

STATE OF WISCONSIN
CIRCUIT COURT – BRANCH 7 - DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., *et al.*,

Defendants.

Case No. 04-CV-1709

NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER

PLEASE TAKE NOTICE that Defendant Teva Pharmaceuticals USA Inc., (“Teva”), by counsel, will bring the following motion at a date and time to be determined by the Special Master, on the deposition that is the subject of this motion as scheduled for May 3, 2006:

MOTION

Pursuant to WIS. STATS. §§804.05(3)(a)(2) and (4), Teva, by counsel, respectfully moves the Court for an order adjourning the §804.05(2)(e) deposition of a Teva representative currently scheduled for May 3, 2006, to a date after Teva has had the opportunity to complete its review of the documents previously requested by the State and has then had a reasonable opportunity, based upon that review, to identify and prepare an appropriate representative (or representatives, if necessary) to testify on the broad, sweeping subject matters that comprise the deposition notice.

Teva brings this motion because requiring a representative of Teva to testify at a §804.05(2)(e) deposition in Madison, Wisconsin, before Teva has had the opportunity to complete a review of the documents that the Plaintiff has requested so that Teva can properly

identify and prepare an appropriate representative is prejudicial to Teva, unduly burdensome, highly inconvenient, and not in the interests of justice. Teva also requests that Madison, Wisconsin be stricken as the location of the deposition.

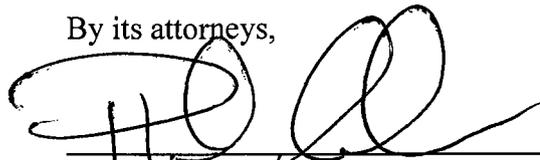
The grounds for Teva's motion are more fully set forth in the memorandum in support of this motion and accompanying affidavits, which are filed herewith.

WHEREFORE, Teva respectfully requests that this Court enter an order: 1) continuing the § 804.05(2)(e) deposition of a Teva representative currently scheduled for May 3, 2006, to a mutually-agreeable date which affords Teva a reasonable opportunity under the circumstances to prepare a representative deponent; 2) striking Madison, Wisconsin as the location of the deposition in favor of a location consistent with § 804.05(3)(b)(1) or mutually agreeable to Wisconsin and Teva; and 3) granting such other and further relief as this Court deems just and proper under the circumstances.

Dated: April 26, 2006

TEVA PHARMACEUTICALS USA, INC.

By its attorneys,



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STATE OF WISCONSIN
CIRCUIT COURT – BRANCH 7 - DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., *et al.*,

Defendants.

Case No. 04-CV-1709

**MEMORANDUM IN SUPPORT OF DEFENDANT TEVA PHARMACEUTICALS USA,
INC.'S MOTION FOR PROTECTIVE ORDER**

INTRODUCTION

In this case, the State of Wisconsin (“Wisconsin”) has demanded that Teva Pharmaceuticals USA Inc., (“Teva”) produce a representative deponent within the next several weeks to testify on a broad, wide-ranging variety of topics covering the past 13 years, prior to Teva’s producing a single document in this case. Wisconsin has candidly stated that its purpose in rushing to depose a Teva representative is to gain admissions by which Wisconsin would attempt to cure the deficiencies of its Amended Complaint noted by Judge Krueger.

Wisconsin’s heavy-handed technique should not be sanctioned. Wisconsin was not amenable to Teva’s suggestion that discovery in this case be conducted in a sequence which would allow Teva the time and opportunity to investigate fully the subjects of the Deposition Notice and to produce relevant documents to Wisconsin prior to the representative deposition. Teva’s proposed sequence of events is not only more constructive and efficient for both Wisconsin and Teva, but is also necessary to avoid undue prejudice to Teva.

BACKGROUND

This case was brought in June 2004 by the State of Wisconsin (“Plaintiff” or “Wisconsin”) against 20 defendants, including Teva, alleging fraudulent reporting of pharmaceutical pricing of each and every one of Defendants’ drugs from 1993 to the present. In November, 2004, Wisconsin filed an Amended Complaint, naming 37 defendants, again alleging fraudulent reporting of pharmaceutical pricing of each and every one of defendants’ drugs from 1993 to the present. Defendants filed various motions to dismiss the Amended Complaint.

While Defendants’ Motions to Dismiss the Amended Complaint were being briefed, Wisconsin served initial written discovery on defendants, including Teva. Unlike a large number of the other defendants in this case, Teva has not been involved in other related drug pricing litigation where it has already had to produce similar relevant documents in any significant volume. Thus, unlike other defendants, Teva is starting discovery from scratch.

In May 2005, the Court entered a protective order in this case, and denied Defendants’ request that discovery in this case be stayed until such time as the Court had ruled on Defendants’ Motions to Dismiss.

Following the Court’s denial of a stay of discovery, Teva began the process of gathering potentially responsive documents in connection with not only this case, but several additional cases around the country involving questions of law and fact regarding Teva’s drug pricing. (Affidavit of Margaret F. Wrigley, Ex. A, ¶¶ 2-3.) Thus, there is substantial overlap in discovery in these cases. In June 2005, Teva identified approximately 185,698 documents, representing approximately 359,451 pages, comprised of documents located in Teva’s offices as well as archived documents in storage. (*Id.* ¶ 4.)

Teva retained an outside vendor to scan the documents into electronic format and to prepare a database of those documents. (*Id.* ¶ 5.) This process began in early August 2005, when the vendor sent employees and equipment to Teva's offices to begin the process of scanning the documents located in Teva's offices. (*Id.* ¶ 6.) Teva paid for six of the vendor's workers to work full-time at Teva with four scanners. (*Id.* ¶ 7.) The vendor also scanned the archived documents located in storage, but at the vendor's own facilities, and then returned those documents to storage. (*Id.* ¶ 8.) The vendor's scanning and subsequent coding process was completed with the delivery of a database to Teva's counsel in December 2005. (*Id.* ¶ 9.) The review of the database is inherently time-consuming and complex, given the nature of Teva's documents, some of which are hundreds of pages long, as well as the fact that Teva's documents are being reviewed in connection with not just this litigation, but others around the country.

During the late summer and early fall of 2005, Teva engaged in discussions with Wisconsin's counsel regarding narrowing the scope of discovery served by Wisconsin, (Affidavit of Lester A. Pines, Ex. B, ¶ 3) which Teva viewed as overly broad and burdensome. At the same time, Teva voluntarily offered to provide Wisconsin with documents that it had previously provided to the Florida Attorney General's Office, which are the only documents Teva has produced to date in any drug pricing matter. (*Id.* ¶ 4.) Wisconsin declined Teva's offer, stating it was not interested in receiving those documents. (*Id.* ¶ 5.) Counsel for Teva and Wisconsin also had limited discussions about the appropriate scope of initial discovery, including the initial drug universe that would be at issue. (*Id.* ¶ 6.) Thereafter, counsel for Wisconsin initiated no further discussions with Teva about production of written discovery. (*Id.* ¶ 7.) Nor has Wisconsin sought to compel Teva to respond. Nevertheless, Teva, with the investment of considerable time and

expense, has been diligently making preparations so that it can comply with its discovery obligations.

Several months afterwards, in March 2006, Wisconsin served a Notice of Deposition (“Deposition Notice,” Ex. C) upon Teva, requiring Teva to designate a witness to give testimony in Madison, Wisconsin, concerning:

1. The evidence or information, if any, about which it is aware, which shows that any of the [16] drugs listed on the attached sheet (“targeted drugs”) were purchased by retail pharmacies at a price equal to or greater than the then current Average Wholesale Price (AWP) published in either First Data Bank or the Red Book in any year from 1993 to the present.
2. The evidence or information about which it is aware which shows, or which defendant believes may tend to show, that the published AWP was higher than the price pharmacies were actually paying for any of the targeted drugs in each year from 1993 to the present.
3. What contacts Teva, or its subsidiaries, have had with First Data Bank or the Red Book about any of the targeted drugs.
4. Whether Teva, or any of its subsidiaries ever communicated to either First Data Bank or the Red Book that the published Average Wholesale Prices of their drugs were neither a price that was actually an average of wholesale prices, nor a price that was actually paid by the retail classes of trade and, if so, when such communications took place and of what they consisted.
5. The Average Manufacturer’s Price (AMP) reported to the federal government of each of the targeted drugs in each year since 1993.
6. Any evidence which shows that the actual average wholesale price at which any of the targeted drugs sold in any given year was greater than the AMP.

(*Id.* at 1-2.) The Deposition Notice also required Teva to bring to the deposition documents responsive to the six deposition categories. (*Id.* at 2.)

On April 3, 2006, the Court issued a Partial Decision and Order (Ex. D) finding that Wisconsin did not meet the pleading requirements for fraud. The Court ordered Plaintiff to amend the Complaint by June 5, 2006 and to substantially re-plead its claims involving fraud.

(*Id.* at 14.) The Court held that the Plaintiff’s fraud and reliance-based claims “failed to set forth the activities of each defendant and to put everyone on notice for what activities, occurring when

and how it wishes to hold each defendant responsible.” (*Id.* at 13.) The Court specifically stated that each Defendant “is entitled to know, with as much detail as Plaintiff can provide, **which** of its drugs are involved and **what** (name, date) publication of AWP is false, and the **actual** price that should have been published.” (*Id.* (emphasis in the original).)

On April 19, 2006, Teva’s counsel held a telephone conference with Wisconsin’s counsel regarding the Deposition Notice. (Pines Aff., Ex. B, ¶ 8.) During this conference, because Teva, unlike other defendants in this matter, has not been involved in litigation that required it to produce the types of documents demanded by Wisconsin, Teva’s counsel suggested a framework under which Teva would first produce documents to Wisconsin and that the representative deposition be conducted after Teva had done so. (*Id.* ¶ 9.)

Wisconsin’s counsel indicated that, while he was amenable to moving the date of the deposition by a week or two, he wanted to take the deposition even without having any Teva documents. (*Id.* ¶10.) Wisconsin’s counsel stated that he felt he needed to take the deposition so as to gain admissions by which Wisconsin could amend its complaint with respect to Teva in conformance with the Court’s April 3, 2006 Order. (*Id.* ¶ 11.)

Counsel for Teva also requested clarification as to the drugs for which Wisconsin sought information. (*Id.* ¶ 12.) Wisconsin’s counsel indicated that he would provide that clarification, but not if Teva would not agree to the deposition proceeding within a week or two of May 3, 2006. (*Id.* ¶ 13.) The parties’ counsel also discussed the location of the deposition. (*Id.* ¶ 14.) Teva and Wisconsin were not able to come to an agreement on the timing, location, or scope of the deposition. (*Id.* ¶ 15.) Teva subsequently advised Wisconsin that it would seek a protective order.

ARGUMENT

Under WIS. STATS. § 804.01(3)(a), the Court has broad authority to control discovery, including the sequence, terms, conditions, time, and place of discovery. Upon a showing of good cause, “the court may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense....” WIS. STATS. § 804.01(3)(a). Specifically, the Court has the authority to control the timing and sequence of discovery in the interests of doing substantial justice to the parties. *Id.* 804.01(4).

Wisconsin has admitted that it seeks to take a Teva deposition so as to cure the defects in its complaint. This is not a proper purpose for discovery. *State ex rel. Dudek v. Circuit Ct. for Milwaukee Co.*, 34 Wis. 2d 559, 576 (1967) (“Pretrial discovery is designed to formulate, define and narrow the issues to be tried, increase the chances for settlement, and give each party opportunity to fully inform himself of the facts of the case and the evidence which may come out at trial.”).

Wisconsin should not have filed its complaint without the information to meet Wisconsin pleading standards. Prior to filing suit, Wisconsin had an obligation to conduct an investigation to determine whether its wide-ranging, universal allegations of fraud had evidentiary support. WIS. STATS. § 802.05(2)(c). Plainly, Wisconsin failed to do so, given Judge Krueger’s April 3 Order, (Ex. D at 13, stating that “Plaintiff seems as though it wants to put the burden on each company to come forward with an explanation for each and every AWP listing since 1992. This is not permissible.”) and Wisconsin’s admission that it does not have the evidence to adequately re-plead its complaint with respect to Teva. The mechanism of discovery is meant to prepare for trial, not to put a party to onerous expense while a plaintiff goes on a fishing expedition to try to

find evidence to support a viable complaint. But that is precisely what Wisconsin hopes to achieve.

Plainly, Wisconsin's purpose in demanding a representative deponent at this very early stage in the proceedings is to attempt to rush Teva into submitting a deponent for sworn testimony, who, on the basis of rushed and incomplete preparation, might make potentially ill-informed, erroneous statements that Wisconsin would attempt to treat as admissions on behalf of Teva on a wide-ranging array of vague topics. This risk is particularly great where, as here, Teva has not had an opportunity to fully gather, digest, and analyze its own information, and to responsibly prepare a representative deponent. This result would be highly prejudicial to Teva under the circumstances in not just this but other state pricing litigation.

During the parties' discovery conference, Wisconsin's counsel suggested that it should be easy for Teva to prepare a representative deponent. But even a surface analysis of the Deposition Notice shows why that it not at all true.

As an example, the first subject of the Deposition Notice requires Teva to produce a representative deponent who is prepared to testify about "[t]he evidence or information, if any, about which it is aware, which shows that any of the [16] drugs listed on the attached sheet ("targeted drugs") were purchased by retail pharmacies at a price equal to or greater than the then current Average Wholesale Price (AWP) published in either First Data Bank or the Red Book in any year from 1993 to the present." (Ex. C at 1.)

Wisconsin's counsel has cynically suggested that Teva needs no time to search for evidence that Wisconsin would view as potentially exculpatory because none exists. Plainly, Plaintiff's counsel would prefer for Teva to submit a witness for testimony without having had a

reasonable opportunity to determine what evidence exists, pro or con, and then to try to bind Teva to an ill-informed statement regarding the state of the evidence.

Contrary to Wisconsin's express and implied statements during the discovery conference, it would not be a simple matter to prepare a representative deponent in these circumstances since there is no one single person who has all of this information. Thus, to adequately prepare one or more representative deponents for this topic, Teva would need not only to complete its review of all of the approximately 180,000 documents in the database, but also to review all archived documents, all electronic documents (including archived back-ups), and interview all current and former Teva employees *back to 1993* and their documents to try to determine what evidence exists.¹ If it were not given an opportunity to do so, the potential prejudicial effect on Teva of presenting an unprepared deponent is plain, particularly given the stated aim of Wisconsin in conducting this deposition. Moreover, if Wisconsin is allowed to proceed with a representative deposition before Teva has even produced any documents, Teva is confident that after it produces documents Wisconsin will seek another representative deposition, giving unfairly giving Wisconsin two bites at the apple.

Teva wants to be clear about its position. By this motion, it is not seeking an order that a representative deposition not be had, or that it not be had until such time as Wisconsin cures the defects in its Amended Complaint. Instead, Teva's position is that if Wisconsin chooses to insist on taking representative depositions about the heart of this case, that it is only fair, equitable and just that Teva be given a reasonable opportunity to prepare a representative to provide sworn testimony on its behalf. Given the subject breadth and complexity and the temporal scope of the

¹ The second, third, fourth, and sixth topics in the Deposition Notice would require a similar investigation. The fifth topic, regarding reported AMPs, would not be as onerous, but would require clarification from Wisconsin as to which drugs it wants information. Wisconsin's counsel refused to provide clarification if Teva wished to move the deposition more than a week or two past the scheduled May 3, 2006 date.

Deposition Notice, as well as the unique nature of a representative deposition, six weeks is simply not a reasonable period of time for Teva to prepare for such a deposition.

Finally, whenever the deposition occurs, it is not proper for the deposition to take place in Madison as required by the Deposition Notice. Teva is a non-resident of Wisconsin, whose corporate offices are in the Philadelphia, Pennsylvania area. Teva has no offices or physical presence in Wisconsin. (Wrigley Aff., Ex. A, ¶ 10.) By statute, therefore, any deposition of Teva is to take place within 100 miles of Teva's residence in Pennsylvania or within 100 miles of where Teva transacts business in person. WIS. STATS. § 804.05(3)(b)(1). Teva has no physical presence or offices in Wisconsin, and so Madison is an improper location for any deposition taken of it.²

² Wisconsin has argued with respect to at least one other defendant that Madison is a proper deposition location because it could (although it has not) served a subpoena upon that defendant's registered agent in Wisconsin, CT Corporation pursuant to Wis. Stats. 804.05(3)(b)(3). Teva notes this only to state that it does not maintain a registered agent in Wisconsin.

In addition, Teva incorporates by reference the law and argument regarding the proper location of a representative deposition of a non-resident defendant in Merck & Co., Inc.'s letter to Judge Eich of April 24, 2006.

CONCLUSION

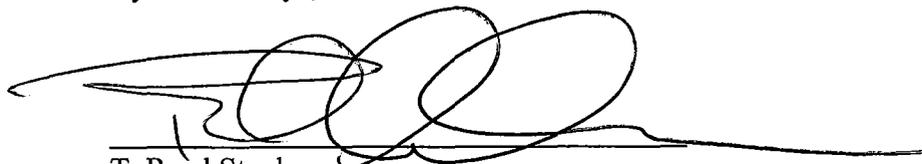
For the foregoing reasons, Teva respectfully requests that this Court enter an order:

1) continuing the § 804.05(2)(e) deposition of a Teva representative currently scheduled for May 3, 2006, to a mutually-agreeable date which affords Teva a reasonable opportunity under the circumstances to prepare a representative deponent; 2) striking Madison, Wisconsin as the location of the deposition in favor of a location consistent with § 804.05(3)(b)(1) or mutually agreeable to Wisconsin and Teva; and 3) granting such other and further relief as this Court deems just and proper under the circumstances.

Dated: April 26, 2006

TEVA PHARMACEUTICALS USA, INC.

By its attorneys,



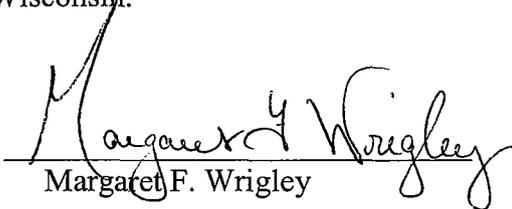
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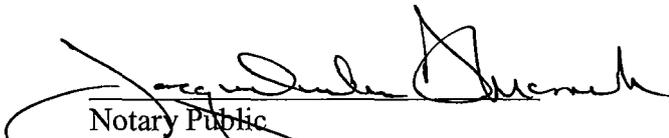
Exhibit A

4. Teva identified approximately 185,698 documents, representing approximately 359,451 pages, comprised of documents located in Teva's offices as well as archived documents in storage.
5. Teva retained an outside vendor to scan the documents into electronic format and to prepare a database of those documents.
6. In early August 2005, the vendor sent employees and equipment to Teva's offices to begin the process of scanning the documents located in Teva's offices.
7. Teva paid for six of the vendor's workers to work full-time at Teva with four scanners.
8. The vendor also scanned the archived documents located in storage, but at the vendor's own facilities, and then returned those documents to storage.
9. The vendor's scanning and subsequent coding process of all the documents was completed with the delivery of a database to Teva's counsel in December 2005.
10. Teva has no offices or physical presence in Wisconsin.

FURTHER AFFIANT SAY NOT.


Margaret F. Wrigley

Subscribed and sworn to before me
this 27th day of April, 2006


Notary Public
Montgomery County, Pennsylvania
My commission expires: 5-9-09

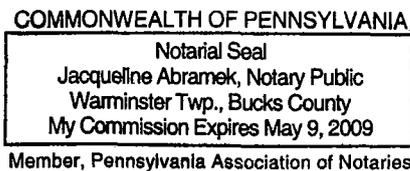


Exhibit B

STATE OF WISCONSIN,

Plaintiff,

Case No. 04-CV-1709

AMGEN, INC. et al

Defendants.

AFFIDAVIT OF LESTER A. PINES

STATE OF WISCONSIN)
) ss.
 COUNTY OF DANE)

Lester A. Pines, being first duly sworn on oath, deposes and says:

1. I am an adult resident of the State of Wisconsin, licensed to practice law in this state. The statements I make hereinafter are based on my personal knowledge.

2. I am one of the attorneys representing Teva in this case.

3. During the late summer and early fall of 2005, I and another counsel for Teva engaged in discussions with counsel for the Plaintiff State of Wisconsin ("Wisconsin") regarding narrowing the scope the discovery that had been served by Wisconsin.

4. During one of these discussions, Teva voluntarily offered to provide Wisconsin with documents that it had previously provided to the Florida Attorney General's Office, which are the only documents Teva has produced to date in any related matter.

5. Attorney Charles Barnhill, one of the attorneys for Wisconsin declined Teva's offer, stating it was not interested in receiving those documents.

6. During these conversations, we had limited discussion with Attorney Barnhill about the appropriate scope of initial discovery, including the initial drug universe that would be at issue.
7. Thereafter, counsel for Wisconsin initiated no further discussions with Teva about production of written discovery.
8. On April 19, 2006, I and other counsel for Teva held a telephone conference with Attorney Barnhill regarding the notice of a representative deposition previously served by Wisconsin.
9. During this conference, because Teva, unlike the other defendants in this matter, has not been involved in litigation that required it to produce the types of documents demanded by Wisconsin, we suggested a framework under which Teva would first produce documents to Wisconsin and that the representative deposition be conducted after we had done so.
10. Attorney Barnhill indicated that, while he was amenable to moving the date of the deposition by a week or two, he wanted to take the deposition even without having any Teva documents.
11. He stated that he felt he needed to take the deposition so as to gain admissions by which Wisconsin could amend its complaint with respect to Teva in conformance with the Court's April 3, 2006 Order.
12. During this conference, we also requested clarification as to the drugs for which Wisconsin sought information.

13. Attorney Barnhill indicated that he would provide that clarification, but not if Teva would not agree to the deposition proceeding within a week or two of May 3, 2006.
14. During this conference, we also discussed the location of the deposition.
15. Through these discussions, Teva and Wisconsin were unable to come to an agreement on the timing, location, or scope of the deposition.
16. I make this affidavit in support of the motion of Defendant Teva Pharmaceuticals U.S.A. Inc. ("Teva") for a protective order.



Lester A. Pines

Subscribed and sworn to before me
this 26th day of April, 2006



Notary Public

Dane County, Wisconsin

My commission expires: 12/13/09

Exhibit C

STATE OF WISCONSIN	CIRCUIT COURT Branch 7	DANE COUNTY
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STATE OF WISCONSIN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 04-CV-1709
)	Unclassified – Civil: 30703
AMGEN INC., et al.,)	
)	
Defendants.)	
)	

NOTICE OF DEPOSITION OF DEFENDANT TEVA PHARMACEUTICALS USA, INC.

To: Lester A. Pines Cullen Weston Pines & Bach 122 West Washington Ave., #900 Madison WI 53703-2718 Tel: 608-251-0101 Fax: 608-251-2883	Elizabeth I. Hack Sonnenschein Nath & Rosenthal LLP East Tower, Suite 600 1301 K Street, NW Washington DC 20005 Tel: 202-408-9236 Fax: 202-408-6399
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Pursuant to Wis. Stats. §§ 804.05(2)(e), 885.44 and 885.46 plaintiff will take the videotaped deposition of defendant Teva Pharmaceuticals USA, Inc., on May 3, 2006, at 9:30 a.m. at the offices of the Attorney General of the State of Wisconsin located at 17 West Main Street, Madison WI 53703. The deposition is to be visually recorded and preserved pursuant to the provisions of Wis. Stats. §§ 885.44 and 885.46. Teva shall designate a person or persons to testify under oath about the following topics:

1. The evidence or information, if any, about which it is aware, which shows that any of the drugs listed on the attached sheet (“targeted drugs”) were purchased by retail pharmacies at a price equal to or greater than the then current Average Wholesale Price (AWP) published in either First Data Bank or the Red Book in any year from 1993 to the present.
2. The evidence or information about which it is aware which shows, or which defendant believes may tend to show, that the published AWP was higher than the

price pharmacies were actually paying for any of the targeted drugs in each year from 1993 to the present.

- 3. What contacts Teva, or its subsidiaries, have had with First Data Bank or the Red Book about any of the targeted drugs.
- 4. Whether Teva, or any of its subsidiaries, ever communicated to either First Data Bank or the Red Book that the published Average Wholesale Prices of their drugs were neither a price that was actually an average of wholesale prices, nor a price that was actually paid by the retail classes of trade and, if so, when such communications took place and of what they consisted.
- 5. The Average Manufacturer's Price (AMP) reported to the federal government of each of the targeted drugs in each year since 1993.
- 6. Any evidence which shows that the actual average wholesale price at which any of the targeted drugs sold in any given year was greater than the AMP.

The designated deponents shall bring with them 1) 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 the present, 2) for the same period all evidence or information showing that actual average wholesale prices of its targeted drugs were less than the published AWP, 3) for the same time period any evidence of communications between Teva and the Red Book and/or First Data Bank about or concerning any of the targeted drugs, 4) for the same time period the reported AMPs of each targeted drug, and, 5) for the same time period any evidence defendant has showing that the actual average wholesale price of any of the targeted drugs was greater than the reported AMP.

Dated this 16th day of March, 2006.



One of Plaintiff's Attorneys

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Attorneys for Plaintiff,
State of Wisconsin

**Targeted Drugs
March 16, 2006**

Notice of Deposition of Defendant Teva Pharmaceuticals USA, Inc.

**Acetaminop
Amoxicilli
Carbamazep
Carbidopa
Cephalexin
Clonazepam
Diltiazem
Gemfibrozi
Glyburide
Lisinopril
Mirtazapin
Nabumetone
Nifedipine
Oxycodone
Propoxyph
Sulfametho**

STATE OF WISCONSIN	CIRCUIT COURT	DANE COUNTY
	Branch 7	
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STATE OF WISCONSIN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 04-CV-1709
)	Unclassified - Civil: 30703
AMGEN INC., et al.,)	
)	
Defendants.)	
)	
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Plaintiff State of Wisconsin's Notice of Deposition of Defendant Teva Pharmaceuticals USA, Inc., to be served by facsimile upon Lester A. Pines, (608) 251-2883 and Elizabeth I. Hack, (202) 408-6399 on March 16th, 2006.

I also certify that I caused a true and correct copy of this document to be served on counsel of record by transmission to LNFS pursuant to Order dated December 20th, 2005.

Dated this 16th day of March, 2006.



Charles Barnhill

Exhibit D

STATE OF WISCONSIN,

Plaintiff,

Case No. 04-CV-1709

v.

AMGEN INC., et. al.,

Defendants.

PARTIAL DECISION AND ORDER

EXPLANATION

The unusual step of issuing different parts of this Decision at different times is being taken for two reasons:

1. *In recognition that composing and issuing a decision addressing ALL the many aspects of Defendants' motion to dismiss is taking an inordinately long time, and*
2. *Substantial re-pleading is being Ordered in the first sections of this Decision. That amending process can be undertaken while the balance of the motion is being addressed.*

BACKGROUND¹

Plaintiff, the State of Wisconsin (State), is suing thirty-seven manufacturers of prescription drugs. The claim is that these companies took "advantage of the enormously complicated and non-transparent market for prescription drugs to engage in an unlawful scheme to cause Wisconsin and its

¹ This background section will form the basis for future rulings and will not be repeated.

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citizens and payers to pay inflated prices for prescription drugs.” First Amended Complaint, ¶ 1.

According to the Amended Complaint, the prescription drug market is quite complex, difficult to understand, and somewhat unusual. First, the market itself is composed of a large number of products. The market is allegedly made up of over 65,000 National Drug Codes - a separate code for each quantity of each drug manufactured by each manufacturer. Second, in the prescription drug market the entity that decides to purchase the product and the entity that pays for the product are often separate. Allegedly, “providers” such as physicians, hospitals and pharmacies initially purchase drugs from manufacturers for resale to patients. “Payers,” private insurance companies, self-insured entities and government entities, pay the “providers” for the drugs. The “providers,” however, in the prescription drug case function not only as middlemen or resellers, but also as the decision-makers regarding which particular drugs should be purchased by the patient. This dual role played by “providers” creates, Plaintiff alleges, the opportunity for a “spread.” A “spread” is created when the “provider” is able to sell a drug to a “payer” for a price higher than the “provider” paid to the manufacturer. Third, Plaintiff alleges that the entire system, including pricing information, is shrouded in secrecy enforced by contractual agreement and supported by mutual self-interest.

Therefore, the State claims, it is difficult to gather accurate pricing information for the prescription drug market. For this reason, in determining

reimbursement, the State allegedly relies heavily on information from Defendants themselves. Among the pricing information available from Defendants are prices known as Average Wholesale Price (AWP) and Wholesale Acquisition Cost (WAC), both of which are prices disseminated by the Defendants to the public via publication in certain medical compendia. Far from representing the actual price paid by an average provider, however, virtually every reported AWP is an inflated – some grossly - number which Defendants have used simply as a starting point from which to negotiate “spreads.” They have continued to report such AWP’s, Plaintiff alleges, even though they are well aware that Wisconsin’s drug reimbursement programs rely almost entirely on the reported AWP’s. Similarly, Defendants have allegedly represented that WAC’s were wholesaler “break even” prices, but have used WAC’s as prediscount prices.

Furthermore, Defendants have allegedly effectively concealed the existence and extent of the price misreporting via various schemes. First, drug manufacturers allegedly purport to sell drugs to “providers” at a stated price, e.g. WAC, but then make use of “charge backs,” free drugs and/or phony grants to arrive at a lower actual acquisition cost. Second, agreements between Defendants and “providers” allegedly often contain contractual provisions requiring secrecy. Finally, Defendants allegedly charge different prices to different sorts of “providers,” allegedly further concealing the actual prices.

The inaccuracy of the published prices and Defendants' efforts to keep the fact and extent of the misreporting secret have, Plaintiff alleges, resulted in injury to the State and its citizens. The State in funding its portion of the Medicaid program expects to spend approximately \$610 million on pharmaceuticals in fiscal year 2004-2005. Wisconsin citizens eligible for and participating in Medicare Part B make co-payments and premium payments to secure certain pharmaceuticals. Each has allegedly relied on Defendants' reported prices, particularly AWP's, and has, thus, overpaid as a result of Defendants' overstated reported prices.

In addition, private "payer" organizations in Wisconsin have allegedly been harmed by Defendants' dealings with Pharmacy Benefit Managers (PBMs). PBMs are organizations which allegedly gather together information regarding cost, availability and comparability of many drugs, and offer to "payers" their services in negotiating lower drug prices. By the late 1990's, four PBMs allegedly controlled approximately 70% of what Plaintiff terms the "reimbursement market." Defendants have allegedly paid fees and rebates to these four major PBMs, some of which fees and rebates have been kept secret from "payer" clients and some of which rebates are based on AWP's. These fees and rebates, Plaintiff alleges, have created an incentive for PBMs to list pharmaceuticals with inflated AWP's on their formularies contrary to their "payer" clients' interests. Thus, Plaintiff claims the State, its citizens and private "payers" doing business in Wisconsin have been harmed by Defendants.

Plaintiff lists five Counts in the Amended Complaint. It alleges that Defendants have violated Wis. Stat. §§ 100.18(1), 100.18(10)(b), 133.05, 49.49(4m)(a)(2) and have been unjustly enriched. The State specifically requests injunctive relief, compensatory damages, restitution to the State and various private entities, treble damages for violations of Wis. Stat. § 133.05, forfeitures under several statutes, disgorgement of unlawful profits and its costs in bringing this action.

Defendants have moved to dismiss the Amended Complaint on several grounds. Collectively, the Defendants argue that this Complaint:

1. is insufficient, both under notice pleading and in particular under Wis. Stat. § 802.03(2),
2. does not establish a causal link between the alleged misconduct and the alleged injuries,
3. alleges certain claims which the Attorney General is not empowered to pursue,
4. fails to allege certain required elements for several claims,
5. is barred by the “filed rate” doctrine, and
6. contains claims that are barred by the applicable statutes of limitations.

Additionally, several Defendants have alleged grounds for dismissal that are specific to their situations.²

² There are, additionally, several outstanding motions. The motions for leave to file additional authority (Plaintiff’s motions filed November 3 and 8, 2005 and Defendants’ motion filed February 3, 2005) are **granted**. The other outstanding motions are considered, as appropriate, below.

STANDARD OF REVIEW

The recent case (July 2005), Doe v. Archdiocese of Milwaukee, 2005 WI 123,

294 Wis. 2d 307, 700 N.W. 2d 180, ¶¶ 19 & 29, offers a good summary of how to analyze

a motion to dismiss:

... [a] motion to dismiss for failure to state a claim "tests the legal sufficiency of the complaint." BBB Doe, 211 Wis. 2d 331, 565 N.W. 2d 94.. A reviewing court "accept[s] the facts pled as true for purposes of [its] review, [but is] not required to assume as true legal conclusions pled by the Plaintiffs." *Id.* Although the court must accept the facts pleaded as true, it cannot add facts in the process of liberally construing the complaint. 3 Jay E. Grenig, *Wisconsin Practice: Civil Procedure* § 206.11 at 304 (West, 3d ed.2003) (hereinafter Grenig, *Civil Procedure*). Rather, "[i]t is the sufficiency of the facts *alleged* that control[s] the determination of whether a claim for relief" is properly pled. Strid v. Converse, 111 Wis.2d 418, 422-423, 331 N.W.2d 350 (1983) (emphasis added).

The court should not draw unreasonable inferences from the pleadings. Morgan v. Pa. Gen. Ins. Co., 87 Wis.2d 723, 731, 275 N.W.2d 660 (1979). After liberally construing the complaint, a court should dismiss a Plaintiff's claims if it is "quite clear" that there are no conditions under which that Plaintiff could recover. *Id.*; see also Prah v. Marette, 108 Wis.2d 223, 229, 321 N.W.2d 182 (1982) (both citing Charles D. Clausen & David P. Lowe, *The New Wisconsin Rules of Civil Procedure, Chapters 801-803*, 59 Marq. L.Rev. 1, 54 (1976) (hereinafter Clausen, *The New Wisconsin Rules of Civil Procedure*)). In other words, "A claim should not be dismissed ... unless it appears to a certainty that no relief can be granted under any set of facts that Plaintiff can prove in support of his allegations." Morgan, 87 Wis.2d at 732, 275 N.W.2d 660.

DECISION ³

First, these parties must be made aware that the reams of extra material submitted and any beyond-the-Complaint "facts" inserted into the briefs will not be factored into this decision. The facts being examined are solely those set forth in the First Amended Complaint. Defendants, especially, have attempted to set forth hundreds of pages of additional facts to be considered in making this

³ At least part of the reason this decision has been so delayed is that the case was removed this past summer, for the second time, to Federal Court. On-going work toward on this decision the motion had to be abandoned, and then started up anew, when time permitted, after the file was returned in November and other decisions issued on cases that had become ready while this case was in Federal Court.

ruling. But neither side has provided adequate justification for going beyond the four corners of this Complaint. This boundary is black letter law for addressing a motion to dismiss. *See, e.g. Wolnak v. Cardiovascular & Thoracic Surgeons of Central Wisconsin*, 706 N.W. 2d 667, ¶ 48 (Ct. App. 2005), which cites with approval *Heinritz v. Lawrence University*, 194 Wis. 2d 606, 614, 535 N.W. 2d 81 (Ct. App. 1995).

While it is true that pursuant to Wis. Stat. § 902.01, a Court may take judicial notice of certain facts, including legislative history, if appropriate, what is being offered here goes far beyond what is generally so noticed. For example, the contents of hefty reports to Congressional committees and sub-committees, testimony before such bodies, news articles, reports to agencies are not proper subjects for judicial notice.⁴

These submissions also go beyond what is helpful to the decision maker. Having to factor in lengthy agency reports and stacks of other information in deciding the sufficiency of the Amended Complaint creates more confusion than it resolves. As a practical matter, for the uninitiated such as this writer, the world described in the Complaint is foreign, complicated, and confusing. Adding more information at this stage of the proceedings only magnifies that reaction, rather than aiding in this decision. It is understandable that the Defendants, especially,

⁴ See, footnote 6 on p. 16 of Plaintiff's brief.

want this lawsuit resolved in their favor as soon as possible, but human and legal limitations must still be recognized.⁵

Equally problematic is that the submissions do not appear to establish any clear factual conclusions. If they did, both sides would not be trying to present contrary information.⁶ It is not even a given that all the facts the parties wish the Court to consider are relevant. This motion is to test the sufficiency of the pleadings in the Complaint; it is not a motion for summary judgment or an exercise to determine which of two competing views of the eventual evidence is more convincing or logical. Such an exercise should not and will not be undertaken at this juncture.

I. THE SUFFICIENCY OF THE PLEADINGS:

A. Notice Pleading:

Despite its length and complexity, this Amended Complaint is indisputably lacking detail as to the specific actions of individual Defendants.⁷ Under Wisconsin's "notice pleading" rules, such outline pleading is not necessarily fatally defective, provided that the parties being sued can figure out the basis of the claims against them. Again, reference is made to the Archdiocese of Milwaukee case, 284 Wis. 2d at 328-329:

¶ 35 In 1975 this court adopted new rules of Wisconsin civil procedure. 67 Wis.2d 585 (1975). One of the " keystones of the new procedural system" was Wis. Stat. § 802.02 (1977-78), which signaled Wisconsin's adoption of "notice pleading." Wilson v. Cont'l Ins. Cos., 87 Wis.

⁵ Since it seems almost a certainty that for whatever causes survive this motion to dismiss, summary judgment motions will be filed, I want to be clear that resubmission of materials is not necessary or wanted. All that need be added are whatever affidavits required under summary judgment procedure.

⁶ See i.e., pp. 3-18 of Plaintiff's brief.

⁷ Eleven pages are devoted to the caption and listing of parties.

2d 310, 316, 274 N.W. 2d 679 (1979); Clausen, *The New Wisconsin Rules of Civil Procedure* at 37. Under § 802.02(1)(a), a complaint must simply contain "[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief." These claims are to be liberally "construed [so] as to do substantial justice." Wis. Stat. § 802.02(6); Prah, 108 Wis.2d at 229, 321 N.W.2d 182.

¶ 36 However, a complaint cannot be completely devoid of factual allegations. The notice pleading rule, while "intended to eliminate many technical requirements of pleading," nevertheless requires the Plaintiff to set forth "a statement of circumstances, occurrences and events in support of the claim presented." Clausen, *The New Wisconsin Rules of Civil Procedure* at 38-39. For example, "a claim in negligence must state general facts setting forth that the [defendant] had knowledge or should have had knowledge of a potential and unreasonable risk...." Wilson, 87 Wis.2d at 318, 274 N.W.2d 679. "[A] bare conclusion [does] not fulfill[] a Plaintiff's duty of stating the elements of a claim in general terms." Id. at 319, 274 N.W.2d 679. In short, we will dismiss a complaint if, "[u]nder the guise of notice pleading, the complaint before us requires the court to indulge in too much speculation leaving too much to the imagination of the court." Id. at 326-27, 274 N.W.2d 679. It is not enough for the Plaintiff to contend that the requisite facts will be "supplied by the discovery process." Id. at 327, 274 N.W.2d 679.

Not surprisingly, the instant challenge does claim that this Amended Complaint requires speculation to be understood. It is true that these pleadings lack the usual contentions that a named-defendant did a discrete act forming the cause of action on a given date. This pleading does a very thorough job of describing the key points of what is repeatedly referred to as "a scheme" which Plaintiff claims was shared by all the Defendants.⁸ As far as can be determined, the contention appears to be that "virtually all" of Defendants' drugs had misleading AWP's released for publication by every single defendant since 1992.⁹ Given the figure cited in this Complaint of "over 65,000 separate National Drug Codes (NDC)" plus 37 Defendants and a time period of either 3 or 6 years (depending on the applicable statute of limitations), the potential permutations are astronomical.

If indeed the actions for which the Defendants are being sued are as global as described, then the notice being given is that each defendant listed false AWP's for each of its drugs during the times within the statute of limitations.¹⁰ Even though the date of 1992 is given, it appears to be more for

⁸ "Notably, the State does not allege any form of conspiracy, collusion, or unlawful agreement among the Defendant manufacturers . . . " Defendants' initial brief, p. 2.

⁹ Amended complaint, ¶37.

¹⁰ Obviously, Plaintiff will be restricted to whatever period is permitted under the applicable statute of limitations.

background than as an effort to hold these Defendants accountable going back that far. The story being told in this Complaint is that of an on-going practice, repeating itself for many years as to “virtually all” the AWP’s listed by these manufacturers. The notice to those who must respond to this Complaint is that they are accused of misstating the actual AWP for each and every one of their drugs during a three or six year period.

These drug manufacturers are also alleged to have taken measures to conceal their misrepresentations. The State of Wisconsin claims that it and other entities relied upon these misrepresented prices when paying for drugs manufactured by Defendants. Under the most liberal reading of this Complaint, each of the allegations applies to each of the Defendants. The role of each defendant appears to have been uniform, varying only as to the specific drug and the magnitude of the misrepresentation. The basic claim as to each defendant is the same. For general pleading purposes, these vast allegations are adequate to put Defendants on notice of the claims against them.

B. Allegations of fraud:

Citing Wis. Stat. § 802.03(2), Defendants argue that the Complaint does not adequately identify which drugs are at issue, does not describe what each of them did, does not adequately detail what fraud each has committed, and improperly relies on “group pleading.” Plaintiff counters that none of its claims are subject to the requirements of Wis. Stat. § 802.03(2), and that, even if any were, the Complaint is sufficiently particular.

Wis. Stat. § 802.03(2) provides:

Fraud, mistake and condition of mind. In all averments of fraud or mistake, the circumstances

constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

No Wisconsin state appellate case could be found which directly addresses whether § 802.03(2) governs pleadings under Wis. Stat. §100.18. State v. American T.V. of Madison, 146 Wis. 2d 292, 312-313, 430 N.W.2d 709 (1988) contains dicta in Justice Steinmetz's dissent. He declared that only notice pleading is required under § 100.18(9), but that is hardly conclusive.

The State relies heavily on legislative history, pointing to a Judicial Council Committee Note to a 1978 change in the notice pleading statute, § 802.02(1)(a) that states, *inter alia*:

This modification will allow a pleader in a **consumer protection or anti-trust case**, for example, for example, to plead a pattern of business transactions, occurrences or events leading to a claim of relief rather than having to specifically plead each and every transaction, occurrence or event when the complaint is based on a pattern or course of business conduct involving either a substantial and continuous transactions and events. (Plaintiff's brief, pp. 38-39.)

Again, this language is not determinative of whether § 100.18 claims must be plead with particularity. All consumer protection cases do not involve claims of fraud. The note does not say that the modification it discusses also changes the requirements of § 802.03(2) when fraud is involved.

The purpose of the rule requiring such detail when fraud is claimed is often repeated:

“ . . . because the particularity requirement affords notice to a defendant for the purpose of a response. As additional rationale, we agree that our statute is designed to protect Defendants whose reputation could be harmed by lightly made charges of wrongdoing involving moral turpitude, to minimize ‘strike suits’ and to discourage the filing of suits in the hope of turning up relevant information during discovery.”

Quoted in Friends of Kenwood v Green, 239 Wis.2d 78, 87, 619 N.W.2d 271 (Ct. App. 2000), [citations omitted]

There is no logical reason for repudiating this rationale just because the charges of fraud being leveled against these Defendants involve consumer protection. Indeed, because the object of such a claim in a consumer protection case may likely be a business or a company dependent for its success on a positive public perception, the need for particularity in pleading seems at least as compelling as in any other fraud case. Here, Defendants are not overstating the matter when they characterize the causes of action in this complaint as “grounded in fraud.” Language synonymous with or highly suggestive of fraud permeates the document. Variations on the word “fraud” appear throughout the complaint; “false” and “phony” are used often, as is “deceptive.” The word “scheme” when presented in this context certainly has a nefarious connotation. Even the title of § 100.18, one of the provisions under which Plaintiff is suing, is entitled “Fraudulent representations,” while Plaintiff’s claim in Court IV comes under § 49.49(4m)(2)(a) “Medical Assistance Fraud.” There is every reason to find that Wis. Stat. § 802. 03(2) applies to these allegations.

As quoted on p. 87 of Kenwood, *supra*, “Particularity means the ‘who, what, when, and how.’ [citation omitted.] . . . the rule ‘requires specification of

the time, place, and content of an alleged false misrepresentation.” While Plaintiff has done a masterful job of describing a “dauntingly complex” drug sale and reimbursement system, it has failed (other than in a few examples) to set forth the activities of each defendant and to put everyone on notice for what activities, occurring when and how it wishes to hold each defendant responsible. ¹¹ Probably for good reason,¹² Plaintiff seems as though it wants to put the burden on each company to come forward with an explanation for each and every AWP listing since 1992. This is not permissible.

Under this complaint, it is not known what Plaintiff considers the threshold for fraud. Would a few cents difference from the AWP and the actual sales price meet that definition? A few dollars? Is the State limiting this case to the drugs mentioned in Exhibits A & B attached to the Complaint or is it including the 65,000 different drugs referenced several times in that pleading?

In order to maintain these causes of action premised on fraud, Plaintiff must re-plead them, giving as many specifics as it can. Each Defendant is entitled to know, with as much detail as Plaintiff can provide, **which** of its drugs are involved and **what** (name, date) publication of AWP is false, and the **actual** price that should have been published. Discovery has been on-going in this case and in national cases, so much of this information should be available. It is difficult to know how long it will take Plaintiff to redraft those claims involving

¹¹ ¶ 51 of the complaint takes the vagueness of this pleading to dangerous level by alleging wrong-doing by “some Defendants” without naming any.

¹² See, ¶¶ 46 & 55 of the complaint.

fraud. Subject to the right to obtain an extension, the State is given 60 (sixty days) to re-plead. Failure to do so within the specified or extended time will result in dismissal of those counts grounded in fraud (I, II, and IV).¹³

II. CAUSATION

Contending that Plaintiff cannot establish belief and reliance on Defendants' AWP's and that the Complaint fails to "affirmatively" allege that anyone "actually" relied on the AWP's as the true price, all Defendants argue that the entire complaint should be dismissed. Since there is no such reliance, Defendants assert, "there is no cognizable link between the alleged misconduct ... and any claimed injury." Joint Memorandum, p. 18.

First, the argument relies on the substantial documentary submissions of Defendants. As explained earlier in this decision, Defendants have not provided a sufficient basis supporting consideration of such materials at this stage of the proceedings. Second, Defendants have provided no substantial argument or any authority for their broad assertion that the Court can dismiss all of Plaintiff's claims based simply on an arguable lack of facts showing this level of reliance. Finally, it is far from clear that the documents selected by Defendants indisputably establish that Plaintiff in no way relied upon Defendants' AWP's. However, the basis for any claim of reliance included in Counts I, II, and IV

¹³ Counts I and II allege violation of Wis. Stat. § 100.18., and Count IV alleges violation of Wis. Stat. § 49.49(4m)(a)(2).

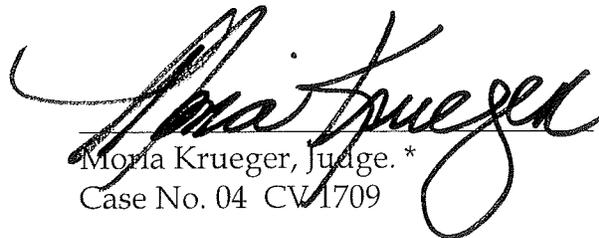
should, for the same reasons articulated in the previous section, be part of the more specific pleadings.

CONCLUSION and ORDER

For the reasons stated above, Plaintiff is to amend its Amended Complaint by **June 5, 2006** to comply with the directive contained in this Partial Decision. In the interim, work will continue on the balance of the contentions in Defendants' motion to dismiss.

Dated this 3rd day of April 2006 at Madison, Wisconsin.

BY THE COURT:



Moria Krueger, Judge. *
Case No. 04 CV1709

*Recognition is given to staff attorney,
Eric Mueller, for his work on this
decision.

CC: (To be distributed electronically by each attorney to the other lawyers on the same side)
AAG C. Hirsch
Atty. B. Butler

STATE OF WISCONSIN
CIRCUIT COURT – BRANCH 7 - DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., *et al.*,

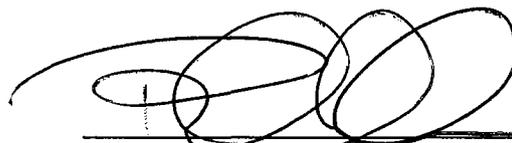
Defendants.

Case No. 04-CV-1709

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Defendant Teva Pharmaceuticals USA Inc.'s **NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER** and **MEMORANDUM IN SUPPORT OF DEFENDANT TEVA PHARMACEUTICALS USA, INC.'S MOTION FOR PROTECTIVE ORDER** to be served on counsel of record by transmission to LNFS pursuant to Order dated December 20th, 2005, on this 26th day of April, 2006.

Dated this 26th day of April, 2006.



Philip F. Ackerman