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**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	)	<b>ALASKA'S OPPOSITION TO SMITHKLINE</b>
DIVISION INC., et al.	)	<b>BEECHAM'S MOTION TO DISMISS</b>
	)	
Defendants.	)	

SmithKline Beecham (GSK) has filed an individual motion to dismiss, making two arguments.

**A. The “Settlement” Argument**

GSK seeks dismissal of claims arising out of two of GSK’s drugs, Kytril and Zofran injectables, on account of a prior settlement. The State has never disputed that this prior settlement bars claims as to these two drugs, and would have gladly stipulated to this had GSK asked it to, rather than waste this Court’s time with an extra individual motion. The State does note, however, that even though the State may not obtain damages in this suit on account of the State’s payments to providers for these two drugs, evidence of GSK’s fraudulent conduct in connection with those drugs may well be admissible to prove elements of GSK’s unlawful conduct in connection with the State’s broader claims against GSK. This is a consequence of the general rule that evidence dealing with claims that are barred (for example, on limitations grounds) may be relevant to prove claims that are not barred. *Bazemore v. Friday*, 478 U.S. 385, 396 n. 6 (1986).

**B. The Argument That GSK Did Not Report Inflated AWP’s After 2001 And Rarely Did So Before 2001**

GSK’s more general argument for dismissal is that since “early 2001” it has never reported AWP’s to the medical compendia, and that even before early 2001 it only occasionally reported AWP’s. Instead, attaching an affidavit of David S. Moules, GSK says that it sent the pricing compendia data about the purported “Wholesale Acquisition Cost” (WACs) of its drugs – the list prices that were used as the starting point (i.e., before

discounts) for the prices at which wholesalers could acquire the drugs from GSK. Mr. Moules seems to say that, from the WAC price data it reported, the compendia computed the “Average Wholesale Price” (AWP). He says that the compendia listed AWP’s that were 20% higher than the WACs that GSK or its predecessors supplied to the compendia. GSK Memorandum, 4-6. On the basis of this affidavit, GSK asks that this Court dismiss the Amended Complaint (hereinafter “Complaint”) at the pleading stage.

This argument is without merit. First, it is procedurally improper, because it depends on the Court relying on extraneous documents on a motion to dismiss. Second, the Complaint covers conduct well before the “early 2001” starting point on which GSK bases its motion. Third, the Complaint alleges that defendants provided inflated data about their WACs, not just their AWP’s. Fourth, regardless of the level of GSK’s WACs, GSK can be held liable, in any event, for standing mute as AWP prices for its drugs were falsely reported by the medical compendia, because it knew that the State relied on those inflated prices to calculate payments for GSK’s drugs.

**1. The motion is procedurally improper.** As the State’s Opposition To Defendants’ Joint Motion To Dismiss discusses in more detail, it is improper to ask the Court to grant a motion to dismiss based on documents extraneous to the complaint. Only with discovery will the State have a chance to test the accuracy of Mr. Moules’ representations about what sorts of prices GSK reported to the compendia and to explore the extent to which those prices were themselves inflated.

**2. Even if GSK's evidence could be considered on this motion, GSK admits that before "early 2001", GSK sometimes reported AWP's to the price compendia.** As discussed in the State's Opposition To Defendants' Joint Motion To Dismiss, the State, at a minimum, can pursue claims that arose on or after October 6, 2000, and in all likelihood it will be able to invoke the "discovery rule" to pursue claims based on conduct occurring before that date. Thus, to the extent that GSK was reporting AWP data to the compendia before "early 2001," GSK's argument fails even on its own terms.

**3. The Complaint states claims against defendants like GSK who reported WACs to the compendia.** Even if GSK was reporting (whether before or after 2001) WACs rather than AWP's, GSK would not be entitled to dismissal of the State's claims. The State's claims are not based solely on reporting inflated AWP's. The Complaint also alleges that, in addition to reporting inflated "Average Wholesale Prices," the defendants reported inflated WACs as well. Amended Complaint ("AC"), ¶47. GSK's complaints about the lack of "particularity" about this allegation merely rehash the particularity arguments in defendants' Joint Motion to Dismiss, and those arguments are answered by the State in its Opposition to that Motion.

**4. Under The Allegations Of The Complaint, GSK Can Be Liable Regardless Of The Accuracy Of the WACs It Reported.** Even if one ignores the Complaint's allegations that defendants inflated the WACs they reported, the Complaint states valid claims against defendants like GSK who purportedly reported WACs rather

than AWP to the pricing compendia. Regardless of whether a defendant reported WACs or AWP, the pricing compendia reported AWP for the drugs of *all* defendants, including those like GSK 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 what they reported to the compendia, knew that the AWP the compendia were reporting were inflated. A defendant like GSK who knew that fact necessarily knew that the State was reimbursing providers for its drugs at rates that were inflated, and therefore that the State was in effect paying providers of GSK's drugs far more than the estimated acquisition cost that the law sets as a ceiling for such payments. A defendant like GSK who stands mute and lets this practice continue for years is liable for an "unfair or deceptive trade practice" under the Alaska Unfair and Deceptive Trade Practices Act.

As discussed in more detail in the State's Opposition To Defendants' Joint Motion to Dismiss, the Unfair Trade Practices Act is to be interpreted in harmony with the Federal Trade Commission Act. AS 45.50.545. Under that Act, it has long been established that "a person is a wrongdoer who so furnishes another with the means of consummating a fraud." *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922). The Federal Trade Commission has ruled: "It is settled law that 'one who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act,' notwithstanding the fact that, in doing so, he

is merely ‘acting on instructions for [his] customer.’ *In the Matter of Coro, Inc.*, 63 F.T.C. 1164 (1963), *quoting C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952). Moreover, “direct participation in the fraudulent practices is not a requirement for liability. Awareness of fraudulent practices and failure to act within one’s authority to control such practices is sufficient to establish liability.” *FTC v. Atlantex Assocs.*, 1987 WL 20384, at \*12 (S. D. Fla. 1987); *FTC v. Windward Marketing, Ltd.*, 1997 WL 33642380, at \*13 (N.D. Ga. 1997). In *Windward Marketing*, a check factoring business was held liable because it neither “ceased doing business with the selling Defendants, or even questioned their practices.” *Id.*

The Complaint is more than adequate to charge GSK with knowing that the AWP’s of its drugs were being greatly overreported and hence that the State was paying inflated prices to providers of its drugs. Paragraph 41 of the Complaint states: “Defendants have defeated the intent of the Medicaid program to pay providers no more than their acquisition cost by reporting false and inflated AWPS to the medical compendia *and/or by reporting prices that they knew, because of the manner of the medical compendia’s operations, would misrepresent defendants’ true wholesale prices.*” This latter phrase covers companies like GSK. The Complaint also contains a lengthy description of how GSK and the other defendants disguised their conduct. AC ¶48, *et seq.* In short, for purposes of a motion to dismiss, the Complaint more than adequately describes GSK’s misconduct even if it were appropriate to accept GSK’s version of the facts at this juncture.

Far from contradicting these allegations of the Complaint, if anything, the affidavit of Mr. Moules suggests that the State will have no trouble proving them. Mr. Moules admits that the compendia reported AWP's that were 20% the *undiscounted* WACs that GSK reported to the compendia. Moules Affidavit, ¶11.

In short, GSK cannot obtain dismissal of the Complaint, regardless of whether it sent AWP's or WACs to the pricing compendia.

\* \* \* \* \*

GSK's motion to dismiss should 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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