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May 13, 2008

VIA HAND DELIVERY

CLIENT/MATTER NUMBER
045152-0101

Honorable Richard Niess
Dane County Circuit Court, Branch 9
215 South Hamilton Street, Room 5103
Madison, WI 53703-3289

Re: *State of Wisconsin v. Abbott Labs., et al.*
Case No. 04-CV-1709

Dear Judge Niess:

Enclosed for filing in the above-referenced matter please find a Notice of Supplemental Evidence in Further Support of Defendants' Joint Opposition to Plaintiff's Partial Motions for Summary Judgment Against Astrazenca, Johnson & Johnson, Novartis and Sandoz, with supporting exhibit.

The signature page of the brief is a PDF copy of the original. We will provide the Court with the original signature page as soon as possible.

All counsel of record have been served with a copy of the same via Lexis Nexis File & Serve.

Sincerely yours,

FOLEY & LARDNER LLP


Matthew D. Lee

Enclosure

cc: Attorney Frank D. Remington (w/enclosure, via Hand Delivery)
Attorney Charles J. Barnhill, Jr. (w/enclosure, via Hand Delivery)
Attorney P. Jeffrey Archibald (w/enclosure, via Hand Delivery)
All Counsel of Record (w/enclosure, via Lexis Nexis File & Serve)

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TAMPA

TOKYO
WASHINGTON, D.C.

STATE OF WISCONSIN,

)

Plaintiff,

)

v.

)

Case No.: 04 CV 1709

)

ABBOTT LABORATORIES, *et. al.*,

)

Defendants.

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**NOTICE OF SUPPLEMENTAL EVIDENCE IN FURTHER SUPPORT
OF DEFENDANTS' JOINT OPPOSITION TO PLAINTIFF'S
PARTIAL MOTIONS FOR SUMMARY JUDGMENT AGAINST
ASTRAZENECA, JOHNSON & JOHNSON, NOVARTIS AND SANDOZ**

Defendants submit this notice of supplemental evidence in further support of their Joint Opposition to Plaintiff's Partial Motions for Summary Judgment Against AstraZeneca, Johnson & Johnson, Novartis and Sandoz. Defendants only recently were provided with this evidence by Plaintiff and ask that the Court consider this evidence in reaching its decision on the pending summary judgment motions.

On May 7, 2008, Plaintiff responded to discovery requests, making two important admissions that have a bearing on the pending summary judgment motions:

1. Plaintiff admitted that it never received First DataBank data, which it has contended contains Defendants' AWP representations.¹
2. Plaintiff also admitted that its fiscal agent, EDS, never received any AWP representations from Defendants.²

The first admission demonstrates that Plaintiff cannot establish essential elements of its § 100.18 claim—that Defendants made a representation to the “public”³ or that such

¹ See Plaintiff's Response to Defendants' Sixth Set of Interrogatories and Requests for Production Directed to Plaintiff (“Plaintiff's Response”) at 3 (May 7, 2008) (attached as Ex. A).

² See Plaintiff's Response at 2 (Ex. A).

representation caused Plaintiff's loss.⁴ The only entities that Plaintiff has shown received any of Defendants' suggested AWP's were First DataBank and another pricing compendia, Red Book.⁵ Plaintiff has not shown that this information was in turn published to the "public" let alone seen and relied upon by it. Plaintiff has argued that Defendants' AWP representations were published to the "public" because they were sent to the State,⁶ but these newly provided discovery responses show that the argument is unsupported by the factual record. As Plaintiff admits in these recent discovery responses, "First DataBank did not send data to the Wisconsin Medicaid Program."⁷ Similarly, without showing receipt of the information, Plaintiff cannot show Defendants' suggested AWP's caused Plaintiff any harm.

The second admission is equally fatal to Plaintiff's case. Even assuming that Plaintiff had shown it received and relied upon First DataBank data (presumably because the data went to EDS, its fiscal agent), it has not and cannot prove that it or EDS received or relied upon a representation by any Defendant. Plaintiff's discovery responses state that

³ See Wis. Stat. § 100.18(1); *K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 301 Wis.2d 109, 121-22, 732 N.W.2d 792, 798, 2007 WI 70, ¶ 19 (Wis. 2007). Of course, the State has incorrectly assumed that a representation made to a Wisconsin administrative agency would constitute a representation made to the "public" under § 100.18 in the first place, a point discussed at greater length in Novartis' Response to Plaintiff's Motion for Summary Judgment. See Response of Defendant Novartis Pharmaceuticals Corporation to Plaintiff's Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment of Defendant Novartis Pharmaceuticals Corporation Seeking Dismissal of the Second Amended Complaint In Its Entirety at 51-55 (Jan. 15, 2008).

⁴ See Wis. Stat. § 100.18(1); *K&S Tool & Die Corp.*, 2007 WI 70, ¶ 35; *Werner v. Pittway Corp.*, 90 F. Supp.2d 1018, 1034 (W.D. Wis. 2000).

⁵ See e.g., Motion for Partial Summary Judgment On Liability Against Defendant Novartis Pharmaceuticals Corporation With Respect to Counts I and II of Wisconsin's Second Amended Complaint, and Supporting Memorandum Filed By Plaintiff State of Wisconsin at ¶ 28 (Oct. 29, 2007).

⁶ See Plaintiff State of Wisconsin's Reply Brief in Support of its Motions for Summary Judgment and Response Brief in Opposition to Defendants' Cross-Motions for Summary Judgment ("Plaintiff's Reply Br.") at 36-37 (Mar. 7, 2008).

⁷ Plaintiff's Response at 3 (Ex. A).

EDS never received from First DataBank the so-called “Suggested Wholesale Prices”⁸ or “SWPs”:

Interrogatory No. 1: In addition to Blue Book AWP, did You receive [Suggested Wholesale Price] information from the Pricing Compendia at any time during the Relevant Time Period?

Answer to Interrogatory No. 1: The Plaintiff Objects to this interrogatory on the ground that the form of the question assumes that the Wisconsin Medicaid Program “received” “Blue Book AWP’s.” At all times relevant to this litigation, the State of Wisconsin had a contract with EDS. In turn EDS had a contract with FDB and pursuant to that contract EDS has provided with data from FDB. Notwithstanding this objection, the answer is “no.”⁹

Instead of receiving the SWPs, EDS requested and received “Blue Book AWP’s,” which First DataBank’s witness has testified were based upon wholesaler surveys and were not set by manufacturers. (DAPUF ¶ 234).¹⁰

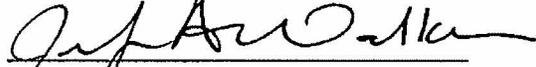
⁸ First DataBank defines “Suggested Wholesale Price” as “*the manufacturer’s* suggested price for a drug product from wholesalers to their customers (i.e., retailers, hospitals, physicians and other buying entities). SWP is a suggested price and does not represent actual transaction prices. First DataBank relies on manufacturers to report or otherwise make available the values for SWP data field.” (DAPUF ¶ 231) (emphasis added).

⁹ Plaintiff’s Response at 2 (Ex. A).

¹⁰ Plaintiff will likely point to its misguided argument that wholesalers responded to First DataBank’s surveys by reporting information provided by the manufacturer and therefore, regardless of which field the State used for its reimbursements, the AWP’s originated with the manufacturers. See Plaintiff’s Reply Br. at 52. First, Plaintiff’s only support for this proposition is the testimony of two wholesalers taken in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, No. 01 CV 12257 (PBS) (D. Mass.). These depositions were not cross-noticed in this case, and are thus inadmissible. Second, the testimony shows that these two wholesalers used manufacturers’ AWP’s *only* when the manufacturer sent the wholesaler a notification of price change specifically recommending an AWP. If no such notification was provided, these wholesalers determined their own AWP’s based on historical price increases or markups from WAC. Plaintiff’s Reply Br., Ex. 1 at 89:7-17; Plaintiff’s Reply Br., Ex. 2 at 38-40. Plaintiff has neither alleged nor presented evidence that any Defendant suggested AWP’s to wholesalers.

May 13, 2008

Respectfully submitted,



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Attorneys for Amgen Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2008, a true and correct copy of the foregoing was served upon all counsel of record via electronic service pursuant to Case Management Order No. 1 by causing a copy to be sent to LexisNexis File & Serve for posting and notification.

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EXHIBIT A

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 7

DANE COUNTY



STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04 CV 1709

ABBOTT LABORATORIES, INC., et al,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' SIXTH SET OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION DIRECTED TO PLAINTIFF

Pursuant to the Wisconsin Rules of Civil Procedure, the State of Wisconsin, by and through its undersigned counsel, respond to "Defendants' Sixth Set of Interrogatories" as follows.

Preliminarily, the Plaintiff incorporates by reference all of the boilerplate, objections propounded by any defendant in response to Plaintiff's discovery, as if more fully set forth herein. For extra good measure and in trying to keep up with learned defense counsel whose responses contain an ever increasing number of objections, the Plaintiff incorporates by reference the objections Plaintiff previously made when it responded to defendants' first through fifth set of discovery requests.

In addition, more specifically, the Plaintiff objects to defendants' definitions numbers four, and nine on the ground that they are overbroad and thus unduly burdensome. A substantially similar definition of "you" has already been condemned by this court as overbroad.

A similar conclusion is inescapable here. The Plaintiff objects to instruction number five on the ground that it is overbroad and is, despite its rhetoric, somewhat confusing.

INTERROGATORY NO. 1

In addition to Blue Book AWP, did You receive Suggested AWP information from the Pricing Compendia at any time during the Relevant Time Period?

ANSWER TO INTERROGATORY NO. 1

The Plaintiff Objects to this interrogatory on the ground that the form of the question assumes that the Wisconsin Medicaid Program “received” “Blue Book AWPs”. At all times relevant to this litigation, the State of Wisconsin had a contract with EDS. In turn EDS had a contract with FDB and pursuant to that contract EDS was provided with data from FDB. Notwithstanding this objection, the answer is “no”.

INTERROGATORY NO. 2

If your answer to Interrogatory No. 2 is anything other than an unqualified “no,” please explain:

- a. The time period during which you received the Suggested AWP information from the Pricing Compendia.
- b. How the Suggested AWP information has been used, relied upon, referenced or considered in evaluating, revising or setting reimbursement to Providers under Wisconsin’s Medical Assistance Programs; and
- c. When You began to use, rely upon, reference or consider the Suggested AWP information in evaluating, revising or setting reimbursement to Providers under Wisconsin’s Medical Assistance programs.

ANSWER TO INTERROGATORY NO. 2

n/a

SPECIFIC REQUESTS FOR DOCUMENTS TO BE PRODUCED

REQUEST NO. 1

All data sent to You from First DataBank and/or Blue Book during the Relevant Time Period.

ANSWER TO REQUEST NO. 1

First DataBank did not send data to the Wisconsin Medicaid Program. Nonetheless, Plaintiff has provided the defendants with at least two sets of pricing files and claims data Plaintiff acquired from EDS.

REQUEST NO. 2

All Documents Concerning the Together Card Program, the Together RX Access Program, and any other pharmaceutical manufacturer sponsored program under which drugs are provided either free or at lower cost to patients/ consumers, including, but not limited to, draft and final public statements concerning these programs, evaluations or analyses of these programs or the benefits conferred by these programs on Wisconsin or its citizens, and descriptions of the operation of these programs.

ANSWER TO REQUEST NO. 2

Upon information and belief no relevant documents are in Plaintiff's possession. Plaintiff OBJECTS to the request to the extent it demands copies of any statement made by any state employee about these programs on the ground that it is over-burdensome and it is not relevant nor likely to lead to the discovery of relevant information. Furthermore, Plaintiff OBJECTS to this request on the ground that it is over-burdensome given the fact that the programs identified above are of the defendants' own creation and the defendants have or should have in their own possession all the information they desire.

REQUEST NO. 3

All Documents Concerning the design, operation, and management of the BadgerCare Rx Gold program.

ANSWER TO REQUEST NO. 3

Upon information and belief no relevant documents are in Plaintiff's possession. Furthermore, Plaintiff OBJECTS to the request on the ground that any relevant documents would be in the possession of Navitus, a third party, from whom the defendants have the ability and right to seek discovery.

REQUEST NO. 4

All Documents Concerning or describing the amount of rebates that pharmaceutical drug manufacturers have provided to Wisconsin or its citizens under the BadgerCare Rx Gold program.

ANSWER TO REQUEST NO. 4

Upon information and belief no relevant documents are in Plaintiff's possession.

REQUEST NO. 5

All Documents Concerning how rebates provided by pharmaceutical drug manufacturers under the BadgerCare Rx Gold program were passed on to Wisconsin patients/consumers.

ANSWER TO REQUEST NO. 5

Upon information and belief no relevant documents are in Plaintiff's possession.

Dated this 7th day of May 2008.


FRANK D. REMINGTON
Assistant Attorney General
State Bar #1001131

Wisconsin Department of Justice
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VERIFICATION

I, Carrie Gray, hereby state that I have reviewed the answer to interrogatory number one and hereby state that I believe the answer given to be true and correct to the best of my knowledge, information and belief.

Dated this 7 day of May, 2008.

Carrie Gray
Carrie Gray

Subscribed and sworn before me
This 7 day of May, 2008.

David Dew
Notary Public, State of Wisconsin
My commission: 3/30/08