebates to the State that resulted in a net cost to the State for most GSK products below the amount that providers who participate in the Wisconsin Medicaid program paid for these products. Therefore, the State has not suffered any injury from the GSK conduct alleged in the Second Amended Complaint.
14. GSK operates in a competitive environment as a result of which contracts and pricing terms are properly protected confidential business information.
15. As a matter of company policy, GSK does not encourage or support the use of free drugs or grants as a means of discounting the overall price of its products.
16. Plaintiff was free at all times to change its pharmaceutical reimbursement under its Medicaid program to a non-AWP based methodology, and in fact did so for some drugs, including in particular multi-source drugs.
17. GSK is unaware of Plaintiff ever enacting a statutory or regulatory definition of AWP.
18. 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.
19. GSK never affirmatively represented to Plaintiff that the AWP published for its products represented an actual average of wholesale prices.
20. Plaintiff was well aware that pharmaceutical manufacturers provided discounts to customers.
21. GSK provided WACs, WPPs, NWP's and SLP's to the pricing compendia in a manner that has been previously described in GSK's discovery responses in this matter, and those disclosures were not deceptive.
22. GSK did not disclose inaccurate pricing information to the State of Wisconsin, but provided accurate pricing information upon request.

GSK expressly reserves the right to supplement this Interrogatory Answer in the

future.

**INTERROGATORY NO. 7:**

Identify each document that supports each such denial.

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

Notwithstanding GSK's general and specific objections, and without waiving them, GSK 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 that GSK has produced, or will produce, in response to discovery requests in this lawsuit and in lawsuits in other states brought by state attorneys general concerning similar subject matter.
2. Documents GSK has produced, or will produce, in response to Wisconsin's First Set of Requests for Production and its Written Discovery Request No. 3 in a manner to be negotiated and agreed upon between the parties including, but not limited to, the following:
  - Communications with the pricing compendia;
  - Sales and other data;
  - AMPs for GSK drugs
  - Communications with Wisconsin
  - Customer contracts;
  - Pricing committee minutes; and
  - Other documents.
3. 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 rebates paid by GSK to the State for 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;
4. Documents received, or expected to be received, from third-parties including, but not limited to, the following:
- Federal government;
  - Other states;

- Pricing compendia
- Other third-parties subpoenaed in this case; and
- Wholesaler data produced by third-parties.

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

Notwithstanding GSK's general and specific objections, and without waiving them, GSK answers that, based upon diligent review and investigation to date, the following facts, among others (including but not limited to those described in response to Interrogatories 6 and 7 above), generally support GSK's Affirmative Defenses, as set forth in its Answer to Plaintiff's Second Amended Complaint:

Affirmative Defenses Nos. 1, 16, 17, 20, 36:

- Since before the period at issue in this lawsuit, Plaintiff was aware that the published AWP's did not represent actual averages of wholesale prices for GSK's products.
- Since before the period at issue in this lawsuit, 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 (and in fact did so for multi-source drugs).
- Plaintiff continues to reimburse providers who participate in its Medicaid program for single-source pharmaceuticals based on published AWP's, with knowledge of the nature of AWP's.
- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access to pharmaceuticals by Medicaid beneficiaries.

Affirmative Defenses Nos. 2-4:

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

Affirmative Defense No. 5:

- 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 Defense No. 6:

- GSK's products are sold in interstate commerce.

Affirmative Defense Nos. 7, 12, 13, 15, 27-28, 30, 38, 41-43

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

Affirmative Defenses Nos. 8, 18, 24

- Plaintiff cannot establish that it was damaged by GSK’s conduct. Plaintiff adopted the reimbursement methodology to further program objectives, including access to pharmaceuticals by Medicaid beneficiaries.
- A written rebate agreement exists between GSK and the Secretary of the Department of Health and Human Services (“HHS”), on behalf of HHS and certain States, entitled, “Rebate Agreement Between the Secretary of Health and Human Services and the Manufacturer Identified in Section XI of this Agreement”, which was entered into pursuant to 42 U.S.C. § 1396r-8.
- GSK has provided rebates to the State that resulted in a net cost to the State for most GSK products below the amount that providers who participate in the Wisconsin Medicaid program paid for these products. Therefore, the State has not suffered any injury from the GSK conduct alleged in the Second Amended Complaint.
- Plaintiff cannot establish that any increase in GSK’s market share was attributable to GSK’s allegedly unlawful conduct as opposed to other factors.
- Plaintiff cannot establish that any increase in GSK’s market share was the result of Plaintiff’s payments as opposed to payments from Medicare or private payors.

Affirmative Defense No. 9

- To the extent that GSK has engaged in lobbying or related efforts before Congress and/or other regulatory agencies, such conduct is protected by the First Amendment, the analogous provisions of the Constitution of the State of Wisconsin, and *Noerr-Pennington*.

Affirmative Defenses Nos. 10, 26-28

- Since before the period at issue in this lawsuit, Plaintiff was aware that the published AWP’s did not represent actual averages of wholesale prices for GSK’s products.
- Since before the period at issue in this lawsuit, 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 (and in fact did so for multi-source drugs).
- Plaintiff continues to reimburse providers who participate in its Medicaid program for single-source pharmaceuticals based on published AWPs, with knowledge of the nature of AWPs.
- A written rebate agreement exists between GSK and the Secretary of the Department of Health and Human Services (“HHS”), on behalf of HHS and certain States, entitled, “Rebate Agreement Between the Secretary of Health and Human Services and the Manufacturer Identified in Section XI of this Agreement”, which was entered into pursuant to 42 U.S.C. § 1396r-8.
- GSK has provided rebates to the State that resulted in a net cost to the State for most GSK products below the amount that providers who participate in the Wisconsin Medicaid program paid for these products. Therefore, the State has not suffered any injury from the GSK conduct alleged in the Second Amended Complaint.
- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access to pharmaceuticals by Medicaid beneficiaries.
- It was commonly known within certain governmental agencies and within the pharmaceutical industry and by those involved with reimbursement that published AWPs did not represent actual averages of wholesale prices.
- Plaintiff has not proven it complied with Wis. Stat. § 165.25(1) or Wis. Stat. § 100.18(11)(d).
- GSK did not cause providers to make a false statement to Plaintiff.
- Attorney General is not authorized to seek forfeitures under § 100.26(4) and § 100.264(2).
- Plaintiff was aware that pharmaceutical manufacturers provided discounts to customers.
- Plaintiff cannot establish that GSK’s discounts to providers had the effect of injuring competition.
- Plaintiff did not confer any benefit on GSK.

Affirmative Defense No. 11

- Plaintiff has not proven it complied with Wis. Stat. § 165.25(1) or Wis. Stat. § 100.18(11)(d).

Affirmative Defense No. 14

- Since before the period at issue in this lawsuit, it was established industry practice for the pricing compendia to publish AWP's that were for the most part higher than actual acquisition costs for pharmaceuticals. It also was commonly known and widely understood that AWP's did not represent actual averages of wholesale prices.

Affirmative Defense No. 18

- Since before the period at issue in this lawsuit, Plaintiff was aware that the published AWP's did not represent actual averages of wholesale prices for GSK's products.
- Since before the period at issue in this lawsuit, 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 (and in fact did so for multi-source drugs).
- Plaintiff continues to reimburse providers who participate in its Medicaid program for single-source pharmaceuticals based on published AWP's, with knowledge of the nature of AWP's.
- A written rebate agreement exists between GSK and the Secretary of the Department of Health and Human Services ("HHS"), on behalf of HHS and certain States, entitled, "Rebate Agreement Between the Secretary of Health and Human Services and the Manufacturer Identified in Section XI of this Agreement", which was entered into pursuant to 42 U.S.C. § 1396r-8.
- GSK has provided rebates to the State that resulted in a net cost to the State for most GSK products below the amount that providers who participate in the Wisconsin Medicaid program paid for these products. Therefore, the State has not suffered any injury from the GSK conduct alleged in the Second Amended Complaint.

- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access to pharmaceuticals by Medicaid beneficiaries.
- It was commonly known within certain governmental agencies and within the pharmaceutical industry and by those involved with reimbursement that published AWP's did not represent actual averages of wholesale prices.
- GSK did not cause providers to make a false statement to Plaintiff.
- Plaintiff cannot establish that GSK's discounts to providers had the effect of injuring competition.
- Plaintiff did not confer any benefit on GSK.

Affirmative Defense No. 19

- 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. 21

- GSK did not control the AWP's published by the pricing compendia, and in fact did not, with a few historical exceptions, provide AWP's to the pricing compendia.
- Since before the period at issue in this lawsuit, Plaintiff was aware that the published AWP's did not represent actual averages of wholesale prices for GSK's products.
- Since before the period at issue in this lawsuit, 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 (and in fact did so for multi-source drugs).
- A written rebate agreement exists between GSK and the Secretary of the Department of Health and Human Services ("HHS"), on behalf of HHS and certain States, entitled, "Rebate Agreement Between the Secretary of Health and Human Services and the Manufacturer Identified in Section XI of this Agreement", which was entered into pursuant to 42 U.S.C. § 1396r-8.

- GSK has provided rebates to the State that resulted in a net cost to the State for most GSK products below the amount that providers who participate in the Wisconsin Medicaid program paid for these products. Therefore, the State has not suffered any injury from the GSK conduct alleged in the Second Amended Complaint.
- Plaintiff continues to reimburse providers who participate in its Medicaid program for single-source pharmaceuticals based on published AWP, with knowledge of the nature of AWP.
- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access to pharmaceuticals by Medicaid beneficiaries.

Affirmative Defense No. 22

- Plaintiff has not named as defendants parties who received the alleged “excessive” reimbursements.

Affirmative Defense No. 23

- GSK’s conduct and activities are distinct from and independent of the conduct and activities of the other defendants named in this action.

Affirmative Defense No. 24

- Plaintiff cannot establish that it was damaged by GSK’s conduct.
- A written rebate agreement exists between GSK and the Secretary of the Department of Health and Human Services (“HHS”), on behalf of HHS and certain States, entitled, “Rebate Agreement Between the Secretary of Health and Human Services and the Manufacturer Identified in Section XI of this Agreement”, which was entered into pursuant to 42 U.S.C. § 1396r-8.
- GSK has provided rebates to the State that resulted in a net cost to the State for most GSK products below the amount that providers who participate in the Wisconsin Medicaid program paid for these products. Therefore, the State has not suffered any injury from the GSK conduct alleged in the Second Amended Complaint.
- Since before the period at issue in this lawsuit, Plaintiff was aware that the published AWP did not represent actual averages of wholesale prices for GSK’s products.

- Since before the period at issue in this lawsuit, 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 (and in fact did so for multi-source drugs).
- Plaintiff continues to reimburse providers who participate in its Medicaid program for single-source pharmaceuticals based on published AWPs, with knowledge of the nature of AWPs.
- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access to pharmaceuticals by Medicaid beneficiaries.

Affirmative Defense No. 25

- In 2005, GSK entered into a settlement with the United States Department of Justice for approximately \$149 million, which resolved, among other things, all federal claims relating to Wisconsin Medicaid payments for Kytril® and Zofran® injectables.

Affirmative Defense No. 29

- Plaintiff has provided no particularized allegations (the “who, what, when, where, and how”) describing GSK’s allegedly fraudulent conduct.

Affirmative Defense No. 31

- Plaintiff did not confer a benefit on GSK.
- Any increased sales and/or market share GSK received during the relevant time period was not the result of unlawful conduct.
- Plaintiff cannot establish that any increase in GSK’s market share was attributable to GSK’s allegedly unlawful conduct as opposed to other factors.
- Plaintiff cannot establish that any increase in GSK’s market share was the result of Plaintiff’s payments as opposed to payments from Medicare or private payors.
- Since before the period at issue in this lawsuit, Plaintiff was aware that the published AWPs did not represent actual averages of wholesale prices for GSK’s products.

- Since before the period at issue in this lawsuit, 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 (and in fact did so for multi-source drugs).
- Plaintiff continues to reimburse providers who participate in its Medicaid program for single-source pharmaceuticals based on published AWPs, with knowledge of the nature of AWPs.
- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access to pharmaceuticals by Medicaid beneficiaries.

Affirmative Defense No. 32

- Plaintiff has not proven it complied with Wis. Stat. § 165.25(1).

Affirmative Defense No. 33

- A written rebate agreement exists between GSK and the Secretary of the Department of Health and Human Services (“HHS”), on behalf of HHS and certain States, entitled, “Rebate Agreement Between the Secretary of Health and Human Services and the Manufacturer Identified in Section XI of this Agreement”, which was entered into pursuant to 42 U.S.C. § 1396r-8.
- GSK has provided rebates to the State that resulted in a net cost to the State for most GSK products below the amount that providers who participate in the Wisconsin Medicaid program paid for these products. Therefore, the State has not suffered any injury from the GSK conduct alleged in the Second Amended Complaint.

Affirmative Defense No. 34

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

Affirmative Defense No. 35, 37

- GSK has never represented that the AWPs published by the pricing compendia represent actual averages of wholesale prices for its products.

- It was commonly known within certain governmental agencies and within the pharmaceutical industry and by those involved with reimbursement that published AWP's did not represent actual averages of wholesale prices.
- Since before the period at issue in this lawsuit, Plaintiff was aware that the published AWP's did not represent actual averages of wholesale prices for GSK's products.
- Since before the period at issue in this lawsuit, 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 (and in fact did so for multi-source drugs).
- Plaintiff continues to reimburse providers who participate in its Medicaid program for single-source pharmaceuticals based on published AWP's, with knowledge of the nature of AWP's.
- In adopting its various reimbursement methodologies over time, Plaintiff adopted and utilized these methodologies to further program goals, including ensuring access to pharmaceuticals by Medicaid beneficiaries.

Affirmative Defense No. 39

- Plaintiff has not proven it complied with Wis. Stat. § 100.18(11)(d).

Affirmative Defense No. 40

- Plaintiff has not named as defendants parties who received the alleged "excessive" reimbursements.
- Plaintiff cannot establish that any alleged overcharge or supracompetitive price was passed on to the State.

Affirmative Defense No. 43

- GSK has made true and accurate representations concerning its products and pricing, and such conduct is protected by the First Amendment and the analogous provisions in the Constitution of the State of Wisconsin.
- To the extent that GSK has engaged in lobbying or related efforts before Congress and/or other regulatory agencies, such conduct is protected by the First Amendment, the analogous provisions of the Constitution of the

State of Wisconsin, and *Noerr-Pennington*.

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

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

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

1. Documents that GSK has produced, or will produce, in response to discovery requests in this lawsuit and in lawsuits in other states brought by state attorneys general concerning similar subject matter.
2. Documents GSK has produced, or will produce, in response to Wisconsin's First Set of Requests for Production and its Written Discovery Request No. 3 in a manner to be negotiated to and agreed upon between the parties including, but not limited to, the following:
  - Communications with the pricing compendia;
  - Sales and other data;
  - AMPs for GSK drugs
  - Communications with Wisconsin
  - Customer contracts;
  - Pricing committee minutes; and
  - Other documents.

3. 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 rebates paid by GSK to the State for 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;
  - Media articles discussing pharmaceutical reimbursement; and
  - Rebate contract between Plaintiff and GSK.
4. Documents received, or expected to be received, from third-parties including, but not limited to, the following:
- Federal government;
  - Other states;
  - Pricing compendia
  - Other third-parties subpoenaed in this case; and
  - Wholesaler data produced by third-parties.

GSK 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:** GSK objects to Interrogatory No. 10 on the grounds that it is overly broad, unduly burdensome, vague, and ambiguous. GSK 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 GSK's general and specific objections, and without waiving them, GSK answers that its investigation is ongoing and it 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:** GSK objects to Interrogatory No. 11 on the ground that it is overly broad and unduly burdensome. GSK further objects to this Interrogatory on the ground that it is not limited by timeframe.

Notwithstanding GSK's general and specific objections, and without waiving them, GSK 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:** GSK objects to Request No. 12 on the ground that it is overly broad and unduly burdensome. GSK further objects to this Interrogatory to the extent it seeks documents that are publicly available or outside GSK's possession, custody and control.

Notwithstanding GSK's general and specific objections, and without waiving them, GSK agrees to produce non-privileged documents identified in its Answers to Interrogatory Nos. 7, 9, and 11 in a manner to be negotiated and agreed upon between the parties. GSK also directs Plaintiff to its own production and 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:** GSK objects to Request No. 13 on the grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence because it reports to require information relating to “drugs” without specification as to which “drugs,” thus including products that are not manufactured, marketed, or distributed by GSK and/or products not at issue in this litigation. In addition, GSK objects to this Request because it is duplicative of Request No. 3 in Plaintiff's First Set of Requests for Production of Documents to GSK, in response to which GSK has already agreed to produce documents. GSK further objects to this Request to the extent it seeks information in the possession of Plaintiff or more appropriately sought from third parties.

Notwithstanding GSK's general and specific objections, and without waiving them, GSK agrees to meet and confer to discuss production of non-privileged documents, if any, that may be responsive to this request in a manner to be negotiated and agreed upon between the parties.

Dated: March 19, 2007

Respectfully submitted,

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*Counsel for Defendant SmithKline Beecham Corporation,  
d/b/a GlaxoSmithKline*

Certificate of Service

I, \_\_\_\_\_, hereby certify that on this 13th day of March 2007, a true and correct copy of RESPONSES AND OBJECTIONS BY SMITHKLINE BEECHAM CORPORATION, D/B/A GLAXOSMITHKLINE (“GSK”) TO PLAINTIFF’S THIRD SET OF INTERROGATORIES AND FOURTH REQUEST FOR PRODUCTION OF DOCUMENTS was served on all counsel of record by Lexis Nexis File & Serve®.

/s/ \_\_\_\_\_