

DOCKET NO. CV 03 0083298 S (X07)

STATE OF CONNECTICUT,	:	SUPERIOR COURT
<i>PLAINTIFF</i>	:	
	:	
V.	:	COMPLEX LITIGATION
	:	DOCKET AT TOLLAND
	:	
GLAXO SMITHKLINE, P.L.C.,	:	
GLAXO WELLCOME, INC., AND	:	
SMITHKLINE BEECHAM CORP.	:	
<i>DEFENDANTS</i>	:	JUNE 10, 2004

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION
FOR ENTRY OF CONFIDENTIAL PROTECTIVE ORDER**

Pursuant to Practice Book § 13-5(7), the plaintiff, State of Connecticut, hereby proffers this memorandum in support of its motion for the entry of a protective order to govern the exchange of protected confidential information. As set forth in greater detail in the accompanying Practice Book §§ 13-8, 13-10 affidavit, the parties do not disagree regarding the need for a protective order to govern the discovery of trade secret or other confidential information. Rather, the parties have been unable to reach agreement with respect to a specific subset of the proposed terms of a confidential protective order.

The proposed confidential protective order ("Proposed Order") accompanies the motion in this matter, with the disagreements between the parties clearly delineated.¹ The parties differ on three substantive issues: (i) a minor disagreement regarding what is definitionally excluded from protected confidential information [Proposed Order ¶3]; (ii)

¹ The proposed order attached to the motion reflects the agreements and disagreements of the parties. Counsel for Pharmacia, Steven Malech, must be acknowledged for his substantial work in coordinating the parties to the point where there are only three substantive points of disagreement.

a complete disagreement regarding what the State may do with discovery material in this matter [Proposed Order ¶¶ 4(k), 8, 19]; and (iii) a complete disagreement regarding who has the burden of filing a motion when a confidential designation is challenged [Proposed Order ¶ 13].

The State proffers its argument regarding each issue in turn:

1. **What is Definitionally Excluded From Protected Confidential Information?**

In ¶3, the State proposes the following language:

3. Protected Confidential Information expressly excludes any document or information that has been publicly disclosed anywhere. Protected Confidential Information also expressly excludes any document or information or category of documents or type of information that any other court of competent jurisdiction has ruled should not be designated as confidential.

The purpose of the proposed language was to avoid the situation where information is publicly available, or has been ruled as not confidential (either by document or category of information) in another jurisdiction, and yet the defendants are nonetheless designating the information as protected confidential information under the protective order. *See, e.g., Commissioner of Environmental Protection v. Terminix International*, 2002 Conn. Super. LEXIS 105 at * 7-8 (complex litigation docket, New Britain, Jan. 3, 2002) (copy attached) (court rejected confidential designation of publicly-available documents); *Kowalonek v. Bryant Lane, Inc.*, 2000 Conn. Super. LEXIS 957 at *24-26, 36-37 (April 11, 2000) (copy attached) (same).

The defendants rejected the above proposed language, due to their stated concern that if a disgruntled former employee, or, e.g., a sloppy Congressional staffer improperly released protected confidential information into the public domain, they should not be precluded from designating the information as confidential. Thus, defendants suggest:

3. Protected Confidential Information expressly excludes any document that any court of competent jurisdiction has considered and ruled should not be designated as confidential, provided that the producing party was a party to the other proceeding or otherwise had reasonable notice and an opportunity to be heard prior to such ruling.

The State's concerns with the defendants' proposed language are two-fold: first, defendants' proposal does not preclude the defendants from designating publicly-available documents as confidential. Second, defendants' proposal envisions that a court ruling would solely be by specific document, rather a category of documents or information. If a court of competent jurisdiction has ruled that a specific defendant's pricing information before 1999 is not protected commercial information, then the fact that that court has not ruled on a particular document or series of documents should not provide a loophole to permit that defendant to designate documents regarding pre-1999 pricing as confidential commercial information.

Finally, to the extent a properly-designated confidential document was publicly revealed due to the malfeasance of a third-party, the affected defendant can simply notify the State of the circumstances of how the document became public, and the efforts undertaken to restore the confidential nature of the document. If the State objects to the designation of the document, the matter then can be taken up with this Court. The State

respectfully suggests that an “improper-release” exception should not swallow-up the “if it is publicly-available, it is not confidential” rule.

2. How May the State Use or Share Discovery Information?

The defendants seek to limit the State’s use of discovery information (proposed ¶ 19) and to preclude the State from sharing any discovery information with other federal or state law enforcement governmental agencies or other AWP plaintiffs (the State’s proposed ¶¶ 4(k), 8). The defendants improperly are seeking to impose private party restrictions upon a governmental plaintiff.

As a general rule, the State (or any party) is not limited in its use of information obtained through discovery. If, for example, during the course of discovery, the State uncovers federal or criminal wrongdoing, it may refer information it discovered to the State’s Attorney’s Office and/or federal authorities. If the State discovers other wrongdoing within Connecticut, it may take additional appropriate action. Likewise, if the State discovers evidence of wrongdoing in another state, it may refer the information and matter to the pertinent agencies in another state. If it determines that state policy is in error based upon what it learns in discovery, it can change state policy. There is no statute, practice book provision, or case law authority that requires the State (or any party) to ignore what it learns during discovery. Moreover, absent a protective order, documents and information provided through discovery typically are placed in the public domain, as they are usually presented at trial, or attached as exhibits to pleadings in the court’s docket. *See also* Practice Book § 11-20A.

There are, however, protections for competitors in the discovery of confidential commercial competitive information and trade secrets. The purpose of a protective order for such information is to ensure that one's competitor does not use a company's sensitive commercial information to compete against the producing party. Thus, in the context of a case by-and-between private entities, an "only this litigation" provision, such as proposed by defendants in ¶19, is understandable.

However, this is not a case by-and-between private entities. Rather, this is a sovereign enforcement action under the governmental provisions of CUTPA, Conn. Gen. Stat. §§ 42-110m, 42-110o. The State of Connecticut does not compete against pharmaceutical manufacturers, and therefore the scenario that defendants' proposed ¶19 is designed to address simply does not apply here. The State of Connecticut has governmental obligations to ensure that its laws are complied with, and comity obligations with other jurisdictions. There also is a fairly well-recognized principle for disclosure of trade secrets if such information is "relevant to public health or safety, or to the commission of a crime or tort, or to matters of substantial public concern." RESTATEMENT THIRD, UNFAIR COMPETITION, § 40. The defendants cannot shield evidence of other wrongdoing that may emerge through the discovery process through the terms of a confidential protective order. The State's proposed ¶19 language properly acknowledges the State's governmental obligations and should be adopted.

Second, Defendants' express concern was that if the State shared discovery information with other states with pending average-wholesale-price (or "AWP")

litigations, each state could concentrate upon a separate defendant, and all the states would be more effective in their prosecutions of their respective average-wholesale-price cases, currently pending in 15 states.² Therefore the defendants object to State's

² Similar cases have been initiated by the States of Arkansas, California, Connecticut, Florida, Kentucky, Massachusetts, Minnesota, Montana, Nevada, New York, Ohio, Pennsylvania, Texas, West Virginia and Wisconsin, as well as some county governments. *See: State of Arkansas v. Dey, Inc., et al.*, Pulaski County, Arkansas Circuit Court, Case No. CV-04-634; *State of California, ex rel., Ven-A-Care of the Florida Keys, Inc., v. Abbott Laboratories, Inc., et al.*; U.S. District Court for the District of Massachusetts, Civil Action No. 1:03-CV-11226-PBS; *State of Florida, ex rel. Ven- A-Care of the Florida Keys, Inc. v. Boehringer Inghelheim Corporation, et al.*, Leon County, Florida, Circuit Court, Civil Action No. 98-3032A; *Commonwealth of Kentucky v. Abbott Laboratories, Inc.*, Franklin District Court – Div. II, Kentucky, Civil Action No. 03-CI-1134; *Commonwealth of Kentucky v. Warrick Pharmaceutical Corp., et al.*, Franklin District Court – Div. II, Kentucky, Civil Action No. 03-CI-1135; *Commonwealth of Massachusetts v. Mylan Laboratories, et al.*, U.S. District Court for the District of Massachusetts, Civil Action No. 03-CV-11865-PBS; *State of Minnesota v. Warrick Pharmaceutical Corporation, et al.*, Fourth Judicial District Court, Hennepin County, Minnesota, Civil File No. MC 03-14691; *State of Montana v. Abbott Laboratories, et al.*, U.S. District Court for the District of Massachusetts, Civil Action No. 1:02-CV-12084-PBS; *State of Nevada v. American Home Products, et al.*, U.S. District Court for the District of Massachusetts, Civil Action No. 1:02-CV-12086-PBS; *State of Nevada v. Abbott Laboratories, Inc., et al.*, Second Judicial District Court, Washoe County, Nevada, Case No. CV02-00260; *State of New York v. Pharmacia Corporation*, New York Supreme Court, Commercial Division, No. 904-03; *State of New York v. SmithKline Beecham Corporation*, New York Supreme Court, Commercial Division, No. 905-03; *State of New York v. Aventis Pharmaceuticals, Inc.*, New York Supreme Court, Commercial Division, No. 1150-03; *State of Ohio v. Dey, Inc., et al.*, Court of Common Pleas, Hamilton County, Ohio, Case No. A 0402047; *Commonwealth of Pennsylvania, by Gerald J. Pappert, Attorney General v. TAP Pharmaceutical Products, Inc., et al.*, Commonwealth Court of Pennsylvania, Case No. 212MD2004; *State of Texas, ex rel. Ven-A-Care of the Florida Keys, Inc. v. Dey, Inc. et al.*, Travis County, Texas, Circuit Court, Civil Action No. No. GV0-02327; *State of Texas v. Roxane Laboratories, Inc.*, U.S. District Court for the District of Massachusetts, Civil Action No. 1:04-CV-10886-PBS; *State of West Virginia, ex rel. Darrell V. McGraw, Jr., Attorney General v. Warrick Pharmaceuticals Corporation, et al.*, Kanawha County, West Virginia, Circuit Court, Civil Action No. 01-C-3011; *State of Wisconsin v. Abbott Laboratories, et al.*, Dane, County, Wisconsin, Circuit Court, Case No. 2004CV001709; *County of Rockland, New York v. Abbott Laboratories, Inc., et al.*, U.S. District Court for the District of Massachusetts, Civil Action No.1:03- CV-12347-PBS; *County of Suffolk, New York v Abbott Laboratories, et al.*, U.S. District Court for the District of Massachusetts, Civil Action No. 1:03-CV-10643-PBS; *County of Westchester, New York v. Abbott Laboratories, et al.*, U.S. District Court for the District of Massachusetts, Civil Action No. 1:04-CV-10322-PBS;. In addition, quite a number of private

language permitting the State to share documents and information with other AWP plaintiff counsel and other governmental agencies who agreed to abide by the terms of the protective order. *See* State’s version only of Proposed Order ¶¶ 4(k), 8. Given that the only basis for defendants’ objections is “the states will be more effective if they coordinate their efforts,” there is no legal reason to permit the defendants to hamstring the State’s prosecution of its claims.

There is also no legitimate policy reason. The State of Connecticut’s investigation prior to filing its complaints was facilitated by its access to the defendants’ pricing and marketing information produced to other law enforcement agencies, both federal and state, and to private counsel for relators in pending federal and state *qui tam* actions. Inter-governmental cooperation is common and essential for the successful protection of federal and state healthcare programs, and the citizens injured by the defendants’ unlawful conduct.

The average-wholesale-price cases filed by Connecticut, New York and Minnesota were removed to the federal court multi-district litigation docket (the “MDL”) and remanded back to the respective state courts at roughly the same time. During the process of removal and remand, certain of the defendants had requested that the three states coordinate their discovery efforts, to ease the burden upon the defendants, and to coordinate on discovery issues such as experts and depositions. After considerable effort,

class actions are pending in a multidistrict litigation case in the U.S. District Court for the District of Massachusetts. In Re Pharmaceutical Industry Average Wholesale Price Litigation, MDL #1456, Civil Action No. 01-12257-PBS (D. Mass.)

the three states submitted a proposal for discovery coordination to the defendants for their consideration. The defendants never responded to the proposal, and at this point, the various AWP state cases are proceeding on parallel, but separate, tracks. The defendants in the MDL also successfully moved the federal court for an order encouraging (but not requiring) plaintiff states that were remanded back to their respective state courts to coordinate their discovery efforts. The defendants' current position seeking to curtail any sharing of discovery materials stands in stark contrast to their stated position before the federal court and their request to the State during the removal-and-remand process.

The State's pending four Average Wholesale Pricing cases were developed, in part, through interstate cooperation among state and federal law enforcement agencies. The cooperating state and federal agencies have a legitimate common interest to prosecute the type of deception, unfair and fraudulent conduct allegedly engaged in by the pharmaceutical defendants in the pending cases. The defendants' efforts here to block cooperation by and between governmental entities and other Average-wholesale-price plaintiff counsel, and adoption of a "divide and conquer" approach, should be rejected in its entirety.

3. **Who has the Burden of Filing a Motion When a Confidential Designation is Challenged?**

Where there is a dispute regarding the confidential designation of information, the State's version of ¶ 13 would require the party designating the challenged material as confidential to file a motion with the Court to defend its designation, whereas the

defendants' version of ¶ 13 seeks to have the party challenging the designation file a motion to compel. The State respectfully submits that its version better comports with the legal presumptions and burdens applicable to confidential designations.

In Connecticut there is a strong presumption “in favor of public access to court records.” Sabanosh v. Durant, 21 Conn. L. Rptr. 213, 1997 Conn. Super. LEXIS 3448 (Dec. 17, 1997) (copy attached); Practice Book §§ 11-20; 11-20A. It is axiomatic that as a matter of public policy and law, court proceedings are conducted in public, not shrouded in secrecy. Thus,

The adjudicative process . . . is a function of the law which is derived from the community's delegation to the courts and to the legislature of the power to establish and enforce the substance of the law. That process is a matter of public concern as the enforcement of the law has a broader impact than just the decision in the dispute of the particular parties. So also the community has a real concern as to the process by which the law is justly enforced. The public's concern is accommodated by the openness of the court's record.

Sabanosh v. Durant, 21 Conn. L. Rptr. 213, 1997 Conn. Super. LEXIS 3448 at *5-6 (Dec. 17, 1997), *quoting* City of Hartford v. Chase, 733 F. Supp. 533, 535 (D. Conn. 1990).

Because the presumption is for civil litigation to be conducted in the open, the party asserting a desire for confidentiality bears the burden of proof that the document or information should be kept as confidential. Practice Book § 13-5(7); Babcock v. Bridgeport Hospital, 251 Conn. 790, 848-49 (1999); Demonico v. Wal-Mart Stores, Inc., 1999 Conn. Super. LEXIS 1937 (July 23, 1999) (copy attached). To meet that burden, the party must make a particularized showing, and cannot rely upon generalized

statements. *See, e.g.,* Demonico, *supra* (court denied protective order for lack of particularized showing): Sabanosh, *supra* (same). Moreover, the party requesting confidentiality must establish interests that outweigh the public interest in an open process. Sabanosh, *supra*.

Having the party who designated the material as confidential bear the burden of filing and defending the designation is not unique in the Connecticut complex litigation docket. In Terminix, the court required the party designating the materials as confidential to bear the burden of filing the motion defending that designation. Commissioner of Environmental Protection v. Terminix International, 2002 Conn. Super. LEXIS 105 (complex litigation docket, New Britain, Jan. 3, 2002) (Terminix filed motions to defend its confidential designations). The court thus may also wish to take judicial notice of the confidential protective order entered in the Terminix matter, docket no. X03CV0510942.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court enter its version of the proposed confidential protective order.

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CERTIFICATION

I hereby certify that true and accurate copies of the foregoing Memorandum in Support of Motion for Entry of Confidential Protective Order were served by first-class mail, postage prepaid, this 10th day of June, 2004, to:

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