

NEW YORK SUPREME COURT
COUNTY OF ALBANY

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People of the State of New York, :
 :
 Plaintiff, :
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 v. : Index No. 904-03
 : Hon. Louis C. Benza
 Pharmacia Corp., : Commercial Division
 :
 Defendant. :

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People of the State of New York, :
 :
 Plaintiff, :
 :
 v. : Index No. 905-03
 : Hon. Louis C. Benza
 SmithKline Beecham, Corp., d/b/a/ : Commercial Division
 GlaxoSmithKline, :
 :
 Defendants. :

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People of the State of New York, :
 :
 Plaintiff, :
 :
 v. : Index No. 1150-03
 : Hon. Louis C. Benza
 Aventis Pharmaceuticals, Inc., : Commercial Division
 :
 Defendant. :

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MEMORANDUM OF LAW IN SUPPORT OF STATE'S
MOTION TO ENTER THE PROPOSED ORDERS
ESTABLISHING A PROCEDURE FOR HANDLING
MATERIALS A PARTY DESIGNATES "CONFIDENTIAL"

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SUMMARY OF ARGUMENT

Pursuant to C.P.L.R. § 3103(a), plaintiff, the People of the State of New York (“State”), moves this Court for an order in each of the above-captioned actions¹ to establish a procedure for handling material a party designates “Confidential” (“‘Confidential’ material”). (The three Proposed Orders are identical to each other except for the name of the defendant.)

The substance of the State’s claims in each of these cases is that each defendant misrepresented the average wholesale price of some of its prescription drugs, and, as a consequence, Medicare beneficiaries, the New York Medicaid program, and the New York Elderly Pharmaceutical Insurance Coverage program (“EPIC”) have overpaid physicians and pharmacies for covered drugs.

The parties have initiated discovery, and the State seeks to have the Proposed Orders that are annexed to the Affirmation of Matthew Barbaro (“Barbaro Affirmation”) entered in these matters. Each defendant has agreed to the provisions of the Proposed Orders, other than subparagraphs 5(h), 5(i), 7(a), 7(b) and Appendix B (which are in italicized typeface). The agreed-upon provisions would govern the grounds on which a party can identify its materials as “Confidential,” the parties’ handling of “Confidential” materials, and the procedure to be followed if a party wishes to include “Confidential” materials in papers filed with the Court. The Proposed Orders also address the persons and entities to which “Confidential” materials may be

¹These actions were removed to the United States District Court for the Northern District of New York, but, upon the State’s motion, have since been remanded to this Court. While in the Northern District of New York, these three cases were consolidated for pre-trial purposes, including discovery. Since the cases were remanded to Supreme Court, Albany County, the Court has continued to treat them as consolidated for this purpose. *See* Order Granting Motion to Drop Party Defendants and to Discontinue Claims entered on June 1, 2004.

disclosed and the purposes for which they may be used. The parties do not agree on the two latter issues.

The State's Proposed Orders would enable the Attorney General to fulfill his law enforcement mandate. Specifically, the Proposed Orders would allow the Attorney General to retain his right to do the following:

- use "Confidential" materials for law enforcement purposes in addition to the prosecution of the instant cases (Proposed Orders ¶ 7(a));
- provide "Confidential" materials to New York political subdivisions, the United States or the Attorneys General of other States for law enforcement purposes (Proposed Orders ¶¶ 5(i), 7(b));
- provide "Confidential" materials to New York State agencies for the purpose of implementing or enforcing applicable law within the State. (Proposed Orders ¶¶ 5(h), 7(a)).

Defendants object to these above-referenced paragraphs. If defendants' position were to prevail, the Attorney General would be powerless to provide to the appropriate law enforcement agency any "Confidential" materials containing evidence of potentially illegal activity in violation of New York law, federal law or the law of another State. While the defendants have an interest in preserving the secrecy of narrow aspects of their commercial activities, that interest is insufficient to thwart the proper enforcement of the law of this State, the United States, or any other State. Indeed, such obstruction of law enforcement is contrary to centuries-old public policy -- a public policy of sufficient importance that an otherwise valid contract that obstructs communication of information concerning illegal activity will be declared void. It therefore

would be an improvident use of discretion for this Court to prevent the Attorney General from making such information available to other law enforcement agencies.

The State's Proposed Orders would provide defendants' "Confidential" materials with ample protection against any subsequent disclosure² that could injure a legitimate interest in keeping such materials secret, *i.e.*, an interest other than obstructing the government from enforcing the law. Under subparagraphs 5(h) and 5(i) and Appendix B, the government entity would have to certify (on Appendix B) that it, and its officers, employees and agents, would:

- not reveal "Confidential" information to any person not entitled to receive it under the Orders entered in the instant actions;
- treat material marked "Confidential" in the instant actions as if it had been marked confidential under the receiving jurisdiction's own open-records law;
- comply with the jurisdiction's law concerning disclosure of materials marked confidential under its open-records law;
- notify the defendant before it discloses the "Confidential" material to anyone who is not an officer, employee or agent of the government body; and
- use the "Confidential" materials only in connection with law enforcement activities or, in the case of a New York State agency, in connection with either implementing or enforcing applicable law.

Subparagraphs 5(h), 5(i), 7(a) and 7(b) and Appendix B are necessary because without them, the Orders would prevent the Attorney General from providing other law enforcement agencies with information of potentially illegal activity. Nor could the State provide

²"Disclosure" is used in this Memorandum to refer to revealing information, and is not limited to "disclosure" under Article 31 of the C.P.L.R.

“Confidential” information germane to the implementation and enforcement of the State’s own laws by New York State agencies. There are no significant countervailing concerns that are not adequately accommodated by the protections built into the State’s Proposed Orders. The Court should, therefore, enter the State’s Proposed Orders in their entirety, including subparagraphs 5(h), 5(i), 7(a), 7(b) and Appendix B.

THE UNCONTESTED PROVISIONS
OF THE PROPOSED ORDERS

Section § 3103(a) of the C.P.L.R. provides that the Court may enter an order “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts,” and the Court has broad discretion to supervise discovery and to enter appropriate orders under this section. *E.g.*, *Pucik v. Cornell University*, 4 A.D.3d 686 (3rd Dep’t 2004); *Button v. Guererri*, 298 A.D.2d 947 (4th Dep’t 2002); *Byck v. Byck*, 294 A.D.2d 456 (2d Dep’t 2002). It would be a provident exercise of the Court’s discretion to enter the undisputed portions of the Proposed Orders (as well as the contested ones).

N.Y. Jud. Law § 4 and 22 N.Y.C.R.R. § 216.1 create a strong presumption against redacting or sealing any materials filed with a court and impose on the party seeking to redact or seal materials the burden to move for such relief and the burden of persuasion on such motion. *E.g.*, *Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter*, 274 A.D. 2d 1 (1st Dep’t 2000); *Visentin v. DiNatale*, 4 Misc. 3d 1018 (S. Ct., Putnam Co. 2004); *Doe 1 v. Bellmore-Merrick Central High Schl. Dist.*, 1 Misc. 3d 697 (Sup. Ct., Nassau Co. 2003).

The agreed-upon provisions fully implement this policy that the public should have access to New York courts and their records. They also serve the recognized interest in preventing disclosure to the public, including competitors, of trade secrets or other commercially sensitive information disclosure of which would cause the party substantial injury. The agreed-

upon sections of the Proposed Orders strike the appropriate balance between these two competing interests.

The undisputed sections of the Proposed Orders address five main issues: the grounds on which material may be marked “Confidential”; the categories of persons and entities to whom “Confidential” materials may be disclosed, the purposes for which “Confidential” materials can be used, the procedures that apply when a party that receives “Confidential” materials through discovery (“receiving party”) wishes to use them in papers filed with the Court, and the procedures that apply when a party wishes to include its own “Confidential” materials in papers filed with the Court.

The parties have agreed that materials may be marked “Confidential” if they are excepted from public inspection and copying under the New York Freedom of Information Law, N.Y. Pub. Off. Law §§ 84, et seq. (“FOIL”) or are otherwise protected from disclosure by law. They have also agreed that “Confidential” materials may be disclosed to opposing counsel, experts, support services personnel (*e.g.*, interpreters, document imaging personnel), the Court, Special Masters, private mediators, persons who previously saw the materials, non-expert deponents (who cannot retain the materials), and individuals who have been determined to be entitled to the materials under FOIL. (Proposed Orders ¶¶ 5(a)-(g) and 5(j).) The parties further agree that, in general, “Confidential” materials could be used only in connection with the instant litigation. (Proposed Orders ¶¶ 7(c) and 7(d).) These uncontested provisions are appropriate for inclusion in a C.P.L.R. § 3103(a) order.

The other uncontested issues in the Proposed Orders govern how a party should proceed if it wants to include “Confidential” material in papers filed with the Court. The Proposed Orders strike a reasonable balance between the mandate that New York courts and their records

should be open to the public and the parties' interest in preventing disclosure of their "Confidential" materials in court records before the Court has an opportunity to determine whether they may be redacted.

In New York, there is an extremely strong presumption against sealing or redacting material from papers filed with a Court. *E.g.*, *Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter*, 274 A.D. 2d 1 (1st Dep't 2000); *Visentin v. DiNatale*, 4 Misc. 3d 1018 (S. Ct., Putnam Co. 2004); *Doe 1 v. Bellmore-Merrick Central High Schl. Dist.*, 1 Misc. 3d 697 (Sup. Ct., Nassau Co. 2003). The party seeking to redact records must obtain an order allowing the redacted papers to be filed, *id.*, and to grant such an order, the Court must find good cause for the redaction, having "consider[ed] the interests of the public as well as of the parties."

22 N.Y.C.R.R. § 216.1. The proposed procedures implement these policies.

Under the Proposed Orders, if a receiving party wishes to file "Confidential" materials it has received through discovery, it would file the papers, having redacted the "Confidential" materials. Unless the party that produced the "Confidential" material ("producing party") files a motion to redact within 15 days of conferring with the receiving party (which must occur within five days of when the papers are filed), the receiving party will file an unredacted set of papers with the Court. (Proposed Orders ¶ 9.) If a producing party wishes to file papers containing its own "Confidential" materials, simultaneously with filing its papers in a redacted form, it must file a motion to redact with a request for a temporary order allowing it to file redacted papers, pending a decision on its motion to redact. (Proposed Orders ¶ 10.) The parties have agreed not to object to the entry of such a temporary order, but retain the right to move to vacate such an order. (Proposed Orders ¶ 10(e).)

These two provisions allow a minimal amount of time during which papers filed with the Court may remain redacted before the redaction issue is presented to the Court, while providing a realistic time frame in which a producing party can evaluate whether to seek redaction (when the receiving party files the papers) or the receiving party can decide whether to oppose redaction (when the producing party files the redacted materials). They, moreover, properly impose on the party seeking to redact court papers the twin burdens of seeking an order to redact and persuading the Court that redaction of specific materials meets the legal standard under N.Y. Jud. Law § 4 and 22 N.Y.C.R.R. § 216.1. These provisions fulfill the purpose of the statutory and regulatory open-court requirements, and, therefore, the State requests that the Court approve and enter these and the other uncontested sections of the Proposed Order.

THE CONTESTED PROVISIONS OF THE PROPOSED ORDERS

The issues in dispute center around whether the Attorney General may fulfill his mandate as a law enforcement officer and his role representing the State. Specifically, the defendants object (1) to the Attorney General making “Confidential” materials available to New York State agencies and to other law enforcement agencies and (2) to the Attorney General’s and other government entities’ use of the “Confidential” material in connection with other law enforcement activities (beyond the instant actions) and, in the case of New York State agencies, in connection with the implementation and enforcement of state law.

From the time of the first United States Congress and before under English common law, public policy strongly disfavored any agreement that served to conceal “information relevant to the commission of a crime.” *Branzburg v. Hayes*, 408 U.S. 665, 696-97 (1972). *See Nickelson v. Wilson*, 60 N.Y. 362, 368 (1875) (“An agreement to cripple, stifle or embarrass a prosecution for a criminal offence, by destroying or withholding evidence, suppressing facts, or other acts of that

character, is against public policy, and void. In such cases the parties take the responsibility of interfering with, and by secret or indirect means, frustrating the administration of justice.”) With the advent of civil law enforcement actions as an alternative means of enforcing the same public interests previously served only through criminal prosecutions, the firmly rooted policy described in *Branzburg* and *Nickelson* must be extended to information that would be relevant to any law enforcement proceeding.

In *Fomby-Denson v. Dep’t of the Army*, 247 F.3d 1366 (Fed. Cir. 2001), the United States Army had entered into a settlement agreement with one of its employees who worked in Germany. The settlement included a provision by which the Army agreed not to disclose the terms of the agreement. Ancillary to the settlement were allegations that the employee had forged certain records in the course of her work for the Army. Subsequently, the Army referred the allegations of forgery to the local German law enforcement authorities, along with information about the terms of the settlement. The Army also communicated information concerning the referral and the content of the agreement to German immigration authorities, which could have had criminal and civil consequences for the employee. The court in *Fomby-Denson* held that it was foreclosed from interpreting the settlement agreement as preventing the Army’s communication with the German police and immigration authorities because such a construction would render the agreement void as violative of public policy.

In reaching its decision, the court explicitly assumed the Army was not required to report the potentially criminal information to the German authorities by statute or treaty. It held, “the public policy interest at stake -- the reporting of possible crimes to the authorities -- is one of the highest order and is indisputably ‘well defined and dominant’ in the jurisprudence of contract law.” *Fomby-Denson v. Dep’t of the Army*, 247 F.3d at 1375 (quoting *W.R. Grace & Co. v.*

Local Union 73, 461 U.S. 757, 766 (1983)); *See Fidelity & Deposit Co. of Maryland v. Grand Nat. Bank of St. Louis*, 69 F.2d 177, 180 (8th Cir. 1934) (*see* cases collected at 69 F.2d at 180).

This public policy must necessarily govern the Court's exercise of its discretion in setting the terms of a § 3103(a) order.

Just as the court was constrained to find that the Army had retained the discretion to reveal potentially illegal conduct to another jurisdiction -- specifically a foreign nation, the Attorney General must retain the discretion to reveal to other jurisdictions any information that might be related to criminal or civil law enforcement. And each jurisdiction must be able to use that information to enforce its law. This public policy against concealing information about possible illegal conduct requires the Court to include subparagraphs 5(h), 5(i), 7(a), 7(b) and Appendix B in the Order it enters pursuant to C.P.L.R. § 3103(a).

In addition to furthering this public policy, paragraph 5(h) of the Proposed Orders recognizes that the Attorney General must retain the discretion to provide "Confidential" material to a New York State agency where the information is relevant to the agency's administration of State law. The information contained in "Confidential" materials may be germane to the agencies' determination of policy questions they are mandated to resolve or to operational issues that affect the programs within their jurisdiction. The Attorney General and administrative agencies each exercise portions of the State's sovereign power. There is no justification for creating an artificial barrier to intra-State disclosure of information needed to fulfill duties imposed by State law. The Court should, therefore, protect New York State agencies' access to the information in "Confidential" materials.

Defendants, moreover, do not have substantial, unprotected interests that outweigh the public policy against concealing information that may be relevant to law enforcement matters. In

fact, the defendants' interests are more than adequately protected by the Proposed Orders, which adopt the safeguards that would be available under the receiving jurisdiction's law. The Proposed Orders may, indeed, afford even greater protection, because they provide that the receiving government must give the defendant notice before it discloses the "Confidential" material to any person or entity, even if the jurisdiction's open-records law does not require such notice. Thus, the defendants will have an opportunity to seek judicial protection of materials that constitute trade secrets or are genuinely entitled to be kept confidential irrespective of the substance of the receiving jurisdiction's open-records procedures and standards.

Given the protections the Proposed Orders afford "Confidential" material provided to another government body, defendants' rationale for opposing the disputed sections appears to be rooted in their desire to know if they are being investigated by any other government. They are not entitled to this knowledge. Additionally, the government recipients can certainly be trusted to maintain the "Confidential" materials in accordance with the terms of their agreement under the Proposed Orders.

In setting the terms of an order under C.P.L.R. § 3103(a), the Court must "strike a balance by weighing the[] conflicting interests in light of the facts of the case." *Hispanic AIDS Forum v. Estate of Joseph Bruno*, 195 Misc. 2d 366, 369 (Sup. Ct., N.Y. County 2003). *See also Ostia Medical, PC v. Government Employees Ins. Co.*, 1 Misc. 3d 907 (Dist. Ct. , Nassau Co. 2003); *Rhoda C. v. Amos C.*, 126 Misc. 2d 551 (Fam. Ct., N.Y. Co. 1984). In this balance, the State's interest in using information in its possession to enforce and implement state law, and in providing this information to other law enforcement agencies so they can enforce their own law, overwhelms the defendants' far less substantial concerns. The defendants' objections to subparagraphs 5(h), 5(i), 7(a), 7(b) and Appendix B simply do not provide sufficient justification

to warrant the Court's rejection of these provisions. The Court, therefore, should approve and order all the provisions of the Proposed Orders.

CONCLUSION

For the reasons set forth above, the People of the State of New York request this Court to enter the Proposed Orders annexed to the Barbaro Affirmation in their entirety.

Dated: New York, New York
November 23, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the twenty-third day of November, 2004, in accordance with the stipulation of the parties so-ordered by the Court on November 18, 2003,

1. I caused the foregoing Memorandum in Support of the State's Motion to Enter the Proposed Orders Establishing a Procedure for Handling Materials a Party Designates "Confidential," with attachments, to be sent by electronic mail to each of the following attorneys of record:

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2. I caused a copy of the foregoing Memorandum in Support of the State's Motion to Enter the Proposed Orders Establishing a Procedure for Handling Materials a Party Designates "Confidential," with attachments, to be deposited in the United States mail, first class, postage pre-paid, addressed to the following attorneys of record:

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