

DOCKET NO. CV 03 0083299 S (X07)

|                              |   |                    |
|------------------------------|---|--------------------|
| STATE OF CONNECTICUT,        | : | SUPERIOR COURT     |
| <i>PLAINTIFF</i>             | : |                    |
|                              | : | COMPLEX LITIGATION |
|                              | : | DOCKET             |
| V.                           | : | AT TOLLAND         |
|                              | : |                    |
| AVENTIS PHARMACEUTICALS INC. | : |                    |
| <i>DEFENDANT</i>             | : | AUGUST 3, 2004     |

**MOTION FOR COMMISSION TO TAKE OUT-OF-STATE  
DEPOSITION AND SUBPOENA FOR DOCUMENTS**

Pursuant to Conn. Gen. Stat. § 52-148c(b) and Connecticut Practice Book § 13-28(a), the plaintiff, respectfully requests that this Court grant to competent authority, a commission to conduct the deposition of First DataBank, Inc., 111 Bayhill Drive, San Bruno, CA 94066 to be held on September 24, 2004 at 10:00 a.m., P.D.T., at Perkins Coie LLP, 180 Townsend Street, San Francisco, CA 94107, or at another mutually agreeable time and date, and from day to day thereafter.

Pursuant to Connecticut Practice Book § 13-27(h), First DataBank, Inc. is commanded to designate one or more corporate representatives to testify concerning First DataBank, Inc.'s policies, procedures and guidelines for collecting and reporting pharmaceutical price related information and its knowledge related to the collection and reporting of such information for certain specified pharmaceuticals.

Plaintiff also requests a commission to issue a *subpoena duces tecum* upon the above-named witness, pursuant to Conn. Gen. Stat. § 52-148e(b) and Connecticut

Practice Book § 13-28(c), for First DataBank Inc. to bring the documents listed in Schedule A of the Commission.

A proposed Connecticut Commission to conduct an Out-of-State Deposition and Subpoena Documents for this Court's signature accompanies this motion as Exhibit A.

PLAINTIFF,  
STATE OF CONNECTICUT

RICHARD BLUMENTHAL  
ATTORNEY GENERAL

BY: \_\_\_\_\_

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Assistant Attorney General  
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[Clare.Kindall@po.state.ct.us](mailto:Clare.Kindall@po.state.ct.us)

**ORDER**

The foregoing Motion for Commission to Take Out-of-State Deposition and Request Documents, having been duly heard by this Court, it is hereby GRANTED / DENIED.

Dated at Tolland, Connecticut, this \_\_\_\_\_ day of August, 2004.

By the Court,

\_\_\_\_\_  
Samuel J. Sferrazza, Judge, Superior Court

**CERTIFICATION**

I hereby certify that true and accurate copies of the foregoing Motion for Commission to Take Out-Of-State Deposition and Subpoena for Documents were served by first-class mail, postage prepaid, this 3rd day of August, 2004, to:

Frank H. Santoro  
R. Cornelius Danaher, Jr.  
Danaher, Tedford, Lagnese & Neal  
700 Capitol Place, 21 Oak Street  
Hartford, CT 06106-8000

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Clare E. Kindall  
Assistant Attorney General

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| AVENTIS PHARMACEUTICALS INC. | : |                    |
| <i>DEFENDANT</i>             | : | AUGUST 2004        |

**COMMISSION TO TAKE DEPOSITION AND SUBPOENA DOCUMENTS**

TO: Some Competent Authority

BE IT KNOWN that pursuant to the laws of the State of Connecticut you are hereby appointed as a Commissioner by Superior Court for the Judicial District of Tolland in order to notice and issue a subpoena duces tecum for the deposition of:

First DataBank, Inc.  
111 Bayhill Drive  
San Bruno, CA 94066

which deposition shall be noticed in the above-captioned matter now pending before the Superior Court of Connecticut, Judicial District of Tolland, Complex Litigation Docket. Pursuant to Connecticut Practice Book § 13-27(h), First DataBank, Inc. is commanded to designate one or more corporate representatives to testify concerning First DataBank, Inc.'s policies, procedures and guidelines for collecting and reporting pharmaceutical price related information and its knowledge related to the collection and reporting of such information for certain specified pharmaceuticals.

You also are hereby authorized to issue a *subpoena duces tecum* upon the above-named witness, pursuant to Conn. Gen. Stat. § 52-148e(b) and Connecticut Practice Book

§ 13-28(c), for First DataBank Inc. to bring the documents listed in Schedule A of this Commission.

You are commissioned to have the testimony of said witnesses taken stenographically and cause the same to be thereafter reduced to typewriting and subscribed by said witness and certified by the witness to be correct unless said signing and certification is expressly waived by said witness in your presence, and to annex thereto any and all papers and documents marked as exhibits at the depositions; and, having completed said depositions, to return same as hereinafter more fully directed, together with this Commission, to the party at whose request the same was taken.

The deposition transcript shall be captioned, headed and introduced as follows:  
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| V.                           | : | AT TOLLAND         |
|                              | : |                    |
| AVENTIS PHARMACEUTICALS INC. | : |                    |
| <i>DEFENDANT</i>             | : | [DATE]             |

Deposition of First Databank, Inc., taken before [insert name], pursuant to Section 13-27 et seq., of the Connecticut Practice Book, and a Commission to Take Deposition Issued on \_\_\_\_\_, 2004 at Tolland Superior Court, Rockville, Connecticut on the \_\_\_ day of \_\_\_\_\_, 20\_\_.

The deponent having been first duly sworn, deposes and states as follows:

\* \* \* \*

Following the foregoing introduction, you will cause the depositions to include the questions and answers to each and in identical language used in said question and in said answers by the witness.

The questions and answers should be appropriately designated according to the party or attorney asking the question. One certificate, envelope and direction will suffice for the entire deposition of the witnesses. Every document or other exhibit referred to in the depositions and annexed thereto should be signed or initialed by the stenographer and marked in some manner for identification. At the conclusion of the depositions, you will annex thereto your certification in the following form:

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|                              | : |                    |
| AVENTIS PHARMACEUTICALS INC. | : |                    |
| <i>DEFENDANT</i>             | : | [DATE]             |

Personally appeared before me this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, who made solemn oath or affirmation to the truth of the same; which deposition was taken to be used in the above-entitled matter now pending before the Superior Court for the Judicial District of Tolland, Complex Litigation Docket, State of Connecticut the reason for the taking of the deposition being that the deponent is permanently located outside the State of Connecticut.

Subscribed, taken and sworn to before me.

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Commissioner Appointed by the Superior Court for the Judicial District of Tolland, CT

\* \* \* \*

You will then place the depositions in an unstamped envelope, securely seal the envelope and endorse the envelope on the outside as follows:

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| AVENTIS PHARMACEUTICALS INC. | : |                    |
| <i>DEFENDANT</i>             | : | [DATE]             |

**DEPOSITION OF FIRST DATABANK, INC.**

\* \* \* \*

You will then promptly deliver said deposition to the party at whose request it was taken.

Dated at Tolland, Connecticut this \_\_\_\_ day of August, 2004.

BY THE COURT,

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Judge of the Superior Court  
The Honorable Samuel J. Sferrazza  
Superior Court, State of Connecticut  
Judicial District of Tolland  
Complex Litigation Docket  
20 Park Street  
Rockville, CT 06066

## **SCHEDULE A**

### **DEFINITIONS**

As used in these Document Requests, the following terms shall have the meanings set forth below:

1. The term "**Affiliated**" shall mean any form of business relationship, including, but not limited to, employee, director, officer, owner, agent, consultant, or contractor.
2. The words "**And**" and "**Or**" shall mean "and/or."
3. The term "**CMS**" means the Center for Medicare & Medicaid Services, a division of the United States Department of Health and Human Services, and also means CMS' predecessor, the Health Care Financing Administration ("HCFA"), and includes its fiscal intermediaries or carriers.
4. The term "**Communication**" means a transmittal of information, or request for information, by document or, if by other means, includes documentation thereof. If such communication was contained or memorialized in a document, you must provide the document.
5. The term "**Department of Social Services**" means the Connecticut Department of Social Services, its predecessors, including the Department of Income Maintenance, the Department of Aging, the Department of Human Resources, and its employees or officials, or their agents and fiscal agents, including Electronic Data Systems Corporation, and sub-contractors or designees.

6. The term "**Document**" means any writing or recording of any kind, in any medium, whether written, graphic, pictorial, photographic, electronic, emails, phonographic, mechanical, taped, saved on computer disc, hard drives or data tapes or otherwise, and every non-identical copy. Different versions of the same document, such as different copies of a written record bearing different handwritten notations, are different documents within the meaning of the term as used. In case originals or original non-identical copies are not available, "document" includes copies of originals or copies of non-identical copies as the case may be.

7. The term "**Entity**" means an individual, corporation, partnership, proprietorship, professional corporation, association, group, governmental agency or agent, municipal corporation, state government, local government, political subdivision, or any other legal entity of any kind, whether for profit or not for profit.

8. The term "**Healthcare Provider**" includes any type of pharmacy, physician's office, oncology practice, infusion suite, long-term care facility, home health care company or any other Entity that has provided drugs to consumers or purchased drugs for resale to consumers. The term "Healthcare Provider" specifically excludes hospitals.

9. The term "**Listed Pharmaceuticals**" means the brand name, trade name or generic products identified in Exhibit A attached.

10. The term "**Pharmaceutical**" means any drug or other product, which requires a physician's or other prescriber's prescription, including, but not limited to, "biological" products such as hemophilia factors and intravenous solutions.

11. The term "**Price Representations**" means any statement, assertion, representation or declaration of any Pricing Element or HCPC Pricing Element.

12. The term "**Publishers**" means you or any other person or Entity engaged in publishing drug prices, including, but not limited to, the publishers of the following pharmaceutical pricing guides and/or databases: the Medical Economics *Drug Topics Red Book*, *Medi-Span, Inc.* or *Drug Facts and Comparisons*.

13. "**Regarding,**" "**Relate to**" and "**relating to**" shall mean relating to, regarding, consisting of, referring to, reflecting, manifesting, prepared in connection with, in comparison to, describing, containing, attesting to, or being in any way legally, logically, or factually connected with the matter discussed, whether directly or indirectly.

14. The term "**Spread**" is used to refer to the difference between the Actual Acquisition Price or purchase price of a Pharmaceutical (paid by purchasers of the Pharmaceuticals) and the reimbursement rate paid by third party payors (to purchasers of the Pharmaceuticals) for the Pharmaceutical. Third party payors include the Medicare program, Medicaid program, the Connecticut Department of Social Services' Medical Assistance Program and private insurance. Thus, the Spread is the gross profit actually or potentially realized by the purchasers of the Pharmaceuticals.

15. "**You,**" "**your,**" "**your company**" means First DataBank, Inc., its domestic or foreign parents, and any other affiliated company, subsidiary, division, joint venture or other Entity having at least 10% ownership interest in you; your agents, independent contractors, directors, employees, officers, and representatives; and merged,

consolidated or acquired predecessors; and any other person or Entity acting on behalf of First DataBank, Inc.

16. **“Listed Defendant”** means the following companies Aventis Pharmaceuticals, Inc., Dey, Inc., Dey L.P., GlaxoSmithKline, PLC d/b/a GlaxoSmithKline, Glaxo Wellcome, Inc. d/b/a GlaxoSmithKline, SmithKline Beecham Corp. d/b/a GlaxoSmithKline, Pharmacia Corporation, Roxane Laboratories, Inc., Schering-Plough Corporation, Schering Corporation, and Warrick Pharmaceuticals Corporation, as well as their predecessors or successors, any parent, subsidiary, affiliate, segment or division thereof, any present or former officer, director, employee, partner, agent, representative, or other person acting or purporting to act on their behalf.

17. **“Customization”** means the entire process employed by you in creating a specific drug formulary for your customers, including, but not limited to, the specification and selection of data elements and fields for information reporting in a particular customers drug files.

18. **“Pricing Element”** means any of the following:

- (a) Average Wholesale Price or “AWP”;
- (b) Blue Book Average Wholesale Unit Price;
- (c) Blue Book Average Wholesale Package Price;
- (d) Calculated Average Wholesale Package Price;
- (e) Wholesale Unit Price;
- (f) Wholesale Acquisition Cost;
- (g) Suggested Wholesale Price;
- (h) Wholesale Net Price; and
- (i) Direct Price.

19. **“HCPC Pricing Element”** means any of the following:

- (a) HCPC Blue Book Average Price;

- (b) HCPC Blue Book Median Price;
- (c) HCPC Wholesale Net Average Price;
- (d) HCPC Wholesale Net Median Price.

20. **“Factor”** means a calculation, mark-up or some other formula applied to a reference price to arrive at a particular Pricing Element.

21. **“National Drug Data File”** or **“NDDF”** means your proprietary drug pricing and information databases and includes, but is not limited to the Medicaid Data File, National Drug Data File® Plus and PriceProbe™.

### **INSTRUCTIONS**

1. Each document request shall be construed to include documents within the knowledge, possession or control of the subpoenaed party, its attorneys, investigators, agents, owners, officers, employees, or other representatives of the subpoenaed party and/or its attorneys, as of the date of the answers given to those documents requests and any supplemental information, knowledge, data, documents or communication responsive to these document requests which is subsequently obtained or discovered.

2. If production is requested of a document that is no longer in your possession, custody or control, your response should state when the document was most recently in your possession, custody or control, how the document was disposed of, and the identity of the person, if any, presently in possession, custody or control of such document. If the document has been destroyed, state the reason for and date of its destruction.

3. If you claim privilege as a ground for not providing documents in response to any document request, describe the factual basis for said claim or privilege in

sufficient detail so as to permit the court to adjudicate the validity of the claim, including the date the document was prepared, its title, the author, the addressees, all recipients and the general subject matter.

4. If the response to any document request consists, in whole or in part of any objection(s), state with specificity the full objection(s) and the particularized basis for each said objection.

5. Unless otherwise indicated in a specific request, the requests herein refer to documents created from January 1, 1993 to the present and documents relating to such period even though created before that period.

6. Documents should be produced as they are maintained in the normal course of business, and thus if documents are maintained in electronic form, they should be produced in electronic form. Data must be produced in the data format in which it is typically used and maintained. Moreover, to the extent a responsive document has been electronically scanned (for any purpose), that document must be produced in a readable and accessible electronic format, with the opportunity provided to review the original document(s).

7. To the extent you object to any portion of a document request, you must respond to the remaining portion of the request to which you do not object.

## **REQUESTS FOR PRODUCTION OF DOCUMENTS AND TANGIBLE THINGS**

### **REQUEST NO. 1:**

All documents relating to any communications between you and a Listed Defendant related to any Pricing Element or any HCPC Pricing Element for any of the Listed Pharmaceuticals.

### **REQUEST NO. 2:**

All documents relating to any communications between you and a Listed Defendant related to Spread.

### **REQUEST NO. 3:**

All documents relating to how you or any Listed Defendant defines any Pricing Element or HCPC Pricing Element.

### **REQUEST NO. 4:**

All documents relating to market audit methodologies and survey policies and calculations used by you to determine any Pricing Element or any HCPC Pricing Element.

### **REQUEST NO. 5:**

All documents relating to any survey of drug wholesalers conducted by you to determine the Pricing Element or HCPC Pricing Element for any of the Listed Pharmaceuticals.

REQUEST NO. 6:

All documents relating to any methods used by you to verify, calculate, estimate and/or publish any Pricing Element or HCPC Pricing Element for any of the Listed Pharmaceuticals.

REQUEST NO. 7:

All documents identifying any Factor used to calculate any Pricing Element or HCPC Pricing Element for any of the Listed Pharmaceuticals.

REQUEST NO. 8:

All documents relating to your practices, policies, and procedures related to the manner and frequency with which you update any Pricing Element or HCPC Pricing Element.

REQUEST NO. 9:

All documents relating to your E-mail function, bulletin board service, or any other First DataBank Network Service or function relating to any of the Listed Pharmaceuticals.

REQUEST NO. 10:

All documents relating to any communication between you and any pharmaceutical trade association including, but not limited to the Pharmaceutical Research and Manufacturers of America (“PhRMA”), the National Pharmaceutical Council and the Generic Pharmaceutical Association (“GPhA”) related to AWP or the use of the Spread.

REQUEST NO. 11:

All documents relating to your practices, policies, and procedures related to the publication of pricing information for a Pharmaceutical covered by the Medicare Part B program.

REQUEST NO. 12:

All documents relating to the repackaging or relabeling of any of the Listed Pharmaceuticals, including, but not limited to:

- a) Any document indicating that any Pharmaceutical with a specific NDC has been repackaged and sold with a different NDC, but is the same Pharmaceutical; and
- b) For any repackaged drug, all documents evidencing or identifying the AWP of the original Pharmaceutical and the repackaged Pharmaceutical.

REQUEST NO. 13:

All documents you have produced to any grand jury or federal or state investigative agency or office including, but not limited to, the United States Congress, related to AWP or the use of the Spread in reimbursement under the Medicare Part B or Medicaid programs.

REQUEST NO. 14:

All documents relating to any litigation or government investigation related to AWP or the use of the Spread in which you are a party or in which you have been subpoenaed including, but not limited to, documents referencing such litigation or investigation and any pleadings, subpoenas, and transcripts of testimony.

REQUEST NO. 15:

All documents relating to any communication between you and the CMS related to Pharmaceutical pricing information.

REQUEST NO. 16:

All documents relating to any government report concerning AWP, the use of the Spread or reimbursement under the Medicare Part B and Medicaid Program, including but not limited to, the United States Department of Health and Human Services (“HHS”), the HHS Office of the Inspector General, the General Accounting Office, or any Congressional Committee.

REQUEST NO. 17:

All of your marketing or promotional materials relating to the First DataBank’s NDDF that were distributed to any of the Listed Defendants, CMS, the Department of Social Services or any other State Medicaid agency.

REQUEST NO. 18:

All contracts or agreements, and any documents related thereto, between you and any of the Listed Defendants.

REQUEST NO. 19:

All documents relating to your document retention policy.

REQUEST NO. 20:

All documents relating to, describing or showing the corporate structure of your company, including organizational charts and descriptions of the responsibilities and functions of each department.

REQUEST NO. 21:

All documents identifying all persons in your company responsible for communicating with each of the Listed Defendants and the Connecticut Department of Social Services.

REQUEST NO. 22:

All contracts or agreements, and any documents related thereto, between you and the Connecticut Department of Social Services.

REQUEST NO. 23:

All documents relating to the Customization of First DataBank's NDDF and related reference products for the Connecticut Department of Social Services.

REQUEST NO. 24:

All documents relating to pricing updates of First DataBank's NDDF and related reference products for the Department of Social Services related to any of the Listed Pharmaceuticals.

REQUEST NO. 25:

All documents relating to any communications between you and the Connecticut Department of Social Services (not encompassed in Requests 22 through 24) related to any Pricing Element, HCPC Pricing element or the Spread.

REQUEST NO. 26:

All documents relating to any inquiries made to you by any Connecticut Healthcare Provider related to the AWP of any of the Listed Pharmaceuticals.

REQUEST NO. 27:

All contracts or agreements, and any documents related thereto, between you and CMS.

REQUEST NO. 28:

All manuals, guidelines, rules, policies and procedures relating to First DataBank's NDDF, Price Probe, Price Alert or any of your other products related to Pharmaceutical pricing.

REQUEST NO. 29:

All documents relating to your acquiring pharmaceutical-price related information referred to as "Medicaid AWP" or "modified AWP," the data pricing element First DataBank published around May 2000 pursuant to its agreement with the federal and state law enforcement and regulatory agencies.

REQUEST NO. 31:

All documents relating to all guidelines, rules, policies and procedures for the assignment of the Generic Price Indicator ("GPI") and the calculation of the Generic Price Spread Indicator ("GSI").

REQUEST NO. 32:

All documents relating to the GPI and the GSI for any of the Listed Pharmaceuticals.

REQUEST NO. 33:

All documents relating to any communication between you and any other Publisher related to the reporting to any third party of any Pricing Element, HCPC Pricing Element or the use of the Spread.