

W. Daniel Miles, III
Clinton C. Carter
Beasley, Allen, Crow, Methvin, Portis & Miles, PC
218 Commerce Street (36104)
Montgomery AL 36103-4160
(334) 269-2343/(334) 954-7555 (fax)

Charles Barnhill
Elizabeth J. Eberle
Miner, Barnhill & Galland, PC
44 East Mifflin Street, Suite 803
Madison WI 53703
(608) 255-5200/(608) 255-5380 (fax)

George F. Galland, Jr.
Robert S. Libman
Miner, Barnhill & Galland, PC
14 West Erie Street
Chicago IL 60610
(312) 751-1170/(312) 751-0438 (fax)

James E. Fosler
Fosler Law Group, Inc.
737 West Fifth Avenue; Suite 205
Anchorage AK 99501
(907) 277-1557/(907) 277-1657 (fax)

Attorneys for Plaintiff

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE**

STATE OF ALASKA,)	
)	
Plaintiff,)	Case No.: 3AN-06-12026 CI
vs.)	
)	
ALPHARMA BRANDED PRODUCTS)	ALASKA'S OPPOSITION TO BRISTOL-
DIVISION INC., et al.)	MYERS SQUIBB'S MOTION TO DISMISS
)	
Defendants.)	

Bristol-Myers Squibb (hereafter “BMS”) has filed a separate motion asking the Court to dismiss the claims against it. BMS begins by offering evidentiary material asserting that, unlike most other defendants, it did not send inflated “average wholesale prices” (AWPs) to the pricing publications upon which Alaska relied in calculating payments to providers. Instead, BMS asserts that it sent something it calls “wholesale list prices” to these pricing publications. Having offered evidence of this purported fact, BMS then offers a murky variation on the “particularity” argument made by defendants’ in their Joint Motion to Dismiss – the argument that the Amended Complaint (hereinafter “Complaint”) fails to satisfy the “particularity” requirement of Rule 9(b). Specifically, BMS seems to argue that the Complaint does not allege wrongful conduct by a defendant who supplied its “wholesale list prices” rather than “average wholesale prices” to the compendia.

The motion has no merit. First, it is procedurally improper, since it depends on evidentiary material that cannot form the basis of a motion to dismiss. Second, even if the evidentiary materials could be considered on this motion, the premise of BMS’s argument is wrong. The Complaint more than adequately states facts sufficient to hold liable those defendants who supplied “wholesale list prices” rather than AWPs to the compendia.

1. The motion is procedurally improper. As the State’s Opposition To Defendants’ Joint Motion to Dismiss discusses in more detail, Alaska law forbids granting a motion to dismiss based on documents extraneous to the complaint. Indeed, one of the

documents BMS asks the Court to rely on in deciding its motion is a letter from its attorney. *See* Exhibit A to BMS's motion. If letters from the attorney representing a defendant could get a defendant off the hook on a motion to dismiss, there would be no point in filing cases.

2. The Complaint alleges valid claims against defendants like BMS who reported wholesale list prices rather than AWP. Assuming for the sake of argument that all the prices BMS sent to the pricing publications were "wholesale list prices," that would not get BMS off the hook.

What BMS calls a drug's "wholesale list price" is essentially the same as a price referred to in the Complaint as "Wholesale Acquisition Cost" (WAC) – the prices that wholesalers pay to buy defendants' drugs. The Complaint alleges that, in addition to reporting inflated "Average Wholesale Prices," the defendants reported inflated WACs as well. Amended Complaint, ¶47.

BMS does not dispute that, if it reported inflated WACs to the pricing compendia, knowing that the compendia would use those inflated WACs to calculate inflated AWP, then the State's theory of liability is just as applicable to BMS as it is to a defendant who directly transmitted inflated AWP to the compendia. BMS argues, however, that the Complaint's allegations against it of transmitting inflated WACs to the compendia are insufficiently "particularized." This argument merely rehashes the "particularity" argument contained in Defendants' Joint Motion to Dismiss, and is answered by the State in its Opposition to that Motion.

BMS's argument about lack of "particularity" in the Complaint's allegations about inflated WACs is particularly weak, because the Complaint alleges facts that would lead to liability for BMS even if the WACs it reported to the compendia had been accurate rather than inflated. Regardless of whether a defendant reported WACs or AWP, the pricing compendia reported AWP for the drugs of *all* defendants, including those like BMS who supposedly reported only WACs to those compendia. And the State based its reimbursements on the compendia's reported AWP. The Complaint alleges -- and it must be taken as true -- that all defendants, regardless of whether they reported AWP or WACs to the compendia, knew that the AWP the compendia were reporting for defendants' drugs were inflated. As the State has shown in its Opposition to SmithKline Beecham's (GSK) individual motion to dismiss, defendants like BMS or GSK knew that the compendia were using wholesale list price data to compute inflated AWP, and knew that the State was in effect paying providers of their drugs far more than the estimated acquisition cost that the law sets as a ceiling for such payments. Defendants who knew those facts, but who stood mute, let the practice continue for years, and reaped the benefits of state-financed overpayments to providers of their drugs committed an "unfair or deceptive trade practice" under the Alaska Unfair and Deceptive Trade Practices Act. To avoid prolonging the present brief, the State respectfully refers this Court to the discussion of that issue in its Opposition to GSK's Individual Motion to Dismiss.

BMS also argues that the “issue” for a defendant that reports WACs rather than AWP to the pricing compendia is “whether a company that publishes a list price is obligated to disclose discounts off of that list price.” BMS Memorandum, 6. The reason BMS makes this argument is that it knows that for many years it has been feeding wholesale list prices to the pricing compendia, knowing that the compendia will mark those prices up to get the AWP that the compendia will then publish and that the States will use to calculate their reimbursements to providers, but also knowing that in fact few wholesalers really pay anything approaching those list prices. This conduct leaves BMS open to the well-founded charge that it has been manipulating State payment levels to providers by providing misleading information about its charges to the compendia. To ward off this charge, BMS argues that it cannot be charged with “deceptive or unfair practices” because, as a matter of law, no one who announces a list price ever has, in any circumstance, the obligation to reveal that most customers in fact receive large discounts off those list prices.

No case cited by BMS remotely supports this argument. The cases it cites simply hold that, in particular circumstances, a seller did not act misleadingly by not disclosing discounts. For example, in *Kolari v. N. Y. Presbyterian Hosp.*, 382 F.Supp.2d 562 (S.D.N.Y. 2005), *vacated for lack of district court jurisdiction*, 455 F.3d (2d Cir. 2006), a hospital had a policy of charging undiscounted rates to uninsured patients but discounted rates to insured patients. The court merely held that the hospital had no duty to tell uninsured patients that if they had been insured they would have been eligible for discounts.

Likewise, in *Whitehall Co. v. Barletta*, 536 N.E.2d 333, 337-338 (Mass. 1989), the court merely held that sellers of products need not disclose that they are making a profit because their suppliers sold the products to *them* at a discount. None of these cases suggests that a manufacturer can escape liability if it knows that the list prices it reports are being used to perpetuate a fraud on a state that is subsidizing the purchase of the manufacturer's drugs.

* * * * *

The State respectfully requests that BMS's individual motion be denied.

FOSLER LAW GROUP, INC.
Attorneys for Plaintiff

DATED: _____

By: /s/ James E. Fosler
James E. Fosler
Alaska Bar No.: 9711055

CERTIFICATE OF SERVICE

Pursuant to Case Management Order No. 1, entered by the Court in this case on December 14, 2006, the undersigned certifies that a copy of the foregoing document was served through the LexisNexis File and Serve ("LNFS") system on February 9, 2007.

 /s/ James E. Fosler
James E. Fosler

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