

STATE OF WISCONSIN  
CIRCUIT COURT Branch 7  
DANE COUNTY

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STATE OF WISCONSIN, :  
Plaintiff, :  
v. :  
AMGEN INC., et al., :  
Defendants. :  
-----X

Case No.: 04 CV 1709  
Unclassified Civil: 30703

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**AFFIDAVIT OF PAUL OLSZOWKA IN SUPPORT OF  
SANDOZ' MOTION FOR A PROTECTIVE ORDER**

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STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF NEW YORK )

PAUL OLSZOWKA, being duly sworn, says:

1. I am an associate at the law firm of White & Case LLP, counsel for Defendant Sandoz Inc. ("Sandoz"). I am a member of the bar of the State of New York and the State Bar of Wisconsin.

2. I submit this affidavit in support of Sandoz' Motion for a Protective Order which is submitted herewith. I have been assigned to this matter since its inception and, as a result of my duties and responsibilities, am fully familiar with all the facts and circumstances described herein.

3. As set forth below, I have discussed Sandoz' position and the subject matter of the instant motion with counsel for Plaintiff and have engaged in a good faith effort to meet and confer so as to resolve this dispute without judicial intervention.

## **Introduction**

4. Plaintiff filed this action against Sandoz on November 4, 2004. Around that time, other attorneys at this Firm and I took steps to begin to identify sources of potentially relevant documents, including individual and departmental files.

5. As part of these efforts, this Firm retained a vendor on Sandoz' behalf to assist in the collection of potentially-responsive documents and to also process Sandoz' documents into images, such as PDFs and TIFFs, that can be made searchable and may also be uniquely labeled and embossed (i.e., Bates numbered) for identification purposes. To date, in excess of 800,000 potentially-responsive documents have been identified. Costs associated with this collection and processing of documents have been in excess of \$500,000.

## **Negotiations Over Plaintiff's Written Discovery Requests**

6. On May 6, 2005, on behalf of Sandoz, this Firm accepted service of Plaintiff's First Requests for Production of Documents (the "First Document Requests") and its First Set of Interrogatories (the "First Interrogatories"), true and correct copies of which are attached hereto as Exhibits 1 and 2.

7. Plaintiff's initial written discovery requests did not identify the specific Sandoz' drugs regarding which it sought discovery. Subsequently, in a letter dated May 20, 2005, Plaintiff identified fifty-two Sandoz drug products as being the subject of its discovery requests. (See Letter from R. Libman to P. Olszowka, dated May 20, 2005, a true and correct copy of which is attached hereto as Exhibit 3.) These fifty-two products, after accounting for different formulations (tablet, capsule, etc.) and package type and size (bottles of 100, 1000, etc.) amount to over three hundred different inventory items.

8. On July 15, 2005, while this action was pending in federal court and pursuant to a prior agreement with Plaintiff, Sandoz served its Responses and Objections to the Plaintiff's First Document Requests and to the Plaintiff's First Interrogatories. (True and correct copies of Sandoz' Responses and Objections are attached hereto as Exhibits 4 and 5.) Therein, Sandoz objected to such discovery on the grounds, among others, that (i) Plaintiff sought information from outside the statute of limitations period applicable to its claims; (ii) the requests and interrogatories were and vague and ambiguous to the extent that they incorporated undefined terms or terms subject to different interpretations; and (iii) the requests were unduly burdensome to the extent the discovery sought production of information or documents already in Plaintiff's possession or available in the public domain.

9. Following the remand of this action to state court, Plaintiff filed a motion to overrule Sandoz' objections and compel Sandoz' to respond to such discovery. Beginning in October 2005, I participated in several telephone discussions with Attorney Robert Libman of the Miner Barnhill Firm about Sandoz' response to the discovery demands in an effort to resolve the dispute.

10. In these discussions, Sandoz expressed its willingness to generally respond to the discovery under certain conditions. Briefly, in exchange for Plaintiff withdrawing its motion to compel, Sandoz offered to (i) begin a rolling production (in response to the document requests); (ii) to supplement its interrogatory responses; and (iii) with respect to Plaintiff's request for certain transactional sales data, to participate in what the parties have called an "informal process" during which Plaintiff's data consultant and Sandoz' IT personnel would directly confer to arrange a means for the production of this data in a form usable and understandable by Plaintiff and without imposing undue burden on Sandoz. This proposal is described in my letter

to Mr. Libman of October 18, 2005, a true and correct copy of which is attached hereto as Exhibit 6.

11. In response, Plaintiff requested that Sandoz prioritize its review and production of documents responsive to Requests Nos. 2, 5, and 6 of the State's First Document Requests. (See Letter from P. Olszowka to R. Libman, dated November 1, 2005, a true and correct copy of which is attached hereto as Exhibit 7.) With this understanding as to the priority of Sandoz' production, Plaintiff agreed to Sandoz' proposal. (See Letter from R. Libman to P. Olszowka, dated November 9, 2005, a true and correct copy of which is attached hereto as Exhibit 8 with the confidential enclosure excluded.)

12. On November 8, 2005, Plaintiff served its Written Discovery Requests No. 3 to All Defendants, a true and correct copy of which is attached hereto as Exhibit 9. Sandoz served written objections and, as part of the negotiations regarding its response to Plaintiff's prior discovery, also agreed to produce documents in response to these requests on a rolling basis.

**Sandoz' Production of Materials Under This Agreement**

13. On December 9, 2005, Sandoz began its production pursuant to this agreement. That day, Sandoz produced a DVD to Plaintiff containing approximately 20,000 pages of documents responsive to Requests No. 5 and 6 of Plaintiff's First Document Requests. These documents included Sandoz' communications with price-reporting services, marketing and sales data prepared by IMS Health, and reports prepared by IMS Health. (See Letter from P. Olszowka to R. Libman, dated December 9, 2005, a true and correct copy of which is attached hereto as Exhibit 10.) In accordance with Plaintiff's request as to the form of documents produced, Sandoz prepared TIFF files. (See Email from R. Libman to P. Olszowka dated December 1, 2005, a true and correct copy of which is attached hereto as Ex. 11.)

14. Further, on January 18, 2006, Sandoz produced data and documents responsive to Plaintiff's Request No. 2. This material consisted of an Excel file that was specifically prepared for Plaintiff containing individual Average Manufacturer Prices ("AMPs") that Sandoz had reported to the Centers for Medicaid and Medicare; this AMP data covered fifty-two drug types (and each of their formulations), by quarter, since 1993 through 2004. (See Letter from P. Olszowka to R. Libman, dated January 18, 2006, a true and correct copy of which is attached hereto as Exhibit 12.)

15. Sandoz produced another DVD containing additional 10,000 pages of documents on January 30, 2006. These documents consisted of the initial set of material responsive to Plaintiff's Document Requests Nos. 3 and 4. (See Letter from P. Olszowka to R. Libman, dated January 30, 2006, a true and correct copy of which is attached hereto as Ex. 13.)

16. On a separate track, Sandoz has been engaged in efforts to respond to Plaintiff's request for production of transactional sales data. It has provided Plaintiff with the so-called "data dictionaries" of the contents of its databases. (See Letter from P. Olszowka to R. Libman, dated December 2, 2005, a true and correct copy of which is attached hereto as Exhibit 14, with the confidential enclosures excluded.) Moreover, on January 20, 2006 and on February 14, 2006, Sandoz made its Chief Information Officer and a Senior Software Engineer available by telephone to answer questions posed by Plaintiff's data consultant about the transactional data requested by Plaintiff.

17. At Plaintiff's request, Sandoz IT personnel also have performed "test runs" on each of the company's two databases that have been identified as containing data responsive to Plaintiff's request. (See Letter from R. Libman to P. Olszowka, dated January 23, 2006, a true and correct copy of which is attached hereto as Exhibit 15.) The results of these "test runs" have

been provided to Plaintiff for its consultant to analyze. (See Letter from P. Olszowka to R. Libman, dated February 17, 2006; Letter from P. Olszowka to R. Libman, dated March 14, 2006, true and correct copies of which are attached hereto as Exs. 16 and 17.)

**Other Sandoz' Documents Obtained by Plaintiff**

18. Sandoz is a defendant in other related litigation, including an action brought by the state of California which is part of the multidistrict proceedings before Judge Saris, In re Pharmaceutical Industry Average Wholesale Pricing Litigation, MDL No. 1456 (D. Mass.). Prior to the filing of that action, California served Sandoz with an investigative subpoena in response to which Sandoz produced nearly 140,000 pages of material.

19. On or around November 9, 2005, I learned based on a document provided to me by Mr. Libman and discussions with a representative of California's Attorney General that Plaintiff has obtained copies of these documents that Sandoz had produced to California.

**Plaintiff's March 23, 2005 Notice of Deposition**

20. On March 23, 2006 Plaintiff served its Notice of Deposition of Sandoz Inc. (the "Notice of Deposition"), a true and correct copy of which is attached hereto as Exhibit 18. Although in prior discussions with Mr. Libman, he had indicated that Plaintiff would seek to take depositions of Sandoz employees at some point in the litigation, we never discussed the appropriate timing of any such deposition nor did he provide any indication to me of Plaintiff's intent to seek a deposition at this juncture.

21. On April 14, 2005, I spoke by telephone to Mr. Libman regarding the Notice of Deposition. After I explained that Sandoz would be serving written objections, we had some limited discussion regarding the appropriate timing for this deposition. Among other things, I inquired why Plaintiff believed that discovery should continue in light of the Court's

April 3, 2006 partial ruling on Defendants' Motion to Dismiss that struck Plaintiff's Amended Complaint and directs Plaintiff to file an amended pleading. (See Partial Decision and Order, State of Wisconsin v. Amgen Inc., No. 04-CV-1709 (April 3, 2006), a true and correct copy of which is attached hereto as Exhibit 19.) Thereafter, Mr. Libman informed me that it was Plaintiff's position that the April 3rd Order had no effect on the timing of Sandoz' response to Plaintiff's discovery because what will be Plaintiff's Second Amended Complaint would not change the substance of its claims, and, in particular, will not add, drop, or otherwise change the Sandoz' products at issue. Mr. Libman conveyed a similar position with respect to the Notice of Deposition, although he informed me that Plaintiff would be willing to consider changing the proposed date of May 10, 2006 for reasons of convenience to any witness or counsel, Plaintiff would not agree to postponing the deposition at least until after it files its amended pleading. Thereafter, Sandoz served its objections to the Notice of Deposition on April 14, 2006, a true and correct copy of which is attached hereto at Exhibit 20.

22. On April 25, 2006, I conferred again with Mr. Libman regarding the Notice of Deposition and Sandoz' objections thereto. Our discussion focused on two issues: (i) whether discovery should progress in light of the April 3rd Order, and (ii) the scope of the Notice of Deposition. Mr. Libman indicated that, while he was amenable to holding discussions about the scope of the topics, and to providing Sandoz with additional detail regarding certain topics, it was Plaintiff's intent to proceed with the deposition before it amended its complaint and despite the fact Sandoz' production efforts still were ongoing pursuant to the parties' prior understanding. (See Letter from R. Libman to P. Olszowka, dated April 25, 2006; Letter from P. Olszowka to R. Libman, dated April 28, 2006, true and correct copies of which are attached hereto as Exhibits 21 and 22.)

**Sandoz' Objection Regarding the Number of Potential Deponents**

23. During these discussions, I explained to Mr. Libman that, given the breadth of the deposition topics and the time period for which Plaintiff sought testimony regarding these topics, multiple witnesses would likely be required.

24. This determination is based on a preliminary review of Sandoz personnel records which reveal that since 1993 through the date of the Complaint, at least fifteen different individuals have held the titles of "Senior Vice President of Sales and Marketing," "Vice President of Sales," "Vice President of Sales, Generics," "Vice President of Sales and Marketing, New Ventures," "Manager of Pricing & Demand," and "Senior Manager of Pricing Financial Analysis" many of whom are no longer employed by Sandoz.

**Sandoz' Objection Regarding the Overlap Between the Notice and Pre-Existing Document Requests**

25. Sandoz has also objected to the Notice of Deposition on the ground that the Topics, and their attendant document requests, seek material requested by Plaintiff in its initial requests to which Sandoz is still engaged in the process of identifying and reviewing material. Accordingly, Sandoz has further objected to the notice on the ground that Plaintiff is attempting to circumvent the understanding of the parties as to the time Sandoz needed (and would be allowed) to conduct its review and production. (See Ex. 20 (Sandoz' Objections to the Notice of Deposition) ¶ 1.)

26. For example, the Notice of Deposition requests that Sandoz produce at the deposition:

All evidence or information showing that any of the targeted drugs was sold at a price equal to or greater than the published AWP from 1993 to present.

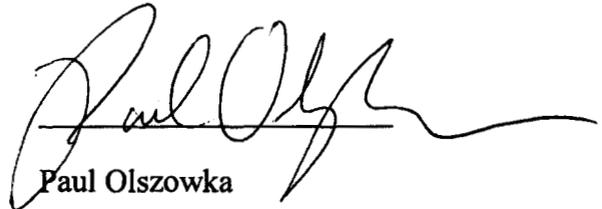
(See Ex. 18 (Notice of Deposition) at p. 2.)

27. As Sandoz understands this request, it would require a search of the prices at which Sandoz products have been sold since 1993, the very transactional sales data responsive to Document Request No. 1 that Sandoz has agreed to produce and regarding which is engaged in discussions with Plaintiff about the form of production. (See Ex. 1 (First Document Requests) at p. 3.)

28. In addition to transactional sales data, Sandoz also understands this request in the Notice of Deposition for “all evidence and information” to require a search of Company documents that refer to either the prices at which Sandoz drugs have been sold since 1993 or published AWP’s for Sandoz drugs since 1993. In this manner, this request is substantially similar to Plaintiff’s Document Requests Nos. 3 and 4 which seek documents that “discuss or comment on the difference (or Spread) between any Average Wholesale Price... and the list or actual sales price (to any purchaser)” of Sandoz’ products or that “contain[ ] an average or composite price identified by you in response to Interrogatory No. 1.” (See Ex. 1 (First Document Requests) at p. 3.)

29. The documents that could have to be analyzed to prepare for this deposition are voluminous. So far, Sandoz has identified (and has been in the process of reviewing) files from fifteen custodians, including salespersons, sales executives, and marketing personnel, whose files could contain documents responsive to the State’s Document Requests Nos. 3 and 4. These files contain approximately 380,000 documents, totaling over 1.3 million pages.

30. Since beginning its production to Plaintiff, Sandoz has had a team of four attorneys reviewing these documents on a full-time basis and has incurred substantial costs. Based on the progress and Sandoz' review team thus far, it is estimated that completing the initial review of these documents will require approximately six additional months.



Paul Olszowka

Sworn to before me  
This 4<sup>th</sup> day of May 2006



Notary Public

**COLIN M. SHAW**  
Notary Public, State of New York  
No. 01SH6119357  
Qualified in New York County  
Commission Expires Nov 29 2008