

State of Wisconsin,

Plaintiff,

v.

Case No. 04 CV 1709

AMGEN INC., et al.,

Defendants.

PLAINTIFF'S RESPONSE TO
DEFENDANTS' FIRST SET OF INTERROGATORIES AND DOCUMENT REQUESTS

Pursuant to the Wisconsin Rules of Civil Procedure, the State of Wisconsin, by and through its undersigned counsel, respond to the defendants' first set of interrogatories and document requests.

Preliminarily, please be advised that the State of Wisconsin is continuing its investigation of defendants' unlawful conduct and has not completed its discovery or its preparation for trial. This response is given without prejudice to the State's right to produce evidence of any subsequently discovered facts, documents or information and thus modify, change or amend its response given below and/or obligation to supplement this response under Wis. Stat. §804.01(5).

OBJECTIONS:

1. The State of Wisconsin objects to the Request to the extent that it seeks confidential information. Notwithstanding this objection, the State will produce confidential

information and documents under such terms and conditions of a protective order tailored to preserve the confidentiality of the information acquired by the State under such pledge.

2. The State of Wisconsin objects to the Request on the ground that it is unduly burdensome for the plaintiff to produce documents that are equally available to the defendants.

INTERROGATORY NO. 1:

With respect to your representation in the Status Report that you have “evidence that the manufacturers caused phony and inflated wholesale prices to be published with respect to each of the listed drugs,” on the list of drugs attached to the Status Report:

- (a) Describe each evidence with respect to each defendant and each drug; and
- (b) Identify all persons with knowledge of each evidence with respect to each defendant and each drug.

ANSWER:

1. Evidence Relevant To All Defendants

It is undisputed that each defendant published or caused to be published a wholesale price. Historical evidence of the defendants’ reported prices are available from First Data Bank, the Red Book, and other publicly available sources of price information and, more importantly, from within each defendant’s own internal records. Each defendant employs one or more persons who can testify as to the price reported by the manufacturer to one or more of these price reporting services.

Evidence that the defendants caused the publication of false wholesale prices is established and shown by the following:

- A. Each defendant maintains pricing information that may be used to make a numeric calculation that yields the conclusion that inclusive of all discounts, rebates, special

offers and arrangements, and the like, that the published wholesale price was and is false and inflated and not reflective of the average of the wholesale price for any particular prescription drug. Each defendant employs one or more persons who can testify as to the price the manufacturer has sold each of its products to a variety of sources and the existence and amount of rebates, discounts, holdbacks, charge-backs or other price or cost incentives used by the manufacturer as an inducement or incentive to purchase its products.

B. The plaintiff has acquired electronic data from pharmaceutical wholesale companies, hospitals, and group purchasing organizations from which the real wholesale price for most, if not all, of defendant's prescription drugs may be computed. This computed price is not necessarily net of any charge-backs, holdbacks, incentives and discounts. The plaintiff has also reviewed publicly available electronic data maintained by various retail pharmaceutical groups or organizations that show that the retail price charged for some of the individual defendant's prescription drugs is less than the false wholesale price reported by the manufacturer. All of these real world prices show that for each defendant and for each drug, the reported wholesale price was exaggerated and inflated and was therefore, as articulated by the plaintiff in its status report, "phony" and "false." The plaintiff does not know the name or names of the persons who prepared this electronic data.

C. The United States of America, Department of Health and Human Services, Office of Inspector General, as well as various committees of the House and Senate, have issued various public reports all of which confirm that, at times, for some drugs, the defendants' published wholesale prices were phony and inflated. More recent reports by these entities show a broad pattern of publication by the defendants of false and inflated wholesale prices.

D. In a number of civil or criminal prosecutions, state and federal, (United States Department of Justice) and in private whistle-blower lawsuits, and in out-of-court settlements facilitated by such groups as the National Association of Medicaid Fraud Control Units, various defendants have admitted that they have engaged in one or more activities the effect of which was to cause the government to pay more as reimbursement than the government would have paid had the defendants not engaged in such illegal and nefarious activities

2. Evidence Relating to Individual Defendants

A. The plaintiff has also reviewed selected documents from other litigation that confirm that particular defendants have caused false and inflated wholesale prices to be publicly reported and were relied upon by consumers, state and local governments and third party payers. (For example, see generally the exhibits attached to the most recent complaint filed in the Multi-District Litigation in Boston, Massachusetts).

B. The plaintiff has received information from specific defendants that confirm the accuracy of the statement that the manufacturer caused phony and inflated prices to be published, such as, for example, the Average Manufacturer Price reported to the federal government. From these reported amounts, it may be concluded that the published wholesale price was often grossly inflated.

C. In the context of confidential discussions with individual defendants, certain defendants have made admissions which although inadmissible in this proceeding to show liability, nevertheless support the statement the plaintiff made in its status report that the manufacturers have caused phony and inflated wholesale prices to be published.

REQUEST NO. 1:

All documents relied upon in connection with your response to Interrogatory No. 1 or that otherwise comprise, refer or relate to your evidence that each defendant “caused phony and inflated wholesale prices to be published with respect to each of the listed drugs” set forth on the list of drugs attached to the Status Report.

ANSWER:

The defendants’ discovery request, a single document, purportedly prepared on behalf of all the defendants, requires that the plaintiff produce to all defendants the internal documents and data of individual defendants that a defendant marked “confidential” or “highly confidential.” Plaintiff has been made well aware by many individual defendants of the individual confidentiality concerns of each particular defendant from whom the document or documents were acquired. The plaintiff will make these documents available to all defendants if that is indeed what the “collective mind” of the defendants continues to so demand.

Additionally, the documents, records and data referenced above contain significant information which relate to pricing methods, marketing plans and methods, financial information and other information as defined in paragraphs 5 and 3 of the Temporary Qualified Protective Order entered May 11, 2005 by the Court. Under the Court’s current order, plaintiff must inquire of each individual defendant regarding whether that individual defendant can and will waive the restrictions imposed by the order on plaintiff’s ability to produce such information relating to a particular defendant to all defendants, before it can produce such documents.

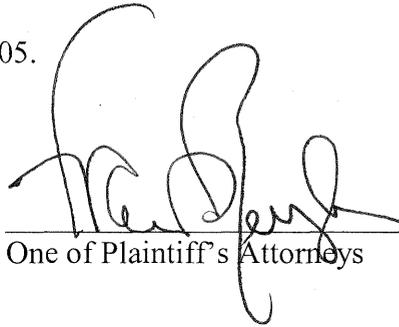
Finally, the plaintiff has acquired records governed by either other court’s protective orders or agreements of confidentiality. For example, under the plaintiff’s agreement with pharmaceutical wholesalers, the data supplied to the State of Wisconsin cannot be disclosed

unless prior notice is given to these companies and provision is made to ensure the confidentiality of the information in accordance with the State's agreement. Each of the defendants, as parties to these proceedings, is well aware of the confidentiality provisions imposed by these foreign jurisdictions.

Subject to the condition set forth in the paragraphs above, and upon receiving the necessary waivers by individual defendants of the protections granted them by the Court's order of May 11, 2005¹, the plaintiff will make the documents referenced in plaintiff's response to defendants' first interrogatory available at a mutually convenient location, date and time.

¹ Plaintiff hereby requests each defendant to submit to plaintiff a waiver of the applicable provisions of the Court's order of May 11, 2005 so that plaintiff can produce to all defendants those relevant documents or pricing information requested in Defendant's First Set of Interrogatories and Document Requests which were produced to plaintiff by an individual defendant or third party. If an individual defendant does not wish to waive the confidentiality provisions of the May 11, 2005 Court order, for any or all documents produced to plaintiff – thereby preventing plaintiff from providing such “confidential” or “highly confidential” documents to all defendants – defendant is asked to so notify plaintiff.

Dated this 19th day of December, 2005.



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