



Jun 15 2007  
2:09PM

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 9

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

AMGEN, INC., et al.,

Unclassified - Civil: 30703

Defendants.

**NOTICE OF DEPOSITION OF DEFENDANT ZLB BEHRING  
AND  
REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT ZLB BEHRING**

To: Stephen Hurley  
Clifford J. Cavitt  
HURLEY, BURISH & STANTON, S.C.  
101 East Doty Street  
Madison, WI 53703

Jonathon T. Rees  
Michael L. LaClare  
HOGAN & HARTSON, LLP  
Columbia Square  
555 Thirteenth Street, NW  
Washington, DC 20004

**NOTICE OF DEPOSITION**

Pursuant to Wis. Stats. §§ 804.05(2)(e), 885.44 and 885.46, plaintiff will take the videotaped deposition of defendant ZLB Behring ("ZLB" or "Defendant") on September 26, 2007, at 9:30 a.m. at the offices the Wisconsin Department of Justice, 17 West Main Street, Madison, Wisconsin. The deposition is to be visually recorded and preserved pursuant to the provisions of Wis. Stats. §§ 885.44 and 885.46. The oral examination will continue from day to day until completed and you are invited to attend.

ZLB shall designate one or more officers, directors, managing agents or other persons to testify under oath about each of the subject matters listed below. ZLB shall identify for each

designated person which of the matters set forth below that person will testify on. Plaintiff requests that Defendant identify the subject matter by topic of each corporate designee's testimony in writing at least ten business days prior to the deposition.

### **Definitions**

"Defendant" means ZLB and its divisions, subsidiaries or corporate predecessors which have owned, manufactured, licensed, sold and/or marketed drugs listed in attached Exhibit A.

"ZLB," or references to its divisions, corporate predecessors, successors or subsidiaries, refers without limitation to ZLB Behring, CSL Limited, CSL Behring, Aventis Behring, and ZLB Bioplasma.

"Targeted Drugs" means the drugs listed in Exhibit A.

The words "document" and "documents" are used in the broadest possible sense and refer, without limitation, to all written, printed, typed, photo-static, photographed, recorded or otherwise reproduced communications or representations of every kind and description, whether comprised of letters, words, numbers, pictures, sounds, or symbols, or any combination thereof, whether prepared by hand or by mechanical, electronic, magnetic, photographic, or other means, as well as audio or video recordings of communications, oral statements, conversations or events. This definition includes, but is not limited to, any and all of the following: day-timers, journals, logs, calendars, handwritten notes, correspondence, minutes, records, messages, memoranda, telephone memoranda, diaries, contracts, agreements, invoices, orders, acknowledgements, receipts, bills, statements, appraisals, reports, forecasts, compilations, schedules, studies, summaries, analyses, pamphlets, brochures, advertisements, newspaper clippings, tables, tabulations, financial statements, working papers, tallies, maps, drawings, diagrams, sketches, x-rays, charts, labels, packaging, plans, photographs, pictures, film, microfilm, microfiche,

computer-stored or computer-readable data, computer programs, computer printouts, telegrams, telexes, telefacsimiles, tapes, transcripts, recordings, and all other sources or formats from which data, information or communications can be obtained. Any preliminary versions, drafts, or revisions of any of the foregoing, any document which has or contains any attachment, enclosure, comment, notation, addition, insertion, or marking of any kind which is not a part of another document, or any document which does not contain a comment, notation, addition, insertion, or marking of any kind which is part of another document, is to be considered a separate document.

**Scope of Time Period**

Each subject listed below is intended to cover the time period beginning January 1, 1993, and ending December 31, 2006.

**REQUEST FOR DOCUMENTS**

Pursuant to Wis. Stat. §§ 804.04(2)(d) and 804.09, the person(s) testifying for the party deponent shall:

1. Bring to the deposition copies of all documents, information or evidence establishing that any of the Targeted Drugs was sold to a wholesaler at a price equal to or greater than the published wholesale acquisition cost (WAC) and/or sold to a retailer at a price equal or greater than the average wholesale price (AWP) published by First DataBank, during the period January 1, 1993, through December 31, 2006; and

2. Within thirty (30) days, pursuant to Wis. Stat. § 804.09 and the terms of this notice, produce to undersigned counsel for the plaintiff all the documents described in the attached Exhibit B.

**SUBJECT MATTERS ON WHICH EXAMINATION IS REQUESTED**

1. The reason(s) for Defendant's signing of Medicaid rebate agreements pursuant to 42 U.S.C. § 1396r-8(a)(1).
2. Defendant's knowledge of the federal Medicaid program's laws, regulations, and rules, including 42 C.F.R. § 447.301 and 42 C.F.R. § 447.331.
3. Defendant's knowledge of the Wisconsin Medicaid Agency's laws, regulations, and rules, including Defendant's knowledge of the Wisconsin Medicaid Agency's reimbursement formula and methodology for prescription drugs.
4. Defendant's knowledge of the Medicare Part B program's laws, regulations, and rules relating to the reimbursement formula for covered drugs, including Defendant's knowledge that prior to January 1, 2005, the reimbursement formula for a covered drug (including the Medicare Part B beneficiary's 20% co-payment to be paid by Wisconsin Medicaid for dual eligibles) was based on the Average Wholesale Price (AWP) of the drug.
5. The information or documents which show that the actual net price paid by wholesalers to Defendant for the Targeted Drugs was equal to or greater than the then current Wholesale Acquisition Cost ("WAC") or Net Wholesale Price ("NWP") published by First DataBank, Red Book, or Medispan for the Targeted Drugs.
6. The information or documents which show that the then current Wholesale Acquisition Cost ("WAC") or Net Wholesale Price ("NWP") published by First DataBank, Red Book, or Medispan was higher than the actual net price paid by wholesalers to Defendant for the Targeted Drugs.
7. The information or documents, if any, about which Defendant is aware, which show, or which Defendant believes may tend to show, that the net price paid by retail and chain pharmacies, long-term care pharmacies, mail-order pharmacies, home health care entities, or doctors for the Targeted Drugs was equal to or greater than the then current Average Wholesale Price ("AWP") published by First DataBank, Red Book, or Medispan for the Targeted Drugs.
8. Defendant's knowledge of the net price paid (in relation to Average Wholesale Price and Wholesale Acquisition Cost) by retail and chain pharmacies, long-term care pharmacies, mail-order pharmacies, home health care entities, and doctors for the Targeted Drugs pursuant to direct sales from Defendant to these entities.
9. Defendant's knowledge of the net price paid (in relation to Average Wholesale Price and Wholesale Acquisition Cost) by retail and chain pharmacies, long-term care pharmacies, mail-order pharmacies, home health care entities, or doctors for the Targeted Drugs when purchased through wholesalers.
10. Defendant's knowledge or belief of the markup or margin above a wholesaler's actual net acquisition cost applied by a wholesaler when selling or re-selling the Targeted Drugs

to retail and chain pharmacies, long-term care pharmacies, mail-order pharmacies, home health care entities, or doctors.

11. The information or documents, if any, about which Defendant is aware, which show, or which Defendant believes may tend to show, that the then current Average Wholesale Price ("AWP") published by First DataBank, Red Book, or Medispan was higher than the actual net price paid by retail and chain pharmacies, long-term care pharmacies, mail-order pharmacies, home health care entities, or doctors for the Targeted Drugs.

12. The discounts, rebates, charge backs, free goods, incentives, or other things of value offered by Defendant to wholesalers, retail and chain pharmacies, long-term care pharmacies, mail-order pharmacies, home health care entities, or doctors that would reduce the net price paid by these entities for the Targeted Drugs.

13. Defendant's pricing decisions, pricing strategies, and pricing recommendations, including but not limited to, decisions, strategies, and recommendations regarding price discounts, rebates, charge backs, credits, inventory management agreements, and other forms of price reductions relating to the Targeted Drugs.

14. Defendant's marketing decisions, plans, and strategies, market share research, product launches, and advertising relating to the Targeted Drugs.

15. Defendant's sales strategies, sales staff training, sales meetings, competitive sales research, sales staff evaluations, and sales forecasts relating to the Targeted Drugs.

16. Communications between Defendant and First DataBank, Red Book, and Medispan about the Targeted Drugs, including the pricing information (such as AWP, WAC, suggested wholesale price or "SWP," and direct price or "DP") provided by Defendant to these entities and Defendant's definitions of these terms.

17. Defendant's reason(s) for supplying pricing information (such as AWP, WAC, SWP, DP) to First Databank, Red Book, or Medispan for the Targeted Drugs.

18. Defendant's knowledge of the relationship between the pricing information (such as AWP, WAC, SWP, DP) Defendant supplied to First DataBank, Red Book, or Medispan and the pricing information published by First DataBank, Red Book, or Medispan for the Targeted Drugs.

19. Defendant's knowledge or understanding of the use of Defendant's reported pricing information (such as AWP, WAC, SWP, DP) by First DataBank, Red Book, or Medispan, including but not limited to the transmission of that information to the Wisconsin Medicaid Agency.

20. The action(s), if any, taken by Defendant to stop, object to, or otherwise oppose the publication of the Wholesale Acquisition Cost ("WAC") or Average Wholesale Price

("AWP") by First DataBank, Red Book, or Medispan for any of the Targeted Drugs and the reason(s) for any such action(s).

21. To the extent Defendant stopped reporting any pricing information (such as AWP, WAC, SWP, DP) to First DataBank, Red Book, or Medispan, for the Targeted Drugs, the reason(s) for doing so.

22. Defendant's confirmation or acquiescence that the pricing information published by First DataBank, Red Book or Medispan for the Targeted Drugs was true and accurate.

23. The information and/or data that Defendant has purchased, obtained, or reviewed from First DataBank, Red Book, Medispan, or IMS relating to the Targeted Drugs, including, but not limited to, pricing and market share.

24. Whether Defendant ever communicated to First DataBank, Red Book, or Medispan that the Average Wholesale Prices ("AWPs") that Defendant reported to these entities was neither a price that was actually an average of wholesale prices, nor a price that was actually paid by retail and chain pharmacies, long-term care pharmacies, mail-order pharmacies, home health care entities, or doctors for the Targeted Drugs and, if so, when such communications took place and of what they consisted.

25. Whether Defendant ever communicated to anyone in the Wisconsin Medicaid Agency that the Average Wholesale Prices ("AWPs") that Defendant reported to First DataBank, Red Book, or Medispan was neither a price that was actually an average of wholesale prices, nor a price that was actually paid by retail and chain pharmacies, long-term care pharmacies, mail-order pharmacies, home health care entities, or doctors for the Targeted Drugs and, if so, when such communications took place and of what they consisted.

26. Whether Defendant ever communicated to First DataBank, Red Book, or Medispan that the Wholesale Acquisition Cost ("WAC") that Defendant reported to these entities was not the net price actually paid by wholesalers to Defendant for the Targeted Drugs and, if so, when such communications took place and of what they consisted.

27. Whether Defendant ever communicated to anyone in the Wisconsin Medicaid Agency that the Wholesale Acquisition Cost ("WAC") that Defendant reported to First DataBank, Red Book, or Medispan was not the net price actually paid by wholesalers to Defendant for the Targeted Drugs and, if so, when such communications took place and of what they consisted.

28. The methodology used by Defendant to calculate the Average Manufacturer's Price ("AMP") (as defined by 42 U.S.C. § 1396r-8(k)(1)) for the Targeted Drugs and Defendant's understanding of the use of AMP by CMS, including but not limited to its use in connection with rebates under the Medicaid rebate statute.

29. Whether Defendant has ever provided AMPs or any other pricing information, such as AWP, WAC or average sales price (ASP), to the State of Wisconsin (apart from providing them pursuant to the State's discovery requests in this case).

30. Defendant's understanding and belief regarding the confidentiality provisions of the Medicaid Rebate statute, 42 U.S.C. § 1396r-8, as it pertains to AMPs and Best Prices.

31. Whether Defendant contends that the State of Wisconsin was not prohibited by federal law from determining, and could have determined, the AMPs of the Targeted Drugs based on the Unit Rebate Amount for such drugs provided to the State by the federal government pursuant to the Medicaid rebate statute, 42 U.S.C. § 1396r-8, and if so, all bases for such contention.

32. Defendant's policies and practices concerning the disclosures that providers (retail and chain pharmacies, long-term care pharmacies, mail-order pharmacies, home health care entities, doctors, hospitals, clinics), wholesalers, and pharmacy benefit managers may make of the drug pricing information they receive from Defendant for the Targeted Drugs.

33. Defendant's knowledge of whether First DataBank increased the AWPs for the Targeted Drugs from WAC+20% to WAC+25% in or around 2001-2002 and the action(s), if any, taken by Defendant in response including, but not limited to, any studies, analyses or white papers regarding this issue.

34. Direct communications between Defendant (or Defendant's counsel or representatives) and the State of Wisconsin Attorney General's Office and/or the State of Wisconsin Medicaid Agency.

35. The nature and type of customers who purchase or distribute Defendant's drugs.

36. Defendant's use in its marketing or sales of the Targeted Drugs of the difference between a provider's acquisition cost and third-party reimbursement, including but not limited to "return to practice."

37. Identification of the existence, location and format of all hard copy and electronic documents, data, and information relating to the subjects identified in paragraphs 1-36 above.

Dated this 15<sup>th</sup> day of June, 2007.



---

Thomas L. Dosch  
Assistant Attorney General, State Bar #1017026  
Michael R. Bauer  
Assistant Attorney General, State Bar #1003627  
Cynthia R. Hirsch  
Assistant Attorney General, State Bar #1012870  
Frank D. Remington  
Assistant Attorney General, State Bar #1001131  
WISCONSIN DEPARTMENT OF JUSTICE  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-0770 (TLD)

Charles Barnhill, State Bar #1015932  
William P. Dixon, State Bar #1012532  
Elizabeth J. Eberle, State Bar #1037016  
MINER, BARNHILL & GALLAND, P.C.  
44 East Mifflin Street, Suite 803  
Madison, WI 53703  
(608) 255-5200

P. Jeffrey Archibald, State Bar # 1006299  
Archibald Consumer Law Office  
1914 Monroe Street  
Madison, WI 53711  
(608) 661-8855

Attorneys for Plaintiff,  
State of Wisconsin

**EXHIBIT A**

<b>DRUG</b>	<b>NDCs</b>
Albuminar®	00053768003
Bioclata®	00053811002 00053811004
Gammar-P.I.V.®	00053748601 00053748602 00053748605 00053748606 00053748610
Helixate®	00053812002 00053812004
Helixate FS®	00053813001 00053813002 00053813004
Humate-P®	00053760501 00053760502 00053760504 00053762005 00053762010 00053762020
Monoclata-P®	00053765601 00053765602 00053765604 00053765605
Mononine®	00053766801 00053766802 00053766804
Zemaira®	00053720102

## EXHIBIT B

### PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT ZLB BEHRING.

#### INSTRUCTIONS

1. In responding to these requests, Defendant is required to produce all responsive documents that are in the possession, custody, or control of it or any of its agents.

2. All documents that respond, in whole or in part, to any portion of the production requests below shall be produced in their entirety, including all attachments and enclosures.

3. If defendant withholds any requested document on the basis of a claim that it is protected from disclosure by privilege, work product, or otherwise, provide the following information separately for each document:

a. The name and title of every author, sender, addressee, and recipient (by category);

b. the date of the document;

c. The name and title of each person (other than stenographic or clerical assistants) participating in the production of the document;

d. The name and title of each person to whom the contents of the document have been communicated by copy, exhibition, reading or summary;

e. A description of the nature and subject matter of the document; a statement of the basis on which it is claimed that the document is protected from disclosure; and the name and title of the person supplying the information requested in subparagraphs (a) through (d) above.

## DOCUMENT REQUESTS

For the period 1993 to the present:

1. Any documents which show that the actual net price paid by wholesalers to defendant for the Targeted Drugs was equal to or greater than the then current Wholesale Acquisition Cost (WAC) or Net Wholesale Price (NWP) published by First DataBank, Red Book or Medispan ("the pricing compendiums") and any documents which show what percentage these sales were to the total sales of a particular drug.
2. Documents which show, or together with other documents tend to show, that the net price paid by retail and chain pharmacies, long-term care pharmacies, mail order pharmacies, home health care entities, or doctors (providers) for the Targeted Drugs was equal to or greater than the then current Average Wholesale Price (AWP) published by the pricing compendiums.
3. Documents which show, or tend to show, the net price paid by providers for the Targeted Drugs.
4. Documents which show, or tend to show, that defendant was aware or believed that the published AWP for any of its drugs exceeded the net price providers were paying for any of the Targeted Drugs.
5. Documents which show defendant's knowledge or belief of the markup or margin above a wholesaler's actual net acquisition cost applied by a wholesaler when selling or re-selling drugs (including but not limited to defendant's Targeted Drugs) to providers.
6. Exemplar documents illustrating the entire range of discounts, rebates, charge-backs, free goods, incentives or other things of value offered by defendant to providers.
7. Any planning document, or document used in planning, referring to the AWP of a Targeted Drug.
8. Documents which describe how the defendant handles returns from pharmacists.
9. All documents reflecting communications between defendant and First DataBank, Red Book or Medispan.
10. Documents which discuss, concern or explain defendant's reasons for supplying AWP's, WAC's or other prices to the pricing compendiums.
11. Documents reflecting communications between the defendant and any Wisconsin state employee.
12. Documents discussing, concerning or about how the defendant initially set its AWP, WAC, Direct Price or any other price it sent to the pricing compendiums in connection with each Targeted Drug.

13. Documents showing each instance in which defendant changed its AWP, its WAC or Direct Price on any of its Targeted Drugs and any documents discussing, concerning or about the reasons for any such change.

14. Documents discussing, concerning or about the formulaic relationship, if any, between defendant's AWP of a particular drug and its WAC.

15. Any document reflecting a public disclosure by the defendant of the fact that the AWPs published by the pricing compendiums do not accurately reflect the price providers are paying for defendant's drugs.

16. Documents describing the methodology, or methodologies (if they have changed over time) used by defendant for calculating its AMPs for the Targeted Drugs.

17. Documents describing defendant's policy and/or practice of requiring purchasers of its drugs to keep the actual prices such purchasers pay for defendant's drugs confidential.

18. Documents discussing, concerning or about any actions taken by First DataBank in connection with the publication of the AWPs of defendant's drugs.

19. Documents in your possession defining AWP or WAC.

20. Documents in your possession discussing how AWP is used by providers.

21. Any and all sales or marketing materials that discuss the money to be made by a provider from purchasing a Targeted Drug.

22. All documents discussing the competition between Anzemet, Kytril and Zofran, including all documents comparing the spread of Anzemet to one or both of the other drugs.

23. All documents discussing, concerning or about marketing the spread (or the providers' "potential profit" or "return on investment") of Anzemet or any other of ZLB' Targeted Drugs.

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this, the 15<sup>th</sup> day of June, 2007, electronically served a true and correct copy of the foregoing Notice of Deposition of Defendant ZLB Behring and Request for Production of Documents To Defendant ZLB Behring on all counsel of record by transmission to LexisNexis File & Serve.

/s/ Thomas L. Gorsel  
OF COUNSEL