

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

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STATE OF WISCONSIN, )

Case No.: 05-C-0408-C

Plaintiff, )

v. )

ABBOTT LABORATORIES, ET AL., )

Defendants. )

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**DEFENDANT MERCK & CO., INC.'S OBJECTIONS AND RESPONSES TO  
PLAINTIFF'S FIRST SET OF INTERROGATORIES TO ALL DEFENDANTS**

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Pursuant to Rule 33 of the Federal Rules of Civil Procedure and Wis. Stat. § 804.08, defendant Merck & Co., Inc. ("Merck") hereby objects and responds to Plaintiff's First Set of Interrogatories to All Defendants ("the Interrogatories") as follows:

Merck is presently pursuing its investigation and analysis of the facts and law relating to this case, and has not completed discovery or preparation for trial. For the reasons set forth in Defendants' pending Motion to Dismiss and accompanying memoranda, the First Amended Complaint lacks particularity as to the conduct or activities alleged to be at issue. The responses set forth herein are given without prejudice to Merck's right to produce evidence of any subsequently discovered facts, documents or interpretations thereof, or to modify, change or amend its responses. The information set forth herein is true and correct to Merck's best knowledge as of this date, and is subject to correction for errors, mistakes or omissions. The within responses are based on documents and information currently available to Merck.

Reference in a response to a precedent or subsequent response incorporates both the information and the objections set forth in the referred-to response. Merck reserves

the right to introduce at trial, or in support of or in opposition to any motion in this or any other proceeding, any and all documents heretofore or hereafter produced by the parties in this action, in any other action or by any third person. Identification or production of certain documents is done without prejudice to establish at a later date any additional facts that may be contained within or discovered as a result of any subsequent review of such documents or additional investigation and discovery.

### **GENERAL OBJECTIONS**

1. Merck objects to the Interrogatories to the extent that they are vague, ambiguous, argumentative, duplicative, overly broad, unduly burdensome or oppressive, or seek information or documents that are not relevant to the claims or defenses of any party or to the subject matter involved in this action or to the extent they seek documents or information beyond those permitted by Rules 26 and 33 of the Federal Rules of Civil Procedure, Wis. Stat. §§ 804.01, 804.08, and other applicable state and federal laws.

2. Merck objects to the Interrogatories to the extent they seek documents or information protected from discovery by the attorney-client privilege, work product doctrine or other privilege, or that are otherwise immune or protected from disclosure. Merck does not intend to waive any applicable protections or privileges through the production of documents or the supplying of information in response to the Interrogatories. On the contrary, Merck specifically intends to preserve any and all applicable protections or privileges.

3. Inadvertent production of any document shall not constitute a waiver of any privilege or any other ground for objecting to discovery with respect to such document or any other document, or with respect to the subject matter thereof or the information contained therein, nor shall such inadvertent production waive Merck's right

to object to the use of the document or the information contained therein during this or any subsequent proceeding.

4. Merck objects to the Interrogatories as overly broad and unduly burdensome to the extent that they call for the identification of “each,” “any” or “all” documents or items of information when relevant information can be obtained from fewer than “each” “any” or “all” documents or information. Merck objects to the Interrogatories to the extent they seek information other than information which can be located upon a search of files or other sources where such information reasonably can be expected to be found.

5. Merck further objects to the Interrogatories to the extent they seek any confidential or proprietary information or trade secrets. Merck will only produce such information subject to and in reliance on the Protective Order entered by the Wisconsin Circuit Court for Dane County on May 11, 2005 (the “Protective Order”). The information and documents provided are for use in this litigation and for no other purpose.

6. Merck objects to the Interrogatories to the extent that they purport to require Merck to provide a compilation, abstract, audit, and/or other document summary that does not currently exist.

7. Merck objects to the Interrogatories to the extent they call for information or documents relating to Merck’s business or practices that are inapplicable to the providers reimbursed by Plaintiff. Unless otherwise specified, Merck’s responses will be limited to information and documents about its business or practices applicable in the United States generally or to Wisconsin in particular and with respect to the types of providers that are reimbursed by the State of Wisconsin under Medicaid.

8. Merck objects to the Interrogatories to the extent that they call for information or documents that are unreasonably cumulative or duplicative, are publicly available, or are obtainable from some other source that is more convenient, less burdensome or less expensive.

9. Merck objects to the Interrogatories to the extent that they are unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

10. Merck is responding to the Interrogatories without waiving or intending to waive, but on the contrary, preserving and intending to preserve: (a) the right to object on any proper grounds to the use of such documents or information for any purpose, in whole or in part, in any subsequent proceedings, in this action or in any other action; (b) the right to object on all grounds, at any time, to interrogatories, requests, or other discovery procedures involving or relating to the subject of the Interrogatories to which Merck has responded herein; and (c) the right at any time to revise, correct, add to or clarify any of the answers made herein.

11. Because of the over breadth of the Interrogatories at this early stage in the litigation and the vague and nonspecific nature of the claims against Merck in the First Amended Complaint, it is not possible for Merck to anticipate all possible grounds for objection with respect to the particular Interrogatories set forth herein. Merck reserves the right to supplement or correct these answers and to raise any additional objections deemed necessary and appropriate in light of the results of any further review.

## OBJECTIONS TO DEFINITIONS

1. Merck objects to Plaintiff's definitions to the extent they purport to expand upon or alter Merck's obligations under Rules 26 and 33 of the Federal Rules of Civil Procedure or Wis. Stat. §§ 804.01, 804.08.

2. Merck objects to Plaintiff's definition of "**Average Manufacturer Price**" or "**AMP**" on the grounds that the phrase is vague and ambiguous and that it differs from the operative statutory and regulatory definitions.

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

4. Merck objects to Plaintiff's definition of "**Defined Period of Time**" on the grounds that the phrase as defined is unreasonably overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. The definition purports to require information from as far back as January 1, 1993, long before any event referred to in the Amended Complaint. Merck will respond with respect to the operative limitations period, November 1, 2001 through the date of the First Amended Complaint (November 1, 2004) for discovery requests addressed to Plaintiff's DTPA claims and November 1, 1998 to November 1, 2004 for discovery requests addressed to Plaintiff's other claims.

5. Merck objects to Plaintiff's definition of "**Document**" on the grounds that the term as defined is unreasonably overbroad, unduly burdensome, and imposes obligations broader than Fed. R. Civ. P. 26 and 33 and Wis. Stat. §§ 804.01, 804.08. Merck also objects to Plaintiff's definition requesting originals and all nonidentical duplicates as not relevant and unduly burdensome. Merck also objects to this definition to the extent it requires or seeks to require Merck to: (a) produce documents or data in a

particular form or format; (b) convert documents or data into a particular or different file format; (c) produce data, fields, records, or reports about produced documents or data; (d) produce documents or data on any particular media; (e) search for and/or produce any documents or data on back-up tapes; (f) produce any proprietary software, data, programs, or databases; or (g) violate any licensing agreement or copyright laws.

6. Merck objects to Plaintiff's definition of "**Incentive**" on the grounds that the term as defined is vague, ambiguous, unreasonably overbroad and unduly burdensome in purporting to require Merck to track each of the items for every customer regardless of time or relation to particular sales of the Merck drugs at issue, and to speculate about what a particular customer would consider to be encompassed within the phrase "anything of value."

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

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

9. Merck objects to Plaintiff's definition of "**Spread**" on the grounds that the term as defined is misleading, unreasonably overbroad, vague, ambiguous and potentially very burdensome. In seeking information about dissimilar sales to other purchasers, requests incorporating this term seek materials that are not relevant, and that

are not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving this objection, Merck will respond with respect to discussions of differences between the catalog price or actual acquisition cost and AWP.

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

**RESPONSES AND OBJECTIONS TO INDIVIDUAL  
INTERROGATORIES**

Merck incorporates its General Objections and Objections to Definitions in each of the responses that follow. The specific objections set forth in each response are in addition to those objections and, unless otherwise specified, Merck's responses are limited in accordance with each of its objections. To the extent that Merck provides or offers to produce confidential information, Merck will do so only subject to and in reliance on the Protective Order.

**INTERROGATORY NO. 1:** Have you ever determined an average sales price or other composite price net of any or all Incentives for a Targeted Drug during the Defined Period of Time? If so, for each Targeted Drug for which you have made such a determination, identify:

- (a) the beginning and ending dates of each period applicable to each such determination;
- (b) the applicable class(es) of trade for which each determination was made;
- (c) each average sales price or composite price determined;
- (d) the person(s) most knowledgeable regarding the determinations;
- (e) the methodology used to determine such prices;
- (f) your purpose(s) in making such determinations;
- (g) whether you disclosed any average sales price or composite price so determined to any publisher, customer, or governmental entity. If so, identify each publisher, customer or governmental entity to whom each such price was disclosed and the corresponding date of the disclosure; and
- (h) whether any such average sales price or composite price was treated as confidential or commercially sensitive financial information.

**RESPONSE:** Merck further objects to the Interrogatory No. 1 on the grounds that the term "composite price" is vague and ambiguous. Merck also objects on the grounds that determining each instance where any such price has been calculated net of any or all incentives and whether or to which persons or entities such price has been

disclosed would be unreasonably burdensome. Merck objects that drug prices for federal sector customers, such as the Department of Veterans Affairs and the Department of Defense, and for the Public Health Service 340B program are not relevant. Merck further objects to subpart (d) on the grounds that it requires Merck to speculate as to the comparative knowledge of its employees or former employees.

Subject to and without waiving these objections, Merck responds that beginning in the last quarter of 2004, it has calculated an “average sales price” for drugs covered by Medicare Part B in accordance with the methodology set forth at 42 U.S.C. § 1395w-3g(c) and the implementing rules promulgated by the Centers for Medicare and Medicaid Services of the U.S. Department of Health & Human Services (“HHS”). Merck objects to the balance of the Interrogatory with respect to “average sales price” as not relevant and not reasonably calculated to lead to the discovery of admissible evidence in that the calculations were undertaken after the filing of the First Amended Complaint in November 2004.

In addition, on a quarterly basis, Merck has calculated Average Manufacturer Price and/or Best Price for drugs covered by Medicaid, in accordance with the rebate methodology set forth at 42 U.S.C. § 1396r-8 and the implementing regulations, as modified from time to time. These prices were calculated in order to comply with Merck’s statutory obligations and the applicable rebate agreements with HHS. In each instance, the price information was reported only to HHS and is subject to verification by HHS through market surveys. By statute and regulation, the prices are monitored only by HHS and are not to be disclosed or reported to the State. Merck accordingly objects to subpart (c).

Merck also has determined a catalog price for its drugs for sales to customers that purchase directly from Merck. Merck will produce the catalog prices for Pepcid® IV and business records from which the requested information may be derived.

**INTERROGATORY NO. 2:** Identify each electronic database, data table or data file that you now maintain or have maintained during the Defined Period of Time in the ordinary course of business which contains a price for a Targeted Drug. For each such electronic data entity, identify, describe or produce the following:

- (a) the name or title of each such database, data table, or data file;
- (b) the software necessary to access and utilize such data entities;
- (c) describe the structure of each database, data table or data file identified in response to Request No. 2(a) above and identify all files or tables in each such database, data table or data file. For each such file or table, identify all fields and for each field describe its contents, format and location within each file or table record or row.
- (d) the current or former employee(s) with the most knowledge of the operation or use of each data entity identified above; and
- (e) the custodian(s) of such data entity.

**RESPONSE:** Merck further objects to this Interrogatory as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Literally hundreds or thousands of Merck employees maintain or have maintained electronic data in various tables or files that include one or more prices for Merck drugs. Cataloging each such “data entity” and providing the requested information for each would be a huge undertaking and would not produce data of discernible relevance to the claims advanced in the First Amended Complaint.

Subject to and without waiving these objections, Merck will produce excerpts from its electronic catalog as to Pepcid® IV.

**INTERROGATORY NO. 3:** Describe each type of Incentive you have offered in conjunction with the purchase of any Targeted Drug. For each such Incentive, identify:

- (a) the type(s) of Incentive(s) offered for each Targeted Drug;
- (b) the class(es) of trade eligible for each Incentive;
- (c) the general terms and conditions of each incentive; and

- (d) the beginning and ending dates of each period during which the Incentive was offered.

**RESPONSE:** Merck further objects that Interrogatory No. 3 is vague, ambiguous and unreasonably overbroad in seeking information on classes of trade other than for purchasers of Pepcid<sup>®</sup> IV reimbursed by Wisconsin's Medicaid program. Merck further objects that this Interrogatory is unduly burdensome to the extent it seeks transaction-specific information.

Subject to and without waiving these objections, Merck states that the types of incentives generally offered in connection with purchases of Pepcid<sup>®</sup> IV include the following: (1) prompt pay discounts, for payment of invoices within a certain limited time; (2) discounts and rebates paid to customers based on performance measures or other negotiated factors. Merck will produce business records for Pepcid<sup>®</sup> IV from which the requested information may be derived.

In addition, Merck participates in the federal Medicaid program under which it pays quarterly rebates to participating states, including Wisconsin, in accordance with the statutory formula set forth at 42 U.S.C. § 1396r-8(c) and the implementing regulations. Some states also have supplemental drug rebate agreements with Merck and other manufacturers applicable to Medicaid reimbursement for certain drugs.

**INTERROGATORY NO. 4:** Describe in detail how you determined each price you used in the ordinary course of business of each Targeted Drug for each year during the Defined Period of Time and identify the person(s) most knowledgeable in making such determinations for each Targeted Drug for each year.

**RESPONSE:** Merck further objects to Interrogatory No. 4 on the grounds that it is vague, ambiguous and overbroad in seeking "each price" for the Merck drug at issue. Merck also objects that Merck's determination of prices other than for providers of

Pepcid<sup>®</sup> IV reimbursed by Wisconsin Medicaid is not relevant and not reasonably calculated to lead to admissible evidence.

Subject to and without waiving its objections, Merck states that it will produce business records from which the requested information for Pepcid<sup>®</sup> IV may be derived. The reimbursement of Pepcid IV<sup>®</sup> by Medicaid has been limited by the Federal Upper Limit price since November 2001.

**INTERROGATORY NO. 5:** Have you ever included in your marketing of a Targeted Drug to any customer reference to the difference (or spread) between an AWP or WAC published by First DataBank, Redbook or Medi-span and the list or actual price (to any customer) of any Targeted Drug? If so, provide the following information for each Targeted Drug:

- a. the drug name and NDC;
- b. the beginning and ending dates during which such marketing occurred;
- c. the name, address and telephone number of each customer to whom you marketed a Target Drug in whole or in part by making a reference to such difference(s) or spread(s); and
- d. identify any document published or provided to a customer which referred to such difference(s) or spread(s)

**RESPONSE:** Merck objects to Interrogatory No. 5 on the grounds that the term “marketing” is vague and ambiguous, and that use of the terms “ever” and “any customer” makes the Interrogatory overbroad and unduly burdensome. By its terms, this Interrogatory could be construed to require Merck to review each and every marketing communication concerning a potential or actual transaction involving Pepcid<sup>®</sup> IV, which would be unduly burdensome and is not reasonably calculated to lead to the discovery of admissible evidence concerning Plaintiff’s AWP claims.

Subject to and without waiving its objections, Merck states it will search for documents responsive to this Interrogatory, if any, to the extent indicated in response to Plaintiff’s First Set of Requests for Production of Documents.

Dated: July 20, 2005

As to objections,

By:  10/31/23

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