

As explained in greater detail below, the State asks the court to compel Novartis to produce the requested documents, answer one interrogatory, and award the State its fees and costs incurred in bringing this motion.

THE COMPLAINT'S ALLEGATIONS

Although the Court and Special Discovery Master are familiar with the allegations of the Complaint as a result of previous pleadings, including discovery disputes with the AstraZeneca Defendants and Pfizer, the State briefly summarizes the key allegations relevant to the present discovery dispute.

Novartis and the other defendants have for years identified an average wholesale price (“AWP”) and wholesale acquisition cost (“WAC”) (or similar terms used to denote either the price charged by wholesalers or a drug’s cost to wholesalers) for most of their drugs. These prices are disseminated to the public by the defendants through publication in certain medical compendia. These are the only prescription drug prices that the defendants make public. Amended Complaint, ¶ 34. The State of Wisconsin, as a payer under the Medicaid program, has based its reimbursement formula for prescription drugs on the defendants’ published AWP. *Id.* 35. Defendants have illegally misrepresented the true AWP for virtually all of their drugs, reporting to the medical compendia AWP that are false and inflated, some by as much as 1,000%. *Id.* ¶ 37. As a result, the State has hugely overpaid for defendants’ drugs.

This scheme violates myriad Wisconsin statutes. For example, Wis. Stat. § 100.18(10)(b) states: “It is deceptive to represent the price of any merchandise as a manufacturer’s or wholesaler’s price, or a price equal thereto, unless the price is not more than the price which retailers regularly pay for merchandise.” Contrary to this statutory command, Novartis reported

and caused to be published wholesale prices that are consistently and significantly greater than the price retailers pay for their drugs.

Further, the Public Assistance code prohibits Novartis from knowingly making, or causing to make “any false statement or representation of a material fact for use in determining rights to a benefit or payment.” Wis. Stat. § 49.49(4m)(a)(2). Novartis’s publication of phony wholesale prices, knowing that Wisconsin will use them in determining its reimbursement to providers, is a direct violation of this statute.

Wisconsin’s law is consistent with other jurisdictions. Pricing deceptions are material as a matter of law. “[A]ny representations concerning the price of a product or service are presumptively material.” *FTC v. Windward Marketing Ltd.*, 1997 WL 33642380, *9 (N.D. Ga. 1997). *See also Sullivan’s Wholesale Drug Co. v. Faryl’s Pharmacy, Inc.*, 214 Ill. App.3d 1073, 1086 (1991) (“There can be no dispute that the representation made by the defendants went to a material fact, *i.e.*, the price which the nursing home residents were being charged for their prescriptions.”).

Because of the materiality of price to purchasers, it has been the law for well over 40 years that it is unlawful to publish a price of any kind, no matter what it is called -- manufacturer’s list, list, regular or wholesale -- where that price does not truly represent a price at which significant sales are made. As the U.S. Supreme Court said in *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965): “It has long been considered a deceptive practice to state falsely that a product ordinarily sells for an inflated price but that it is being offered at a special reduced price, even if the offered price represents the actual value of the product and the purchaser is receiving his money’s worth.” *See also Idaho v. Master Distributors*, 101 Idaho 447, 454 (1980); *Niresk Industries, Inc. v. FTC*, 278 F.2d 337 (1960). Phony wholesale prices

are subsumed in this general rule. *See Federated Nationwide Wholesalers Service v. FTC*, 398 F.2d 253 (2d Cir. 1968).

In sum, it is unlawful for a company to publish a price for a product -- whether it is called a suggested list price, a manufacturer's price or a wholesale price -- where that price does not represent a price at which the product is actually sold. (The one exception to this principle is the automobile industry which is exempt by federal statute.) Novartis's conduct in this case clearly runs afoul of this prohibition. Indeed, as discovery will make clear, Novartis does not (and cannot) dispute the complaint's representations about its conduct. Its only defense is that Wisconsin knew, or should have known, that Novartis was publishing fraudulent prices, and that, as a consequence, Wisconsin was required to restructure its Medicaid program to account for Novartis's fraudulent practices (and to determine the actual prices despite Novartis's best efforts to obscure them) -- rather than Novartis being required to fulfill its duty to report its true prices. As Wisconsin will show at the proper juncture, this defense is both factually incorrect and unavailable to Novartis against Wisconsin as a matter of law. *See, e.g., FTC v. The Crescent Publishing Group, Inc.*, 129 F.Supp. 2d 311 (S.D.N.Y. 2001).

BACKGROUND OF DISCOVERY DISPUTE

The State's first set of interrogatories and requests for production of documents were narrowly-tailored. They were also few in number -- the State served only five interrogatories and six requests for production of documents. These discovery requests were served on Novartis and the other defendants on January 27, 2005.¹

At issue in this motion are one interrogatory and one document request, which are set forth below.

¹ See Novartis's Responses and Objections to Plaintiffs First Set of Interrogatories and Novartis's Responses and Objections to Plaintiff's First Set of Requests for Production of Documents, attached hereto as Exhibits 1 and 2, respectively.

Interrogatory No. 1: Have you ever determined or calculated a unit price, average sales price, aggregate sales figure, or other numerical price or sales figure for a Targeted Drug net of any or all Incentives² during the Defined Period of Time? If so, for each Targeted Drug for which you have made such a determination or calculation, identify:

- (a) the beginning and ending dates of each period applicable to each such determination;
- (b) the applicable class(es) of trade for which each determination was made;
- (c) the numerical figure(s) determined or calculated;
- (d) the current or former employee(s) with the most knowledgeable [sic] of the determinations or calculations;
- (e) the methodology used to determine or calculate such numerical figure(s);
- (f) your purpose(s) in making such determinations or calculations;
- (g) whether you disclosed (“disclosed in this context refers to the first publication of the information to each person or entity to whom the information was provided, only, and not subsequent communications of the same information to the same person or entity) the numerical figure(s) to any publisher, customer, or governmental entity. If so, identify each publisher, customer or governmental entity to whom each such numerical figure was disclosed and the corresponding date of the disclosure; and
- (h) your purpose(s) whether the numerical figure(s) is/was (are/were) treated as confidential or commercially-sensitive financial information.

In a companion document request, the State asked Novartis to produce documents containing any of the figures or calculations identified in response to Interrogatory No. 1:

Request No. 4: All Documents containing an average sales price or composite price identified by you in response to Interrogatory No. 1 of Plaintiff’s First Set of Interrogatories to All Defendants.*³

² The State defined the term “Incentive” to mean: “anything of value provided to a customer which would lower the consideration paid for a drug, regardless of the time it was provided (for example, at the time of invoicing, shipment, or payment, or monthly, quarterly, annually, or at any other time or on any other basis) and regardless of its name. The term “Incentive” therefore includes, but is not limited to, payments or proposed payments in cash or in kind, Chargebacks, credits, discounts such as return to practice discounts, prompt pay discounts, volume discounts, on-invoice discounts, off-invoice discounts, rebates such as market share rebates, access rebates, or bundled drug rebates, free goods or samples, credits, administrative fees or administrative fee reimbursements, marketing fees, stocking fees, conversion fees, patient education fees, off-invoice pricing, educational or other grants, research funding, payments for participation in clinical trials, honoraria, speaker’s fees or payments, patient education fees or consulting fees.” See Exhibit 1, at 7.

³ The asterisk (“*”) at the end of the request directed defendants to the State’s instruction that responsive documents be produced in electronic format:

* Documents are to be produced in electronic format with all documentation required to identify files and fields by name, content, and format, and explanations for all coded data. Acceptable electronic format for documents which in their native form are organized as word processing documents, or printed documents other than tabular reports, (documents comprised principally of text, or of a combination of text and graphics) is searchable Adobe Acrobat portable document format (.pdf). Acceptable electronic format for documents which in their native form are organized as spreadsheets is Microsoft Excel format (.xls).

The purpose of these discovery requests was to determine the true prices of Novartis's drugs and to show that Novartis knew that the actual prices at which its drugs were sold by wholesalers were well below the prices that Novartis was reporting to the medical compendia. Moreover, under federal law, Wisconsin was supposed to pay no more than the acquisition cost of the drugs by providers. Thus, the actual price of the drugs is also relevant to Wisconsin's damage claim. Because drug companies use a variety of different terms for these internal calculations, the State carefully crafted its interrogatory to prevent Novartis and the other defendants from narrowly construing the interrogatory to a specific name known only to the defendants.

Novartis served its responses to these discovery requests on July 14, 2005. In its answer to Interrogatory No. 1, Novartis interposed numerous boilerplate objections, but stated that it "will produce non-privileged records from which answers to Interrogatory No. 1 may be derived" and that "following Plaintiff's review of such records, Novartis will produce Plaintiff with the name of the Novartis employee with the most knowledge concerning questions Plaintiff may have regarding unit price, average sales price, aggregate sales figures, or other numerical price or sales figures net of any or all incentives . . ." See Exhibit 1, p. 11. Novartis did not specifically answer any of the subparts of Interrogatory No. 1. *Id.* In its response to Document Request No. 4, Novartis stated that it had no responsive documents. See Exhibit 2, p. 13.

Meanwhile, in response to the State's Interrogatory No. 4, which asked Novartis, among other things, to describe how it determined each price used in the ordinary course of business, Novartis stated that it would produce the deposition transcript of Gary Rosenthal, Novartis' Vice

Acceptable electronic format for documents which in their native form are comprised principally of tabular data, or tabular reports with fixed column widths or field lengths is fixed-field ASCII text (.txt).
Acceptable electronic format for documents which in their native form are comprised principally of electronic data in one or more data tables, files, or other data entities, is delimited ASCII text (.csv).

President of Finance and Administration, taken pursuant to Fed. R. Civ. P. 30(b)(6) on June 24, 2004 in *In Re Pharmaceutical Industry Average Wholesale Price Litigation* (D.Mass.), MDL No. 1456. See Exhibit 1, at 14.

During various meet and confer conversations, counsel for Novartis advised the State that Novartis does not calculate an “average sales price” for any of its drugs. Counsel for the State reiterated to counsel for Novartis that the internal figures or calculations sought by Interrogatory No. 1 and Request for Documents No. 4 were not limited to calculations having the specific name “average sales price” or any other name ascribed by Novartis. Counsel for Novartis continued to assert that Novartis had no documents responsive to the State’s discovery requests.

Novartis withheld the Rosenthal deposition for more than six months after it first promised to produce it, despite repeated inquiries from the State. In a meet and confer conversation on October 14, 2005, the State inquired as to when Novartis would produce the Rosenthal deposition. The State renewed this request by letter of October 21, 2005 (a copy of which is attached as Exhibit 3). The State reiterated this request during a meet and confer conversation on November 22, 2005 and by letters dated January 6 and 18, 2006 (copies of which are attached as Exhibits 4 and 5). It was not until January 26, 2006, that Novartis finally produced the Rosenthal deposition. See January 26, 2006 letter of Mark Godler (attached as Exhibit 6), p. 3.

Among other things, Mr. Rosenthal testified to the following:

Q: Does Novartis ever do any analysis of net revenue over the units of the drug sold for each drug?

A: Yes.

Q: What is that called?

A: There is not a defined name for it. There have been reports that called it, maybe net revenue per unit or net price, there is not really a product that’s sold at that price, it’s simply a mathematical financial summary of what’s left over after all parties are dealt with.

Q: But Novartis runs that calculation?

A: Novartis would prepare a calculation like that, yes.

Rosenthal Tr. p. 140 (emphasis added).⁴ The colloquy continued:

Q: I want to know what it is called at Novartis.

A: There is not really a terminology for -- you could call it net sales, per unit, net revenue, per unit, because it is not an official not, it is not – there is not like a designator that we solely use. The implication is, what is – at the end of the day what is left over available per product divided by the number of units . . .

Id. at 144-45 (emphasis added). Questioning continued regarding the existence of documents relating to these calculations:

Q: Are there documents at Novartis which would reflect how that calculation was made?

A: There are documents that would lay out gross sales or X factory sales and they would also indicate the total level of rebates discounts sales – I’m sorry, returns, Medicaid rebates, etcetera, to determine a net revenue, there would be that document, I have also –

Q: What is that document called?

A: There is not really a name for it, we have it is [sic] part of our profit and loss statement.

Q: Who generates it?

A: The raw data comes through the general ledger system of our business.

Q: And this is done on a per drug basis?

A: Yes, it is.

Q: How frequently is this report made?

A: We do it monthly.

Q: Who is it distributed to?

A: It is part of our – it is one of the materials that is part of the monthly distribution of financial statements.

Q: Who is that given to?

A: I think I highlighted the group of distributed people earlier when we talked about the distribution of financial statements.

Q: It is the same group of people you testified to earlier who received the financial statements?

A: Yes. There are multiple financial statement reports, some are just report net sales for a brand, and then there are also some reports that have growth sales revenue. Each of those individual numbers, in aggregate for an individual brand and there are various parties, many of which are the financial people that I mentioned earlier that would get that.

* * * * *

Q: And in those reports, are they distributed in hard copy?

A: I have seen hard copies of that type of gross to net – let’s call it gross sales or X factory sales or WAC sales. There are some hard copy reports that can be published. Our primary distribution is, you know, an e-mail containing the financials.

⁴ The cited portions of the Rosenthal deposition are attached as Exhibit 7.

Q: So what I'm referring to, I want to be clear, is the document that is distributed which calculates monthly net revenue per unit as we have called it before in our discussion --

A: Okay.

Q: Let me finish.

A: Yeah.

Q: Is that document distributed -- is that available on electronic format?

A: Let me answer -- you asked me -- actually, I want to clarify once piece of your question and I can also answer your question. The P and L for brand does not calculate net per unit, it calculates net sales. There is another report that that would have information that says net. I don't know whether it says net sales, you know, per unit or net revenue per unit, et cetera. And that report is electronic.

Q: And is that report created monthly?

A: Yes, it is.

Q: Is it also in hard copy distributed to people at Novartis?

A: It's an electronic report.

Q: Okay. Where is that report maintained? Is there a database where that's maintained?

A: It calculates the report by taking the net --

Mr. Morgenstern: That's not the question. The question is, where is it maintained? Is it an Excel spreadsheet. It's an e-mail report that has a Excel spreadsheet calculation in it.⁵

Q: And that's calculated by your department?

A: Yes.

Q: Companywide?

A: Yes.

Q: And for every drug?

A: I can't say every drug, but I can say for many of our drugs.

Id. at 145-50.

Upon receiving and reading Mr. Rosenthal's deposition, the State immediately wrote to Novartis, asserting that the analysis and calculations about which he testified were responsive to the State's discovery requests and should be produced. The State also requested that Novartis amend its answer to Interrogatory No. 1. *See* February 2, 2006 letter of Robert Libman (attached as Exhibit 8). Novartis responded that the documents described by Mr. Rosenthal "are not only not responsive to any of plaintiff's document requests, they are in no way relevant to plaintiff's claims in this action . . ." *Id.* at 2. Accordingly, Novartis refused to produce the documents or to supplement its interrogatory answer.

⁵ It appears that the transcript incorrectly attributed the last sentence to Mr. Morgenstern, counsel for Novartis, rather than the deponent, Mr. Rosenthal.

Argument

The monthly reports and internal calculations described by Novartis's corporate designee are relevant to the issues in this lawsuit and responsive to the State's discovery requests. They should be produced forthwith.

The Special Discovery Master has already concluded that Interrogatory No. 1 and Document Request No. 4 seek relevant information and documents. In its motion to compel production of documents from the AstraZeneca Defendants, the State asserted the same purposes asserted here for these discovery requests: to determine the actual prices of the defendant's drugs, to demonstrate that these prices were below the prices reported to the pricing compendia, and to show defendant's knowledge of these facts. The Special Discovery Master concluded that these requests sought relevant material. January 31, 2006 Decision and Report regarding Plaintiff's Motion to Compel (AstraZeneca Defendants), at 9 ("On this record, it does not appear that any of the Interrogatories or document requests should be barred as seeking irrelevant material.").

Nevertheless, Novartis argues that the reports and internal calculations described by Mr. Rosenthal are not responsive to the State's discovery requests. This appears to be a two-part argument. First, Novartis mischaracterizes the State's requests as only seeking "average sales prices." Because, according to Novartis's counsel, Novartis does not ascribe the name "average sales price" to any of its internal calculations, the reports and calculations described by Mr. Rosenthal are not responsive to the State's discovery requests. Second, Novartis contends that the reports and calculations about which Mr. Rosenthal testified relate to *profits* and *revenues*, rather than *prices*. These arguments are wholly without merit.

Initially, it is clear from the face of the discovery requests that the State is not limiting

itself to internal calculations with the specific name “average sales price.” Interrogatory No. 1 asks whether Novartis has ever calculated a “unit price, average sales price, aggregate sales figure, or other numerical price or sales figure . . . net of any or all Incentives” and the subparts of the interrogatory refer to “numerical figures.” Moreover, the State has made clear from the very first meet and confer conversation regarding this issue that it was not limiting itself to any particular term ascribed internally by Novartis to such calculations. The reason for doing so is obvious. The State does not know the internal terminology used by Novartis (or any other defendant for that matter) for calculations that compute how much Novartis is receiving for its drugs, on a unit basis, net of incentives. The State has long believed, however, that sophisticated corporations such as Novartis must do such calculations in order to compete successfully in the marketplace and, for a publicly traded company such as Novartis, to be responsible to its shareholders. Accordingly, the State crafted its discovery requests to avoid the very dispute that is presented by this motion. The Court should therefore reject Novartis’s narrow construction of the State’s discovery requests.

Furthermore, even if Novartis’s narrow construction of the discovery requests was correct, Mr. Rosenthal testified that although there is not a defined name for the internal calculations, “[t]here have been reports that called it, maybe net revenue per unit or net price.” Rosenthal Tr. At 140. He further testified that the calculations could be called “net sales, per unit” or “net revenue, per unit.” *Id.* at 144-45. This testimony also disposes of the semantic arguments made by Novartis’s counsel. Revenue is the product of price times quantity (or units). Because, as Mr. Rosenthal testified, Novartis divides revenue (net of incentives) by units, the resulting figure is an average price. The plain, sworn testimony of Mr. Rosenthal, rather than argument of Novartis’s counsel, controls the resolution of this dispute. The testimony

establishes that these reports and calculations are responsive to the State's discovery requests.⁶

Finally, Novartis appears to take the position that it need not produce its internal reports and calculations because it has already agreed to produce electronic data relating to sales and incentives, allowing the State to make its own calculations to determine the true average prices of Novartis's drugs. This argument should be rejected. First, the rules of discovery do not relieve a party from its obligation to produce relevant material simply because it is also producing other relevant material. Second, and more importantly, Novartis's internal calculations of net sales per unit demonstrate something different than the underlying data itself. These internal calculations demonstrate not only that Novartis has the ability to determine that average prices of its drugs, but that it has actually done so. These internal calculations therefore directly establish that Novartis knew its true average prices at the time it reported false and inflated ones to the pricing compendia.

For these reasons, Novartis should produce the reports and calculations about which Mr. Rosenthal testified. Such reports should be produced in both hard copy and native electronic format (including, but not limited to Microsoft Excel files). In addition, Novartis should amend its interrogatory answer to provide the information requested in each subpart.⁷

Attorneys' Fees and Costs

If Wisconsin is successful in this Motion, it requests that this Court award it the reasonable expenses incurred in bringing this Motion, including attorneys' fees. Wis. Stat. §

⁶ At the eleventh hour, Novartis suggested that in order to avoid the dispute as to whether the reports and calculations were responsive to the existing discovery requests, the State should serve new discovery requests to ask for the specific reports and calculations described by Mr. Rosenthal. This was a hollow suggestion, for when the State asked whether Novartis would produce the reports and calculations in response to such new requests, Novartis stated that it would not on the ground that the documents are not relevant to any issue in the case.

⁷ To the extent Novartis attempts to rely on the reports and calculations themselves as well Mr. Rosenthal's testimony to answer Interrogatory No. 1, such materials are clearly not sufficient to answer subparts (b), (d), (g), and (h).

804.12 (1)(c) (“[i]f the motion is granted, the court shall, after opportunity for hearing, require the party ... whose conduct necessitated the motion ... to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.”). Wisconsin also requests an award of the fees of the Special Discovery Master (“SDM”) pursuant to the authority granted the SDM in para. 2(a) of the Court’s Order of June 23, 2005.

Conclusion

For the foregoing reasons, Wisconsin respectfully asks this Court compel Novartis to produce the documents described by Mr. Rosenthal and to amend its answer to Interrogatory No. 1 and to award Wisconsin the costs and fees associated with bringing this motion.

Dated this 7th day of March, 2006.

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