

UNITED STATES OF AMERICA
BEFORE THE FOOD AND DRUG ADMINISTRATION
DEPARTMENT OF HEALTH AND HUMAN SERVICES

In the Matter of:

**Enrofloxacin for Poultry:
Withdrawal of Approval of
New Animal Drug Application
NADA 140-828**

**FDA DOCKET: 00N-1571
November 29, 2002**

**RESPONDENT BAYER CORPORATION'S MOTION TO COMPEL
ADDITIONAL SUBMISSION UNDER 21 CFR § 12.85**

Respondent Bayer Corporation, ("Bayer") hereby moves to compel the Center for Veterinary Medicine ("CVM") to submit to the Dockets Management Branch additional relevant documents to this proceeding, which they are obligated to provide under 21 CFR § 12.85. CVM has acknowledged that it is aware of documents which are relevant to the hearing and which CVM intends to rely upon in its witness testimony, but has refused to provide these documents to Bayer as part of the discovery process or as part of its 12.85 submissions.

Under § 12.85(a), CVM is required to submit the following materials:

- the relevant portions of the administrative record of the proceedings;
- all documents in the director's files containing factual information, whether favorable or unfavorable to the director's position, which relate to the issues involved in the hearing;
- all other documentary data and information relied upon.

See 21 CFR § 12.85(a)(1-3) (emphasis added). CVM submitted its initial 12.85 submission on February 20, 2002. CVM made supplemental submissions of 12.85 materials on May 10, 2002 and November 14, 2002.

CVM Has Acknowledged It Will Rely on Documents In Its Testimony But Has Not Included Those Documents In Its 12.85 Submissions or as Part of the Discovery Process

Although 12.85(a)(3) requires each party to submit all data and information it intends to rely upon, CVM has acknowledged to Bayer it will rely on certain documents in its testimony that it has not provided as part of its 12.85 submission and has refused to provide to Bayer as part of the discovery process.

Prior to the exchange of discovery requests, the parties agreed that they would in good faith provide answers and documents that were responsive to the requests. The parties did not place any restrictions on the types of information that would be exchanged.¹

On June 24, 2002, Bayer and CVM exchanged interrogatories. On July 26, 2002, Bayer and CVM exchanged answers to those interrogatories. In three interrogatory answers, CVM identified that an "agent" of CVM had informed CVM of the existence of a study, but that CVM had not yet reviewed this study.² CVM did not provide a copy of those studies at that time.

¹ For example, Bayer provided confidential information to CVM in response to several questions that it would not have otherwise been required to submit to the agency but for the discovery request.

² The interrogatories and the CVM answers follow below:

58. Does CVM have any facts or data demonstrating any other adverse human health consequences from infections caused by fluoroquinolone-resistant *Campylobacter* (*C. jejuni* and separately, *C. coli*) as compared to infections caused by fluoroquinolone-susceptible (non-resistant) *Campylobacter* (*C. jejuni* and separately, *C. coli*)? If CVM does have such facts or data, please identify the other adverse consequences, identify the facts and data on which CVM relies and identify when CVM first learned of such facts or data.

Answer: Yes. An "agent" of CVM (for purposes of this hearing) has informed CVM of the existence of an additional study in which preliminary analysis demonstrates increased mortality associated with fluoroquinolone-resistant *Campylobacter* infections compared to fluoroquinolone-susceptible *Campylobacter* infections. However, CVM has not yet reviewed this study. CVM learned of this study while preparing its responses to these Interrogatories.

59. Identify all complications CVM is aware of that are associated with infections caused by fluoroquinolone-resistant *Campylobacter* that are not associated with infections caused by fluoroquinolone-susceptible (non-resistant) *Campylobacter*? If CVM is aware of any such complications, please identify all facts or data in support and identify when CVM first learned of such facts or data.

On November 11, 2002, Bayer counsel sent a letter to CVM counsel indicating that CVM had provided, at the time it initially answered the interrogatories, only partial or incomplete information for several answers, and requested that CVM review these answers and respond if those answers had changed based on more complete information. (Attachment 1.)

CVM ignored this letter and only after further telephone contact by Bayer counsel did CVM finally respond. By email dated November 27, 2002, CVM responded that it was "unaware" whether the studies described in the interrogatories had been "published," but that the results of "this study" will be described in CVM witness testimony to be submitted on December 9, 2002. (Attachment 2.) CVM stated that "therefore [its] responses ... have not changed" and again refused to provide Bayer information about the study or a copy of this study. Frankly, it strains credulity to believe that CVM has not yet reviewed the only study to date purporting to show a fluoroquinolone resistant *Campylobacter*-related death, notwithstanding that CVM has been aware of a study of such potential pivotal importance for at least four months and, notwithstanding that CVM intends to rely on the study as it will be included as part of a witness's

Answer: Yes. Patients don't respond to fluoroquinolone therapy. An "agent" of CVM (for purposes of this hearing) has informed CVM of the existence of an additional study in which additional analysis demonstrates increased mortality associated with fluoroquinolone-resistant *Campylobacter* infections compared to fluoroquinolone-susceptible *Campylobacter* infections. However, CVM has not yet reviewed this study. CVM learned of this study while preparing its responses to these Interrogatories.

* * *

75. Does CVM acknowledge that multiple epidemiological studies demonstrate a significant negative association between handling, cooking, and eating chickens at home and acquiring human *Campylobacter* infections?

Answer: No. CVM has reviewed the conclusions of only one study, by C. Friedman (exhibit G-228) where the author concluded "eating chicken or turkey cooked at home was a protective factor" for the acquisition of campylobacteriosis. However, an "agent" of CVM (for purposes of this hearing) has informed CVM of the existence of additional studies. CVM itself has not yet reviewed these additional studies.

CVM Responses to Bayer's Interrogatories at 22, 26.

testimony to be filed next week. This study has also not been included in CVM's 12.85 submissions, even though CVM's most recent submission was made on November 14, 2002.

Although CVM poorly attempts to make a distinction between published and unpublished studies, it is a distinction without a difference, as the regulations do not distinguish between published and unpublished studies.³ Indeed, the regulations clearly require that CVM submit "all documentary data and information" relied upon. See 21 CFR § 12.85(a)(3). CVM has acknowledged it is both aware of the study, and will rely on the study in its witness testimony. Under the regulations, this admission requires them to submit the data and information under 21 § CFR 12.85(a)(3). Therefore, if CVM has had access to and reviewed this study, as surely it must have since it intends to rely on it, then CVM should be required to either produce these documents or provide an adequate answer as to why they are not required to do so. Thus far, CVM has failed to do either of these.

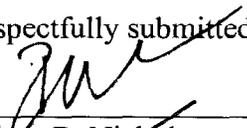
CONCLUSION

Upon consideration of the foregoing, Bayer requests that CVM be required to immediately submit to the docket, to the extent not already part of its 12.85 submission, the study or studies referenced or otherwise identified in answers to Respondent Bayer's

³ CVM's implies in its response that because the study is "unpublished" it need not provide Bayer a copy. It is difficult to understand the logic of this assertion since CVM has previously relied upon unpublished data in both the Notice of Opportunity for Hearing and its Risk Assessment, and has previously submitted other unpublished data as part of its 12.85 submission.

Interrogatory numbers 58 and 59, or provide an adequate explanation of why the regulations do not require them to do so.

Respectfully submitted,



Robert B. Nicholas
James H. Sneed
Gregory A. Krauss
M. Miller Baker
McDERMOTT, WILL & EMERY
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Attorneys for Bayer

CERTIFICATE OF SERVICE

I hereby certify that a copy of Bayer's Motion to Compel Additional Submission was emailed and also mailed this 29th day of November, 2002, via first-class mail, postage pre-paid to:

Kent D. McClure
Animal Health Institute
1325 G Street, N.W., Suite 700
Washington, D.C. 20005

I hereby certify that a copy of Bayer's Motion to Compel Additional Submission was e-mailed and also mailed, postage pre-paid, this 29th day of November, 2002 to:

Nadine R. Steinberg, Esquire
Food and Drug Administration
Office of General Counsel (CGF-1)
5600 Fischers Lane, Room 7-77
Rockville, MD 20857



Robert B. Nicholas

UNITED STATES OF AMERICA
BEFORE THE FOOD AND DRUG ADMINISTRATION
DEPARTMENT OF HEALTH AND HUMAN SERVICES

In the Matter of:

**Enrofloxacin for Poultry:
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NADA 140-828**

FDA DOCKET: 00N-1571

ORDER

UPON CONSIDERATION of the Bayer's Motion to Compel Additional Submission under 21 CFR § 12.85, it is hereby

ORDERED that CVM must immediately submit to the Dockets Management Branch, any studies, data or information, including documents published or unpublished, identified or otherwise referenced in CVM's reply to Respondent Bayer's interrogatory numbers 58 and 59, filed on July 26, 2002.

DATED this the ___ day of December, 2002.

Daniel J. Davidson
Administrative Law Judge

ATTACHMENT !

November 11, 2002

VIA FACSIMILE & FIRST-CLASS MAIL

Nadine R. Steinberg, Esquire
Food and Drug Administration
Office of General Counsel (CGF-1)
5600 Fischers Lane, Room 7-77
Rockville, Maryland 20857

Re: Bayer AG
Enrofloxacin Hearing; Docket 00N-1571

Dear Nadine:

This letter addresses several issues outstanding from the Center for Veterinary Medicine's ("CVM") Responses to Bayer's Interrogatories dated July 26, 2002. Several of your answers were incomplete in that you indicated CVM had not yet reviewed information described in the answer.

I direct your attention to the following CVM interrogatory answers contained in CVM's Responses to Bayer's Interrogatories dated July 26, 2002:

58. Does CVM have any facts or data demonstrating any other adverse human health consequences from infections caused by fluoroquinolone-resistant *Campylobacter* (*C. jejuni* and separately, *C. coli*) as compared to infections caused by fluoroquinolone-susceptible (non-resistant) *Campylobacter* (*C. jejuni* and separately, *C. coli*)? If CVM does have such facts or data, please identify the other adverse consequences, identify the facts and data on which CVM relies and identify when CVM first learned of such facts or data.

Answer: Yes. An "agent" of CVM (for purposes of this hearing) has informed CVM of the existence of an additional study in which preliminary analysis demonstrates increased mortality associated with fluoroquinolone-resistant *Campylobacter* infections compared to fluoroquinolone-susceptible *Campylobacter* infections. However, CVM has not yet

reviewed this study. CVM learned of this study while preparing its responses to these Interrogatories.

59. Identify all complications CVM is aware of that are associated with infections caused by fluoroquinolone-resistant *Campylobacter* that are not associated with infections caused by fluoroquinolone-susceptible (non-resistant) *Campylobacter*? If CVM is aware of any such complications, please identify all facts or data in support and identify when CVM first learned of such facts or data.

Answer: Yes. Patients don't respond to fluoroquinolone therapy. An "agent" of CVM (for purposes of this hearing) has informed CVM of the existence of an additional study in which additional analysis demonstrates increased mortality associated with fluoroquinolone-resistant *Campylobacter* infections compared to fluoroquinolone-susceptible *Campylobacter* infections. However, CVM has not yet reviewed this study. CVM learned of this study while preparing its responses to these Interrogatories.

* * *

75. Does CVM acknowledge that multiple epidemiological studies demonstrate a significant negative association between handling, cooking, and eating chickens at home and acquiring human *Campylobacter* infections?

Answer: No. CVM has reviewed the conclusions of only one study, by C. Friedman (exhibit G-228) where the author concluded "eating chicken or turkey cooked at home was a protective factor" for the acquisition of campylobacteriosis. However, an "agent" of CVM (for purposes of this hearing) has informed CVM of the existence of additional studies. CVM itself has not yet reviewed these additional studies.

Each of these answers indicate CVM had, at the time it initially answered the interrogatories, only partial or incomplete information. Bayer requests that CVM review these answers, and respond if your answers have now changed based on more complete information. Specifically, if CVM has now reviewed the studies brought to their attention by their "agents", Bayer requests that you now identify those studies. I look forward to your prompt response.

Sincerely,

Robert B. Nicholas

ATTACHMENT 2

"Steinberg, Nadine"
<NSteinbe@OC.FDA.
GOV>

11/27/02 02:52 PM

To: Robert B Nicholas/DC/MW&E@MW&E
cc: "Spiller, Robert" <RSpiller@OC.FDA.GOV>
Subject:

Bob,

I received your voicemail message of this afternoon. CVM proposes that we exchange pdf files of the witnesses testimony on CD. Our plan is to provide you with the pdf files on CD and a hard copy of the testimony by COB Dec.

9th. Please let me know if this plan is acceptable, and whether we should be expecting the same form of exchange from Bayer on Dec. 13th. If you agree, one of us can call Kent McClure and see if he will agree to this format for exchange of testimony as well.

With respect to your letter of November 11, 2002, CVM is unaware of whether the study described in our answers to Bayer's Interrogatories Nos. 58 and 59 has been published. However, we believe that the results of this study will be described by a CVM witness in testimony to be submitted on Dec. 9, 2002. Therefore, CVM's responses to Bayer's Interrogatories Nos. 58 and 59 have not changed.

In addition, I have enclosed an e-mail, dated Sept. 6, 2002, which was sent to Greg Kraus, providing additional information to Bayer's Interrogatory No. 75.

I hope you have a nice Thanksgiving and get to spend some time with your family and friends.

Nadine

-----Original Message-----

From: Steinberg, Nadine

Sent: Friday, September 06, 2002 11:56 AM

To: 'gkrauss@mwe.com'; 'nbeaver@mwe.com';
'rnicholas@mwe.com'
Cc: Spiller, Robert
Subject:

Greg,

Attached is a copy of my letter to you providing additional information from CVM in response to your discovery requests and follow-up questions.

As indicated, if you have any questions, please direct them to Bob Spiller in my absence. Thanks,

Nadine
<<9.6.02 response to Bayer.doc>>