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

STATE OF ALASKA,

Plaintiff,

vs.

ALPHARMA BRANDED PRODUCTS
DIVISION INC., et al.

Defendants.

)
)
) **Reply Brief**
) **In Support of Individual Motion to Dismiss**
) **the First Amended Complaint as to**
) **SmithKline Beecham Corporation, d/b/a**
) **GlaxoSmithKline**

)
)
) **Case No. 3AN-06-12026 CI**
)

Defendant SmithKline Beecham Corporation, d/b/a GlaxoSmithKline (“GSK”), in addition to joining Defendants’ Joint Motion to Dismiss the First Amended Complaint, separately moved to dismiss on two grounds: (1) all claims in the First Amended Complaint (“Complaint”) relating to the physician-administered drugs Zofran® and Kytril® injectables are covered by a prior settlement and release with the State and must therefore be dismissed, and (2) the remaining claims must be dismissed for failure to satisfy Rule 9(b) because the State does not sufficiently allege how GSK, which reported “WAC” list prices and *not* AWP’s for most of the drugs and time period at issue, can be liable without having reported AWP’s.

In its Opposition, the State *concedes* that GSK’s prior settlement with the State requires dismissal of all claims relating to Zofran® and Kytril® injectables. Instead of attempting to explain why the State ignored the release it signed and included the released claims in its Complaint, the State seeks to blame GSK for the State’s error -- because GSK did not ask the State to stipulate to a dismissal. The State, of course, is the party with the obligation to investigate the facts before filing a lawsuit and to refrain from asserting claims it clearly cannot bring. We are still awaiting its dismissal of the settled GSK claims.¹

The State’s position on GSK’s second argument -- that the State has failed to plead its claims *as to* GSK with the particularity required by Rule 9(b) -- reveals a similar disdain for the requirements of the Alaska pleading Rules and basic fair play. The State now takes the amazing position, in a case in which the Complaint and the State’s briefs repeatedly rail against the pharmaceutical industry for allegedly reporting false and inflated “average wholesale prices,” that it doesn’t really matter that a particular defendant like GSK *actually did not report “average wholesale prices”* for most of the period at issue, and, even more amazingly, that it doesn’t really matter *whether the “WAC” list prices that GSK actually did report were accurate or inaccurate*. This position, combined with the incredibly bare

¹ The State also asserts that evidence relating to the settled claims may be admissible. It is premature for GSK to point out the many flaws in this position.

allegations of the Complaint as to companies like GSK that reported WACs, makes it impossible for GSK to know exactly what it is being accused of doing wrong here so that it can mount an effective defense. Rule 9(b) prohibits plaintiffs from doing exactly what the State is attempting to do.

The State makes four arguments in opposition to GSK's motion to dismiss for lack of particularity, which we will consider in turn.

First, the State says that GSK's motion to dismiss is procedurally improper because GSK attached a sworn affidavit and several documents that describe its actual WAC list price reporting practices, all of which the State's counsel had before the Complaint was filed. But GSK did not attach these documents to show (at this point in the case) that its version of the facts is correct. It attached them to demonstrate that the State, which had these documents for months prior to filing the Complaint, has no excuse for its failure *even to try* to plead the *actual facts as to GSK*, in blatant disregard of the requirements of the Rules. GSK's motion is based on the State's failure to satisfy Rule 9(b)'s particularity requirements, and this failure can easily be discerned as to GSK from the face of the Complaint and without accepting or rejecting Mr. Moules's recitation of GSK's actual price reporting practices.

Second, the State points out that GSK has acknowledged that more than six years ago, for some drugs, GSK reported AWP's. This, of course, does not relieve the State of its burden to plead its claims with particularity as to that historical price reporting (all of which falls outside of the statutes of limitations) -- let alone as to GSK's other price reporting, which did not include AWP's at all.

Third, the State argues that a single paragraph in its Complaint satisfies its pleading burden with respect to GSK's WAC price reporting. That paragraph, paragraph 47, alleges that some unidentified defendants "illegally and deceptively misrepresented and inflated the wholesale acquisition cost ("WAC") of their drugs," without saying which WACs for which drugs were inflated or anything more specific. Even the State implicitly recognizes that such

bare allegations are not enough, because when it comes to its AWP-based allegations, it attaches an exhibit to its Complaint (Exhibit C) that purports to provide specifics as to which AWPs (at least for some period) were allegedly inflated.² *But nowhere on Exhibit C or anywhere else in the Complaint is a single specific WAC listed for GSK (or for any other defendant that reported WACs), as to which the State alleges anything specific, including whether such a WAC was “illegally and deceptively misrepresented and inflated” or not.* Thus, GSK is left guessing as to which of its reported WAC list prices -- if any -- the State is saying were inflated. Moreover, this failure of pleading is compounded by the State’s new position, described below, that the Complaint states a claim *even if GSK’s WACs were accurate*. Thus, in a case that we all thought was about inaccurate price reporting, the State’s latest position is that it is under no obligation to plead that GSK reported any inaccurate pricing information at all, let alone to say which reported prices were inaccurate and which were accurate yet still somehow actionable. Rule 9(b) was designed to prohibit such a slippery approach to pleading, which makes a case impossible to defend.

Finally, the State tries to establish a legal basis for its new argument that even if the WAC list prices that GSK reported were accurate, GSK is still liable because a third party price reporting service took GSK’s accurate WACs and added its own mark-up to create an AWP for GSK’s drugs. The State’s novel legal argument is based on certain FTC cases that are easily distinguishable.³ But GSK will not take the Court’s time -- yet -- to demonstrate why the State’s new argument is incorrect, because it is a red herring. The point at this pleading stage is that the Complaint *does not plead, let alone plead with specificity, this*

² GSK does not concede that Exhibit C to the Complaint shows that any AWP was inflated either -- but that is not the issue here.

³ Co-defendant Bristol-Meyers Squibb (which also reported WAC) distinguishes these cases in its individual Reply Brief (also filed today), to which we respectfully refer the Court.

novel theory that GSK reported accurate WAC list prices and yet is still liable because of another price that a reporting service published. In fact, such an allegation would fly in the face of innumerable statements made by the State in its recent brief.⁴ Rule 9(b) requires that before GSK is obligated to respond to such an allegation of accurate yet actionable price reporting, it must be pled with specificity -- along with any allegation that GSK inaccurately reported pricing information. Thus, at the very least, the State must plead which WAC list prices (or other prices) GSK reported that the State now claims to have been inflated (and why), and which such WACs or other reported prices the State now claims were accurate and yet still the basis for liability (and why). In the absence of these particulars, the Complaint must be dismissed as to GSK.

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Respectfully submitted,

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⁴ The State, for example, says in its Opposition to Defendants' Joint Motion to Dismiss that First DataBank (a third-party price reporting service) gets AWP's "from the defendants" (p. 5), that "all of the defendants have inflated their drugs' reported AWP's" (p. 6), that some defendants have reported "meaningless and inflated" WACs (p. 6), that "defendants provide phony, inflated 'average wholesale price' data to the compendia" (p. 9), that the "State relies on defendants' misrepresentation of AWP data to First DataBank, not First DataBank's regurgitation of this data" (p. 14), that "defendants were lying about their AWP's" (p. 18), and that the "Complaint makes clear that each defendant reported false and inflated AWP's, and gives detailed data in Exhibits B and C" (p. 28).