

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

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STATE OF WISCONSIN, )

Plaintiff, )

v. )

AMGEN INC, ET AL., )

Defendants. )

Case No.: 04 CV 1709

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**REPLY MEMORANDUM OF DEFENDANT  
SMITHKLINE BEECHAM CORPORATION, D/B/A GLAXOSMITHKLINE  
("GSK") IN SUPPORT OF ITS MOTION  
TO DISMISS THE AMENDED COMPLAINT**

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In addition to the reasons set forth in the defendants' Joint Memoranda and GSK's Supplemental Memorandum in support of its Motion to Dismiss, the State's Opposition Brief further illustrates the need for the State to be held to its burden to plead its claims with the required particularity against each defendant, including GSK. In its Opposition Brief, the State makes two key assertions:

1. The State contends that reporting an "Average Wholesale Price" ("AWP") is different in a meaningful way from reporting a "sticker price" or "suggested retail price." The State argues that reporting an AWP is deceptive, because its name implies (despite overwhelming public record evidence to the contrary) that it is an actual average of prices charged by wholesalers. The State concedes that if the defendants had called their reported prices something other than AWP's -- like "sticker prices" or "Suggested List Prices" -- then there would have been no deception or misrepresentation. Opposition Brief at 23.

2. The State further argues that if, in addition to calling reported prices something other than AWP's, the defendants had included a notice which explained that the reported prices were merely list prices that did not necessarily reflect the "real prices" that purchasers paid (because they did not include negotiated discounts and other price concessions), then the State could not have been misled and would have paid "far less in reimbursements." Opposition Brief at 26-27. The State says that "it is hard to imagine any set of facts under which Wisconsin would *not* have paid less if this truth had been told." Opposition Brief at 26.

In fact -- as even a cursory inquiry by the State into the open and continuous price reporting practices of *GSK* would reveal -- *GSK* has reported its prices using terms and including disclosures that, *by the State's own admission*, negate the possibility of deception or fraud. For large portions of the period at issue, one of *GSK's* two predecessor companies openly and continuously used the term "Suggested List Price" (as opposed to AWP) to report prices, a term that the State now concedes would have eliminated the possibility of deception. In addition, *GSK* and both of its predecessor companies have reported prices that were lower than published AWP's, and have openly and continually provided the kind of "notice" about those reported prices that the State now also concedes would have eliminated the possibility of deception.<sup>1</sup>

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<sup>1</sup> As discussed below, in order to learn how *GSK* actually reported *its* pricing information, all the State would have to do (if it has not done so already) is to review a sampling of the pricing communications that were actually used by *GSK* and its two corporate predecessors. *GSK* has filed a motion seeking the Court's permission to make the sampling of *GSK* pricing communications discussed below a part of the record in support of the instant motion.

During the period prior to the merger that formed GSK in early 2001, its corporate predecessor SmithKline Beecham Corporation reported a “Suggested List Price,” not an AWP.<sup>2</sup> SmithKline Beecham defined its “Suggested List Price” *in its pricing communications* as follows:

The Suggested List Price represents a non-binding suggested retail price to end-user purchasers who do not purchase under special contractual arrangements. Actual end user product acquisition costs may be lower than the Suggested List Price, depending on wholesaler mark-ups, chargebacks, or other pricing concessions.”  
*Id.*

SmithKline Beecham also reported a *lower* “Wholesaler Purchase Price” (“WPP”) which it defined as part of its written pricing communications as follows:

Wholesaler Purchase Price represents SB’s price to SB’s wholesaler class of trade, without taking into account prompt pay discounts or other pricing or promotional concessions paid to wholesalers, or chargebacks paid to wholesalers on account of purchases by wholesalers’ end user customers. *Id.*<sup>3</sup>

Since the merger that formed GSK in early 2001, GSK has reported a “Wholesale Acquisition Cost,” or “WAC,” but *not* an AWP or anything like it, and the reported WAC has always been

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<sup>2</sup> See Exhibit A hereto. Consistent with defendants’ position that there was a common understanding that AWP’s were essentially the same thing as “Suggested List Prices,” the “Suggested List Prices” that SmithKline Beecham Corporation reported for its products were generally the same as the AWP’s reported by third-party commercial price reporting services for those same products.

<sup>3</sup> GSK’s other corporate predecessor -- Glaxo Wellcome, Inc. -- similarly reported a price that was lower than the AWP’s published by the commercial price reporting services, which it called “NWP” (net wholesale price), and which it defined *in its written pricing communications* as a “List price to wholesalers and warehousing chains, not including prompt pay, stocking or distribution allowances, or other discounts, rebates or chargebacks. List price may not represent prices charged to other customers.” See Exhibit B hereto. Glaxo Wellcome, Inc., with a few historical exceptions, generally did not report AWP’s.

lower than the AWP published by third-party commercial price reporting services. Moreover, in its pricing communications, GSK has provided the kind of written description about the meaning of WAC that the State now argues it should have provided, as follows:

Wholesale Acquisition Cost ... is the listed price to wholesalers and warehousing chains, not including prompt pay, stocking or distribution allowances, or other discounts, rebates or chargebacks. Listed price may not represent prices charged to other customers, including specialty distributors.<sup>4</sup>

Thus, GSK and its predecessors (1) have openly and continuously used terms to describe their prices that the State now concedes are not misleading (such as "Suggested List Price"); (2) have openly and continuously reported prices for its products (such as WAC, WPP and NWP) that are lower than the published AWP; and (3) have included in those communications the kinds of written descriptions (about what those reported prices do and do not represent) that the State now concedes would have prevented the possibility of deception. These simple facts doom the State's claims against GSK.

Because we are now only at the pleading stage in this case, GSK is not yet seeking summary judgment on the merits in favor of GSK with respect to all pricing claims for all GSK products. We are simply attempting to demonstrate, by citing widely-disseminated GSK pricing communications that should be at the heart of any analysis of GSK's price reporting, why it is so critically important for the State to be held to its obligation to do a minimal amount of pre-pleading factual investigation and to plead its claims against each defendant as to each drug with sufficient specificity to demonstrate that there is possibility that it can state factually-based

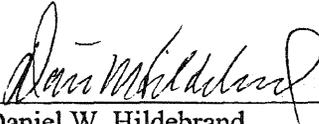
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<sup>4</sup> See Exhibits C (GSK pricing communications template) and D (typical post-merger GSK pricing communication) hereto.

claims against each defendant for specific drugs -- as opposed to the sweeping, conclusory and baseless claims against the entire industry that are contained in its current Amended Complaint.

Dated: April 19, 2005

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