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

STATE OF ALASKA,)
)
Plaintiff,)
vs.)
)
ALPHARMA BRANDED PRODUCTS)
DIVISION INC. et al.,)
)
Defendants.)

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Clerk of the Trial Courts

Case No. 3AN-06-12026 CI [WFM]

**DEFENDANT BRISTOL-MYERS SQUIBB COMPANY'S
REPLY MEMORANDUM IN FURTHER SUPPORT OF
MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

Defendant Bristol-Myers Squibb Company ("BMS") has moved to dismiss the First Amended Complaint ("Amended Complaint") with prejudice for failure to plead fraud with particularity, based on undisputed evidence that it does not report average wholesale prices ("AWPs") to the publications.

In response, the State does not attempt to dispute the evidence showing that BMS does not report AWPs,¹ but it claims that its allegations regarding wholesale acquisition cost ("WAC") pricing are adequate under Alaska R. Civ. P. 9(b). (Pls' Opp. at 3-4.) This is simply wrong. The Amended Complaint has only two paragraphs regarding WAC pricing. Paragraph 47 states:

¹ Plaintiff claims that BMS's motion is "procedurally improper" because it relies on material outside the Complaint. (Pls' Opp. at 2-3.) That may be true on a Rule 12(b)(6) motion; but this is a motion pursuant to Rule 9(b), and plaintiff cites no authority (and BMS has found none) prohibiting the Court from considering evidentiary materials on a 9(b) motion. The only case on this issue cited by plaintiff (see Opp. to Joint Motion at 3), Kollodge v. State of Alaska, 757 P.2d 1024, 1026 (Alaska 1988), involved a Rule 12(b)(6) motion.

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1 As they have done with their AWP's, defendants have illegally and deceptively
2 misrepresented and inflated the wholesale acquisition cost ("WAC") of their
3 drugs. WAC is the price at which defendants sell their drugs to wholesalers.
4 Defendants have made it appear that any reduction in the purchase price below
5 the listed WAC would result in a loss to the wholesaler and was, hence,
6 unachievable, when in fact defendants secretly discounted the WAC to
7 purchasers other than the Medicaid program through an elaborate charge back
8 system (as described in more detail below).

9 Paragraph 51 mainly describes the chargeback system,¹ which has been adopted by all
10 companies in the industry.

11 Neither of these paragraphs mentions BMS nor makes any specific allegations
12 regarding BMS' WAC (called wholesale list price by BMS) pricing and reporting. Plaintiff's
13 conclusory WAC allegations do not state what BMS (not the other defendants) said, to whom it
14 was said and how BMS' statements were fraudulent, which the cases require for a complaint to
15 pass muster under Rule 9(b). Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001);
16 Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985); Vess v. Ciba-Geigy Corp. USA, 317
17 F.3d 1097, 1106 (9th Cir. 2003); see also Commonwealth of Massachusetts v. Mylan
18 Laboratories, Civil Action No. 03-11865-PBS (4/5/05 Mem. and Order at 2) (holding that
19 plaintiff's WAC fraud allegations were inadequate because "Massachusetts provides no other
20 details about how or by whom the allegedly fraudulent WACs were calculated . . .") (attached
21 as Ex. A to BMS's Memorandum in Support of Motion to Dismiss).²

22 ¹ Plaintiff apparently claims that the defendants have hidden the chargeback system from
23 it. (Am. Cmplt. ¶ 51.) However, the chargeback system was described in 1999 by Judge
24 Posner of the United States Court of Appeals for the Seventh Circuit in a published opinion in
25 In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 783-85 (7th Cir. 1999).
26 Thus, the chargeback system was a matter of public record years before Alaska brought this
action.

² Plaintiff makes no attempt in its opposition papers to distinguish the 9(b) cases cited by
BMS at page 4-6 of its moving brief, including Judge Saris' decision in Mylan.

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Moreover, the evidence submitted by BMS on this motion demonstrates that plaintiffs' WAC allegations are simply untrue as to BMS (as was also the case with its AWP allegations). BMS's WLP prices are real prices, which appear on its invoices to wholesalers.¹ (Szabo Aff. ¶ 2) (attached as Ex. C to Affidavit of Steven M. Edwards.) In addition, BMS makes substantial sales at or near list price. (Szabo Aff. ¶ 10.) BMS has also disclosed to the publications, since 1999, that some customers receive rebates and discounts that are not reflected in the WLPs BMS reports to the publications. (Szabo Aff. ¶ 5.)

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Citing cases under Section 5 of the FTC Act, plaintiff takes the amazing position that BMS could be liable "even if the WACs it reported to the compendia had been accurate. . . ." (Pls' Op. at 4, Opp. to GSK Motion at 5-6.) This is so, Plaintiff claims, because under the FTC Act, a defendant can be liable for "plac[ing] in the hands of another a means of consummating a fraud." See, e.g., C. Howard Hunt Pen Co. v. FTC, 197 F.2d 273, 281 (3d Cir. 1952). However, even assuming the publications' AWP are inflated (which BMS does not concede), it cannot be the case that the provision of accurate pricing information to the publications by BMS can be a basis for liability, in the absence of some showing that BMS participated in or had the ability to control the publications setting of fraudulent AWP. See, e.g., FTC v. Kitco of Nevada, Inc., 612 F. Supp. 1282, 1292 (D. Minn. 1985); FTC v. Int'l Diamond Corp., No. C-82-0878 WAI (JSB), 1983 WL 1911, at *1, 5 (N.D. Cal. Nov. 8, 1983). In all the cases plaintiff cites, the defendant had participated in the fraud (and sought to avoid liability by claiming it did so at another's behest), Howard Hunt, 197 F.2d at 275, 281

¹ As is commonly known in the industry, the publications mark up companies' WACs (including BMS's reported WLPs) by 20.5-25% to create the AWP they publish. (Kaszuba Aff. ¶¶ 2-3) (attached as Ex. B to Affidavit of Steven M. Edwards.)

1 (defendant pen manufacturer falsely described pens, inter alia as "14 Kt. Gold Plated" and as
2 products of another company); FTC v. Winsted Hosiery Co., 258 U.S. 483, 492-93 (1922)
3 (company falsely described its underwear as "wool"); In re Coro, Inc., 63 F.T.C. 1164 (1963)
4 (jewelry manufacturer, inter alia, provided to distributors of its products catalog sheets falsely
5 representing the retail prices of its merchandise), or had the ability to control the fraudulent
6 activities of another. See FTC v. Atlantex Assocs., No. 87-0045-CIV-NESBITT, 1987
7 WL 20384, at *11-13 (S.D. Fla. Nov. 25, 1987) (individual defendants had the authority to
8 control corporate defendants' fraudulent activities); FTC v. Windward Marketing, Ltd., No.
9 Civ.A. 1:96-CV-615F, 1997 WL 33642380, at *13 (N.D. Ga. Sept. 30, 1997) (defendant "was
10 in a position to control the [fraudulent] activities" of the corporate defendant). Here, there can
11 be no allegation that BMS either set the AWP's for its drugs, or controlled the publications'
12 reporting of the AWP's for its drugs. (Kaszuba Aff. ¶¶ 2-4; Szabo Aff. ¶ 6.)

14 Conclusion

15 For all the reasons stated herein and in BMS's moving papers, we respectfully
16 suggest that the Court should dismiss the First Amended Complaint with prejudice for failure to
17 plead fraud with particularity.

18 DATED at Anchorage, Alaska this 2nd day of March, 2007.

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21 Attorneys for Defendant
22 **Bristol-Myers Squibb Co.**

23 By: 

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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 March 2, 2007.

/s/ Scott Hendricks-Leuning

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