STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: Other Civil
(Enforcement of Civil Investigative Demand)

Court File No.: __________________

In the matter of GlaxoSmithKline plc.

MEMORANDUM OF STATE OF MINNESOTA IN SUPPORT OF MOTION TO COMPEL COMPLIANCE WITH STATE'S CIVIL INVESTIGATIVE DEMAND

INTRODUCTION

The State of Minnesota, by its Attorney General, Mike Hatch, brings this motion to compel GlaxoSmithKline plc ("GSK") to fully comply with the State's May 30, 2003 Civil Investigative Demand ("CID") issued pursuant to Minn. Stat. §§ 8.31, subd. 2, 325D.51, 325D.53 and 325D.59 (2002). Because of the exorbitant cost of prescription drugs in the United States, many Minnesotans have been forced to buy their drugs from Canadian pharmacies, where drug prices are substantially less. As a result of this threat to their sales revenues and profits, GSK has taken dramatic steps to block U.S. citizens from buying their drugs from Canada. Specifically, GSK has implemented a boycott to halt the supply of its drugs to Canadian pharmacies that sell these drugs to American citizens who are unable to afford GSK's much higher drug prices in the U.S.

In response, the Attorney General initiated an investigation several months ago to determine if GSK has violated any Minnesota antitrust laws. The Attorney General served a CID on GSK seeking the production of documents and information about its practices. In response, GSK has refused to produce any documents or information in its possession, custody or control

responsive to the State's CID that are located outside the United States. This includes GSK documents in Canada -- the site of the drug boycott -- and GSK documents at its corporate headquarters in the United Kingdom. There is no legal basis for GSK to hide these materials from the State. Accordingly, the Court should order GSK to fully comply with the State's CID.

PROCEDURAL AND FACTUAL BACKGROUND
RE: STATE'S INVESTIGATION OF GSK

1. GSK

GSK is a large multinational company engaged in the business of manufacturing and selling prescription and other consumer drug products.[1] In 2002, it had worldwide sales of $31.8 billion and pretax profits equal to 30.5 percent of sales. GlaxoSmithKline, http://www.gsk.com (last visited Sept. 30, 2003). It is the second largest drugmaker in the world and professes to have seven percent of the world's pharmaceutical sales market. *Id.* GSK has 100,000 employees worldwide and manufacturing sites in numerous countries. *Id.* GlaxoSmithKline plc is the parent corporation which wholly owns and directly controls numerous subsidiary and affiliated corporations.[2] GSK has its corporate headquarters outside London, England and has operational headquarters in Philadelphia and Research Triangle Park, North Carolina.[3] *Id.*

2. GSK's Canadian Drug Boycott

Because of the exorbitant cost of prescription drugs in the United States, many Minnesotans and other Americans have opted or been financially forced to purchase their

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[1] GSK manufactures a wide variety of well-known prescription drugs, including Paxil (for depression), Zantac (for ulcers), Augmentin (an antibiotic), Zyban (for smoking cessation), Advair (for asthma), and Avandia (for diabetes).

[2] A list of GSK's principal subsidiaries and affiliates, including those in the U.S. and Canada, is attached to the Affidavit of Michael J. Vanselow at Ex. B.

[3] GSK was formed in 2000 by the merger of Glaxo Wellcome and SmithKline Beecham. *Id.*

prescription drugs from Canadian pharmacies.[4] Prescription drug prices in Canada are substantially cheaper than in the United States because Canada, like all other industrialized nations except the United States, has price controls on drug sales.

On January 21, 2003, the Minnesota Senior Federation ("MSF"), a nonprofit advocacy organization for Minnesota seniors, launched a Canadian prescription drug importation program. Pursuant to an agreement between the MSF and CanadaRx.net ("CanadaRx"), a Toronto-based mail order prescription drug business supplying prescription drugs to Americans, the program allows MSF members to obtain prescription drugs through the mail from Canada at greatly reduced prices. *See* Aff. of Michael J. Vanselow, Ex. C.[5] In fact, the savings MSF members realize by ordering their drugs through the program are dramatic. The MSF has estimated that its members save an average of over 52 percent by ordering their drugs through CanadaRx. *Id.*

On January 21, 2003, the very same day the MSF announced its new drug importation program, GSK announced that it would no longer supply prescription drugs to Canadian wholesalers and pharmacies exporting drugs to the United States. *Id.*, Ex. D. Consistent with its announcement, GSK implemented strict measures to control the resale practices of certain Canadian pharmacies and wholesalers. *E.g.*, *id*, Exs. E, F. First, GSK changed the terms and conditions of its sales to these pharmacies and wholesalers, dictating that if they sold drugs via the Internet to United States customers they could not receive any GSK drugs. *Id.* Second, certain blacklisted Internet pharmacies identified by GSK had to copy their written orders to

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[4] Several public entities, including municipalities and States, are also now buying or planning to buy their prescription drugs from Canada in light of high U.S. drug prices.

[5] To participate in the program, MSF members complete a written order form, part of which is filled out and signed by the member's own physician. The order form is then faxed or mailed to CanadaRx. A pharmacist at CanadaRx reviews the order and, if appropriate, co-signs and fills it. MSF members are limited to a 90-day supply of pharmaceuticals in any given order. The pharmacies working with CanadaRx then mail the prescription drugs directly to the MSF member. The member pays for the prescription and shipping by credit card.

GSK so that GSK could oversee their sales. *Id.*, Ex. E. Third, GSK required the blacklisted pharmacies to affirmatively certify to GSK that the drugs they purchase will not be provided to the United States. *Id.* GSK indicated it would review the pharmacy orders for suspiciously high quantities and compliance with its certification requirement. *Id.* GSK made clear that it would completely cut off supply to the pharmacies if these steps were not strictly followed. *Id.*

GSK sent similar threats to its Canadian wholesalers, ordering them not to supply the blacklisted pharmacies if the above requirements were not met. *E.g., id.*, Ex. F. GSK dictated that wholesalers submit to quarterly detailed sales audits by customer and product so that GSK could control their sales. *Id*. GSK threatened that if the wholesalers did not comply with GSK's pharmacy boycott, they too would be cut off. *Id.*

Many of the Canadian wholesalers and blacklisted pharmacies vehemently protested GSK's mandates, arguing that they violated Canadian and provincial laws and unduly interfered with their business decisions. *E.g.*, *id.*, Ex. G.

Public reports and the State's investigation have revealed that other prescription drug companies are taking simultaneous and very similar actions to prevent Canadian pharmacies and wholesalers from selling drugs to United States citizens, including Minnesotans. For example, Wyeth Laboratories and AstraZeneca are monitoring the sales volumes of Canadian wholesalers and pharmacies looking for spikes that could indicate sales to the United States and are restricting supplies based on previous order volumes. *Id.*, Ex. H. Likewise, Pfizer no longer permits Canadian wholesalers to sell drugs to approximately 50 Canadian pharmacies known to export to United States consumers. Pfizer now only sells directly to these pharmacies and closely oversees their sales to prevent surpluses that could be sold to United States consumers. *Id.*

The drug companies' boycott of Canadian wholesalers and pharmacies selling drugs to United States citizens does not just affect senior citizens. The boycott also hinders the ability of other Minnesotans of all ages who cannot afford the high cost of prescription drugs in the United States and have to buy their drugs from Canadian pharmacies.

3. State's CID

In response to GSK's Canadian drug boycott, the Attorney General served a CID on GSK on May 30, 2003 seeking information and documents the State needs to evaluate whether GSK has violated Minnesota's antitrust laws. *Id.*, Ex. A. The State served its CID on GSK's headquarters in Great Britain and on its operational headquarters in the United States.[6] Specifically, the State has reasonable grounds to believe that GSK has combined or conspired with other pharmaceutical manufacturers, wholesalers, distributors and/or retailers to refuse to supply prescription drugs to Canadian pharmacies engaged in the sale of GSK's drugs to Minnesota purchasers, including Canadian pharmacies supplying the Minnesota Senior Federation pursuant to its contract with CanadaRx, in violation of Minn. Stat. §§ 325D.51 and 325D.53, subd. 1(1), (3) (2002).

4. GSK's Response to the State's CIDs

While GSK has produced some documents in response to the State's CID, it has refused to produce any documents in its possession, custody or control located outside the United States. Instead it has produced only documents from the United States, none of which pertain to GSK's strict measures to control Canadian wholesalers and pharmacies, one of the very issues the State is investigating. The *sole* issue before this Court is whether GSK must produce documents and information in its possession, custody or control responsive to the CID that are located outside

[6] GSK did not contest the State's service of its CID. Vanselow Aff. at ¶ 12.

the United States.[7] GSK argues that it should not have to produce any documents or information located in Canada because of a so-called Canadian blocking statute. GSK alternatively contends that it is not obligated to supply these materials because this Court does not have personal jurisdiction over it. As discussed below, GSK is wrong on all accounts, and the Court should grant the State's motion to compel. [8]

ARGUMENT

I. THE COURT SHOULD ORDER GSK TO COMPLY WITH THE STATE'S CID AND TO PRODUCE THE DOCUMENTS AND INFORMATION IN ITS POSSESSION, CUSTODY OR CONTROL RESPONSIVE TO THE CID THAT ARE LOCATED OUTSIDE THE UNITED STATES.

The Attorney General is expressly authorized by statute to investigate violations of the Minnesota Antitrust Law of 1971, including Minn. Stat. §§ 325D.51 and 325D.53, subds. 1(1), (3) (2002). Minn. Stat. § 8.31, subd 1 (2002). The Minnesota Antitrust Law of 1971 also explicitly vests the State with extremely broad investigatory authority. Minn. Stat. § 325D.59 (2002). When there is "information providing a reasonable ground to believe that any person has violated, or is about to violate, any of the laws of the state referred to in subdivision 1, the attorney general shall have power to investigate those violations, or suspected violations . . . ." Minn. Stat. § 8.31. The Attorney General can issue a pre-complaint civil investigative demand

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[7] As discussed herein, the facts in this matter amply satisfy the very minimal threshold the State needs to issue a CID under Section 8.31. In any event, GSK has chosen not to contest the State's authority to issue the CID. After the State served its CID, GSK's counsel requested and received numerous extensions of time for GSK to respond to the CID. Vanselow Aff. at ¶ 3. As an express condition of these extensions, the State required that GSK file any objection or petition to limit or quash the CID by July 10, 2003. *Id.* The State did not want to give GSK additional time so that it could take this time to argue that it did not need to respond at all. *Id.* The State agreed that GSK could assert objections to particular interrogatories and document requests after this July 10 deadline. The State considers GSK's instant objection to the production of documents outside the United States to fall within this latter category.

[8] For the purposes of this motion, the State is willing to narrow its request to documents and information located in Canada and the United Kingdom.

("CID"), without leave of court, "regarding any matter, fact or circumstance, not privileged, which is relevant to the subject matter involved in the pending investigation." *Id.* at subd. 2. If a person fails to respond to a CID, the Attorney General has the authority to request a district court to compel the person to answer interrogatories, be examined under oath, or produce materials as requested. *Id.* at subd. 2a ("[T]he attorney general may apply to a district court . . . [and the court] may issue such order as may be required to compel compliance with the discovery procedures authorized by this section.").[9]

The Minnesota Supreme Court discussed the history and importance of the Attorney General's CID authority stating:

> This precomplaint procedure was created because other methods of obtaining information had proved unsatisfactory. The voluntary cooperation of the party being investigated was not always forthcoming. Nor did it seem fair for the state to file a bare-bones complaint, as it could do, and then undertake discovery in an adversary setting to ascertain if it had a case. Experience has indicated that the precomplaint investigative procedure, somewhat akin to a state's visitorial powers over corporations, is often the best and fairest manner in which to proceed.

Kohn, 336 N.W.2d at 296 (citation omitted).

While Minnesota's appellate courts have not directly addressed the issue before this Court, other courts have required the production of documents and information located outside

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[9] The Minnesota Supreme Court has articulated the liberal legal standards governing enforcement of a CID as follows:

> Thus, to obtain discovery, our statute requires only that the Attorney General has reasonable grounds to believe that there is or may be a violation of state law. It is enough to show, on the basis of information the Attorney General already has, that it is reasonable for the investigation to continue.

Kohn v. State, 336 N.W.2d 292, 296 (Minn. 1983). In affirming an order compelling compliance with the Attorney General's CID in *Kohn*, the supreme court made clear that even if the Attorney General's factual allegations are controverted, compliance with the demand is mandatory so long as the Attorney General has reason to believe that there may be a violation. *Id.* at 296. As noted above, GSK has decided not to challenge the State's issuance of its CID.

the United States in directly analogous circumstances involving government investigations. Moreover, Minn. R. Civ. P. 45, 33 and 34 directly support the State's position in this motion. Finally, GSK's objections to the production of the requested documents are legally flawed.

A. Courts Have Ordered Companies To Produce Documents And Information Located Outside The United States In Response To Government Civil Investigative Demands In Other Similar Circumstances.

GSK should be ordered to produce documents and information in its possession, custody or control located outside the United States as courts have frequently required entities to do in response to civil investigative demands under similar circumstances. For example, the Eleventh Circuit Court of Appeals in *EEOC v. Kloster Cruise Ltd.* required a Bermuda corporation with a Bahamian subsidiary and offices in Miami that owned and operated a cruise ship to produce documents to the EEOC over objections by the Bahamas government. 939 F.2d 920, 924 (11th Cir. 1991).[10] Additionally, in *SEC v. Minas de Artemisa*, the Ninth Circuit enforced an investigative subpoena that required a Mexican corporation that was owned by a U.S. corporation and did business in the U.S. to produce records located in Mexico. 150 F.2d 215, 219 (9th Cir. 1945). The court found that "[c]ourts have frequently required persons within their jurisdiction to produce books and papers which were beyond the territorial limits of the court, even in cases where the documents were located in a foreign country." *Id.* at 217. *See also In re*

[10] State courts frequently look to federal law when adjudicating challenges to the issuance of CIDs by State Attorneys General. *See Brixen & Christopher Architects v. State*, 29 P.3d 650, 663-64 (Utah Ct. App. 2001) ("[f]ederal law looks to standards set in subpoena duces tecum proceedings for guidance regarding antitrust civil investigative demands") (citing 15 U.S.C. § 1312(c)(1)(A) (1998) and noting that the standard of relevancy required for the issuance of the antitrust CID is similar to that required for a subpoena duces tecum). Likewise, in a New Jersey case, the New Jersey Attorney General served investigative interrogatories pursuant to a New Jersey statute. *In re Doe and Roe Corporation*, 682 A.2d 753, 756 (N.J. Super. Law Div. 1996), *aff'd,* 695 A.2d 319 (N.J. Super. App. Div. June 20, 1997). The court also looked to federal law for guidance. *Id.* at 758-59. It noted that "with respect to the proper standard of judicial scrutiny, case law has essentially treated the grand jury subpoena and the civil investigative demand in a similar fashion." *Id.* at 759.

Sealed Case, 832 F.2d 1268, 1284 (D.C. Cir. 1987), *abrogated on other grounds by Braswell v. U.S.*, 487 U.S. 99 (1988) (holding that a subpoena issued to a U.S. citizen as a representative of eight foreign companies could be enforced despite objections by Swiss government that certain documents may be protected by Swiss secrecy laws); *Federal Maritime Comm'n v. DeSmedt*, 366 F.2d 464, 474 (2d Cir. 1966) (enforcing subpoena duces tecum requiring production of documents located outside the U.S. in the possession of shippers who engaged in commerce in the U.S.).

Applying principles generally applicable to Rule 45 subpoenas, which are directly analogous to CIDs, courts have also recognized that "records kept beyond the territorial jurisdiction of the district court issuing the subpoena may be covered if they are controlled by someone subject to the court's jurisdiction." 9A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2456 (2d ed. 1995). In *U.S. v. First Nat'l City Bank*, the Second Circuit upheld the civil contempt citation of a U.S. bank that was being investigated for antitrust violations for refusing to comply with a subpoena duces tecum that requested documents possessed by the bank's branch in Germany. 396 F.2d 897, 905 (2d Cir. 1968). *See also First National City Bank v. IRS*, 271 F.2d 616, 620 (2d Cir. 1959) (ordering a U.S. bank to produce documents from Panama branch in response to a summons); *Ghandi v. Police Dep't*, 74 F.R.D. 115, 122 (E.D. Mich. 1977) (finding that recipient of a subpoena must produce all documents within its custody regardless of where they are located), *superseded on other grounds by Richardson v. State of Florida*, 137 F.R.D. 401 (M.D. Fla. 1991). Suffice it to say, if the recipient of a routine Rule 45 subpoena is required to produce documents within its possession, custody or control located outside the U.S., the recipient of a Section 8.31 CID has an equal obligation.

B. The Documents And Information The State Has Requested Are Also Discoverable Under The Standards Set Forth In Minn. R. Civ. P. 33 and 34 For Interrogatory Answers and Responses To Requests For The Production Of Documents.

GSK is also obligated to produce the documents and information the State has requested under the analysis applicable to interrogatory answers and requests for the production of documents during discovery. Both the Minnesota and Federal Rules of Civil Procedure provide in Rule 34 that "[a]ny party may serve on any other party a request . . . to produce . . . any designated documents . . . which constitute or contain matters within the scope of [Rule 26] and which are in the possession, custody or control of the party upon whom the request is served . . . ."[11] Rule 26 of both the Minnesota and Federal Rules further state that unless otherwise limited, parties may obtain discovery "regarding any matter, not privileged, that is relevant [to the claim or defense of any party]." As the requested documents and information in this case are not privileged, are clearly relevant and necessary for the State to evaluate whether GSK has violated Minnesota's antitrust laws and are clearly within GSK's possession, custody or control, the Court should order GSK to produce the information and documents.

"*Possession* and *custody* include both actual and constructive possession and custody, and *control* means the party has a legal right to obtain the documents." Roger S. Haydock & David F. Herr, DISCOVERY PRACTICE § 24.06 (4th ed. 2002) (emphasis in original). "Documents

[11] The analysis as to why GSK must supply the State with documents found at its corporate facilities in Canada and the United Kingdom applies equally to GSK's obligation to include the knowledge of these foreign facilities in its answers to the State's interrogatories. Minn. R. Civ. P 33(d) requires a corporation to answer an interrogatory with such information as is "available" to it. Courts have consistently construed this obligation to require a corporation to answer interrogatories with information available to it in the hands of affiliated corporate entities. *See, e.g., Erone Corp. v. Skouras Theatres Corp.,* 22 F.R.D. 494, 498 (S.D.N.Y. 1958); *Skelton & Co. v. Goldsmith*, 49 F.R.D. 128, 130-31 (S.D.N.Y. 1969); *Transcontinental Fertilizer Corp. v. Samsung Co.*, 108 F.R.D. 650, 652-53 (E.D. Pa. 1985); *Sol S Turnoff Drug Distributors Inc. v. NV Nederlandsche Combinatie Voor Chemische Industrie*, 55 F.R.D. 347, 349 (E.D. Pa. 1972); *Brunswick Corp. v. Suzuki Motor Co.*, 96 F.R.D. 684, 686 (E.D. Wis. 1983).

and objects a party possesses, controls or has custody of are discoverable, even though such records and things may be beyond the court's territorial jurisdiction." *Id.* (citations omitted). Further, courts have expressly held that "[a] corporation is required to produce documents held by its subsidiaries, even if the subsidiary is a foreign corporation and documents are located in a foreign country." *Id.* (citations omitted). This rule applies to both foreign and domestic subsidiaries and to predecessor corporations and subsidiaries, as well as to documents in the possession of a sibling corporation, such as a subsidiary of a nonparty parent corporation, of the party to the action. *Id.* (citations omitted).

In 1997, the Ramsey County District Court applied these Rule 34 principles in compelling the production of documents from various affiliated corporate entities in a situation remarkably similar to this case. *State of Minnesota v. Phillip Morris Inc.*, File No. C1-94-8565, Order and Memorandum Granting Plaintiffs' Motion to Compel Regarding Phillip Morris International and Denying Defendants' Motion for a Protective Order (Ramsey County District Court Mar. 25, 1997) (copy at Vanselow Aff. at Ex. I). In that case, the State and other plaintiffs sought to compel Defendant Phillip Morris Inc. ("PM") to produce documents in the possession of its foreign corporate entities affiliated with PM. PM argued that it had no obligation to produce documents in the possession of these other entities because they were separate corporations and not parties to the action. *Id.* at 8. The court agreed with the State that PM's failure to produce the files of these other corporate entities was an "egregious attempt to hide information" relevant to that action. *Id.* at 9. The court reasoned that PM's organizational structure provided practical as well as legal access to the requested documents whether such documents were "in the hands of one of its subsidiaries, parent or sister corporations." *Id.* at 14-15. Finally, the court concluded it would not tolerate PM's attempts at hiding documents in the "morass of interlocking related organizations." *Id.* at 16.

As the above court recognized, Rule 34's operative test is one of control, not location. In *In re Harris*, the court found that "[t]he force of a subpoena for production of documentary evidence generally reaches all documents under the control of the . . . corporation . . . and it makes no difference that a particular document is kept at a place beyond the territorial jurisdiction of the court that issues the subpoena." 27 F. Supp. 480, 481 (S.D.N.Y. 1939). Likewise, in *Buckley v. Vidal*, the court stated that "[p]roduction may be ordered when a party has the legal right to obtain papers, even though he has no copy, and regardless of whether a paper is beyond the jurisdiction of the court." 50 F.R.D. 271, 274 (S.D.N.Y. 1970) (citing Wright, FEDERAL COURTS § 87, at 386-87 (2d ed. 1970)).[12]

Many cases in other jurisdictions have applied these basic principles regarding Rule 34 to arrive at the same result. For example, in *Perini Am., Inc. v. Paper Converting Mach. Co.*, a patent infringement action was brought by a corporate agent of an Italian corporation. 559 F. Supp. 552, 552-53 (E.D. Wis. 1983). The defendant moved to compel the production of documents in the possession of a sister corporation, an entity that was a subsidiary of the Italian corporation. *Id.* at 553. The court found that while the sister corporation was not under the "control" of the corporate agent per the corporate hierarchy, "under the facts . . . the documents of [the sister corporation] are under the control of the [corporate agent] . . . [as both] corporations are the 'alter egos' of [the parent]. To treat them as unrelated entities would defy reality." *Id.*

[12] In *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, the United States Supreme Court held that a foreign country's prohibitions on disclosure do not bar the conclusion that a foreign entity has control over documents within the meaning of Fed. R. Civ. P. 34. 357 U.S. 197, 205 (1958). The Court found that "to hold broadly that petitioner's failure to produce [the records] because of fear of punishment under the laws of its sovereign precludes a court from finding that petitioner had 'control' over them, and thereby from ordering their production, would undermine congressional policies . . . and invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records." *Id.* As discussed further herein, GSK's reliance on such a foreign blocking statute is altogether misplaced.

The court concluded that the requested documents had to be produced under Rule 34. *See also Cooper Industries v. British Aerospace*, 102 F.R.D. 918, 919-20 (S.D.N.Y. 1984) (holding that party must provide documents of affiliated foreign corporation as they are in the party's control under Rule 34 and stating that given that the "documents plaintiff seeks all relate to the [objects] that defendant works with every day; it is inconceivable that defendant would not have access to these documents and the ability to obtain them for its usual business").

Likewise, the court in *Japan Halon Co., LTD v. Great Lakes Chemical Corp.*, 155 F.R.D. (N.D. Ind. 1993), compelled the plaintiff to produce documents in the possession of its two Japanese parent companies under Rule 34. The court expressly rejected the plaintiff's contention that it had no control over the documents under Japanese law. *Id.* at 627. The court concluded that the close nature of the three corporate entities gave the plaintiff sufficient possession, custody and control over the documents. *Id.* at 627-28.

The implications of any contrary rule are obvious as the court recognized in *Jee v. Michelman*, where the court was faced with circumstances that were similar to the present case. 104 B.R. 289 (C.D. Calif. 1989). A subpoena duces tecum was issued to a Los Angeles bank on behalf of its Korean parent. *Id.* at 291. The subpoena requested documents that were located in Korea and New York. *Id.* Despite objections that the Los Angeles branch did not control the documents and that Korean law prevented their disclosure, the court concluded that it had jurisdiction over the bank, that the bank controlled the documents and that ordering their production was appropriate. *Id.* at 294. In reaching this result, the court specifically noted that to hold otherwise would mean that documents could be moved from one branch to another in an attempt to avoid disclosure. *Id.*

There is no question in this case that GSK, just as the companies in the numerous cases cited above, has possession, custody and/or control of its documents and other information

located outside the United States that the State has requested in its CID. GSK should not be permitted to hide these materials from the State. If GSK were to prevail in this motion, any person or entity could avoid the production of documents and information demanded in a Minnesota CID simply by locating the materials across the border as the court observed in *Jee*. There is absolutely no reason for the Court to encourage or sanction such conduct and to thereby undermine the protection of important public interests that the State tries to vindicate in using CIDs.

C. Both Of GSK's Two Objections To The State's Demand For GSK Documents And Information Located Outside The United States Are Completely Meritless.

GSK has articulated two objections to the State's request for documents and information located outside the United States. First, GSK asserts that its refusal to supply materials located in Canada is supported by Ontario's so-called blocking statute. Second, GSK contends that such material is not discoverable because Minnesota's long-arm statute does not reach GSK's activities outside of the United States. For the reasons discussed below, neither of these arguments has any merit.

1. The Ontario blocking statute upon which GSK relies does not preclude GSK from supplying documents and information located in Canada.

GSK's refusal to disclose materials located in Canada based on a so-called Canadian "blocking statute" is wholly unfounded.[13] The U.S. Supreme Court stated that "[i]t is well

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[13] The statute at issue is the Ontario Business Records Protection Act, R.S.O. ch. B.19 (1990). It provides that:

> No person shall, … under the authority of … any requirement, order, direction or summons of any legislative, administrative or judicial authority in any jurisdiction outside Ontario, take … send or … remove … from a point in Ontario to a point outside Ontario, any … material in any way relating to any business carried on in

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settled that [foreign blocking statutes] do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." *Societe National Industrielle Aerospatiale v. U.S.*, 482 U.S. 522, 544 n.29 (1987). Numerous lower federal courts have held likewise. *See, e.g., Bodner v. Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000) (holding that a French blocking statute and bank secrecy laws did not prohibit discovery given the United States' significant interest in the action); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 118 (S.D.N.Y. 1981) (compelling Swiss corporation to provide discovery and answer interrogatories presented by SEC even though disclosure might subject it to criminal liability in Switzerland, as disclosure was required due to national interest in maintaining integrity of securities markets); *In re Grand Jury Proceeding*, 532 F.2d 404, 409 (5th Cir. 1976) (upholding a grand jury subpoena served on a nonresident alien despite fact that the act of testifying was a violation of Grand Cayman law); *U.S. v. Vetco, Inc.*, 691 F.2d 1281, 1291 (9th Cir. 1981) (upholding sanctions for a corporation's refusal to comply with IRS summonses despite possible criminal liability under Swiss law).

In *In re Uranium Antitrust Litigation*, the court ordered production of documents located outside the United States despite Canadian nondisclosure laws, including the very same Ontario Business Records Protection Act at issue here. 480 F. Supp. 1138, 1155-56 (N.D. Ill. 1979). The court held that it had the power to order production as it had personal jurisdiction over the entity and the entity had control over the documents. *Id.* at 1145. The court determined that the

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> Ontario, unless such taking, sending or removal … is consistent with … a regular practice of furnishing to a[n] … organization outside Ontario material relating to a[n] … organization carrying on business in Ontario; [… is done in a certain manner on behalf of companies or persons as defined in the *Securities Act*, or] … is provided for by or under any law of Ontario or of the Parliament of Canada.

existence of a conflicting foreign law which prohibited the disclosure of the requested documents did not prevent the exercise of this power. *Id.* (noting that this proposition has been accepted by the American Law Institute and the U.S. Supreme Court).

Likewise, in *General Atomic Co. v. Exxon Nuclear Co.*, when faced with the assertion that the Ontario Business Records Protection Act prevented the disclosure of documents that were located in Ontario, a court held that "the Ontario Act is not, nor has it ever been, a legitimate impediment to production by [the party]." 90 F.R.D. 290, 294 (S.D. Cal. 1981). *See also United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231, 293 (N.M. 1980).

Accordingly, the Canadian blocking statute relied upon by GSK is not a basis upon which the Court should allow GSK to refuse to produce its documents located in Canada. Moreover, even if this statute justified GSK's refusal to produce its documents located in Canada, GSK would still, of course, be obligated to produce its documents and provide information located everywhere in the United Kingdom.

2. As no Complaint has been served on GSK, it is premature for the Court to evaluate whether it would have personal jurisdiction over GSK under the State's long-arm statute were the State to commence an action against GSK.

The State has not served GSK with a Complaint in this matter and may, in fact, never do so. GSK's assertion that Minnesota's long-arm statute does not reach GSK's conduct is, therefore, entirely premature. *See Cefis v. Cefis*, 555 N.W.2d 333, 336 (Minn. Ct. App. 1997), *rev. denied* (Minn. Jan. 29, 1997) ("Absent the statutory prerequisite of service of process, a due process analysis [is] premature.") (citing Minn. Stat. § 543.19, subd. 2). *See also Wittie v. Texas Gulf, Inc.*, 495 N.Y.S.2d 862, 862 (N.Y. Sup. Ct. 1985) (holding that because individual had not been served with complaint, motion for lack of personal jurisdiction was premature). Consequently, the issue of whether this Court would have personal jurisdiction over GSK in a

lawsuit that might or might not be brought by the State is simply inapplicable to the issue of whether GSK must comply with the State's CID.[14]

3. This Court clearly would have personal jurisdiction over GSK if the Court uses this jurisdictional analysis in deciding the State's motion to compel GSK to comply with the State's CID.

Furthermore, if the Court were to consider whether it would have personal jurisdiction over GSK's activities under the State's long-arm statute in a hypothetical lawsuit by the State, it should conclude that it would have such jurisdiction and that GSK must, therefore, fully comply with the State's CID. Specifically, this Court would have personal jurisdiction over GSK because GSK does sufficient business in, has sufficient minimum contacts with, and otherwise has intentionally availed itself of the markets of the State of Minnesota through its extensive promotion, marketing, sale and distribution of its drugs and products in Minnesota.[15]

A Minnesota court can exercise personal jurisdiction over a nonresident defendant if the applicable Minnesota long-arm statute is satisfied and the defendant has sufficient minimum contacts with the state to satisfy the due process requirements of the United States Constitution.[16]

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[14] As discussed further herein, the Court is hard pressed to even examine the factors relevant to personal jurisdiction in the abstract without a Complaint reciting the operative facts and the State's legal claims.

[15] As discussed above, the State would at most need personal jurisdiction over GSK's U.S. subsidiaries to obtain documents from GSK entities in the U.K. and Canada. Here the State not only would have personal jurisdiction over GSK's U.S. subsidiaries, it would also have jurisdiction over GSK itself.

[16] The State's long-arm statute provides that:

> As to a cause of action arising from any acts enumerated in this subdivision, a court of this state with jurisdiction of the subject matter may exercise personal jurisdiction over any foreign corporation or any nonresident individual, or the individual's personal representative, in the same manner as if it were a domestic corporation or the individual were a resident of this state.
>
> This section applies if, in person or through an agent, the foreign corporation or nonresident individual:

(Footnote Continued on Next Page)

Domtar, Inc. v. Niagara Fire Ins., 533 N.W.2d 25, 29 (Minn. 1995), *cert. denied*, 516 U.S. 1017 (1995). The Court should interpret Minnesota's long-arm statute broadly to afford maximum protection to Minnesota residents injured by acts of nonresidents. *B & J Mfg. Co. v. Solar Industries, Inc.*, 483 F.2d 594, 598 (8th Cir. 1973). Minnesota courts have repeatedly held that Minnesota's long-arm statute is intended to permit district courts to exercise jurisdiction over defendants to the fullest extent that federal constitutional requirements of due process will allow. *State Farm Mut. Auto. Ins. Co. v. Tennessee Farmers Mut. Ins. Co.*, 645 N.W.2d 169, 172 (Minn. Ct. App. 2002); *In re Minnesota Asbestos Litigation*, 552 N.W.2d 242, 246 (Minn. 1996). Accordingly, the existence of personal jurisdiction typically merges into one inquiry -- whether the exercise of jurisdiction comports with due process. *Valspar*, 495 N.W.2d at 411 ("If the personal jurisdiction requirements of the federal constitution are met, the requirements of the long-arm statute will necessarily be met also.").

A state court may constitutionally exercise jurisdiction over defendants who have "minimum contacts" with the state if the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S.

(Footnote Continued From Previous Page)

> (a) owns, uses, or possesses any real or personal property situated in this state; or
> (b) transacts any business within the state; or
> (c) commits any act in Minnesota causing injury or property damage; or
> (d) commits any act outside Minnesota causing injury or property damage in Minnesota, subject to the following exceptions when no jurisdiction shall be found:
> (1) Minnesota has no substantial interest in providing a forum; or
> (2) the burden placed on the defendant by being brought under the state's jurisdiction would violate fairness and substantial justice; or
> (3) the cause of action lies in defamation or privacy.

Minn. Stat. § 543.19 (2002).

310, 316 (1945) (citations omitted). Thus, the *International Shoe* test essentially boils down to two considerations: (1) whether the defendant has minimum contacts with the state; and, if so; (2) whether the exercise of jurisdiction is reasonable or fair. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985).

The United States Supreme Court has defined minimum contact as "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). If a defendant seeks "to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States" if its product caused injury there. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980). The Minnesota Supreme Court reaffirmed that personal jurisdiction may be established by showing the defendant "intended to directly or indirectly market its product in Minnesota" or that the defendant delivered its product "into the stream of commerce with the expectation that it would be purchased by customers in Minnesota." *In re Minnesota Asbestos Litig.*, 552 N.W.2d at 247.[17]

Once a plaintiff establishes that the defendant has minimum contacts with a state, a defendant is subject to jurisdiction unless the exercise of jurisdiction is unfair or unreasonable. *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 113-14 (1987); *Domtar*, 533 N.W.2d at 34. In considering the fairness issue, courts evaluate several factors, including the forum state's

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[17] There are two types of personal jurisdiction: general and specific. In a general jurisdiction case, the defendant's contacts with the state must be continuous and systematic. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 & n.9 (1984). If, however, the plaintiff's cause of action either arises out of, or is related to, the defendant's contacts with the forum state, a single contact can constitute "minimum contacts" and the court can exercise specific jurisdiction. *Id.* at 414 & n.8; *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221-24 (1957).

interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief and the burden on the defendant. *Burger King*, 471 U.S. at 476-77. If a defendant has purposefully directed its activities at forum residents, it "must present a *compelling case* that the presence of some other consideration would render jurisdiction unreasonable." *Id.* at 476-77 (emphasis added); *see also Asahi*, 480 U.S. at 113-116.

In evaluating the issue of personal jurisdiction in a case, Minnesota's courts consider five factors: (1) the quantity of contacts with the forum, (2) the nature and quality of those contacts, (3) the connection of the cause of action with the contacts, (4) the state's interest in providing a forum, and (5) the convenience of the parties. *Marquette Nat'l Bank v. Norris*, 270 N.W.2d 290, 295 (Minn. 1978). The first three factors are primary considerations, the remaining two factors are secondary considerations. *Id.* The five factors are simply another way of asking "whether the defendant has established enough contacts with Minnesota to justify being sued here and whether those contacts were established on purpose in order to conduct business in this state." *Trident Enters. v. Kemp & George, Inc.*, 502 N.W.2d 411, 415 (Minn. Ct. App. 1993) (citation omitted). Moreover, any doubt regarding the sufficiency of contacts to support the exercise of personal jurisdiction should be resolved in favor of finding jurisdiction. *Marshall v. Inn on Madeline Island*, 610 N.W.2d 670, 674 (Minn. Ct. App. 2000). In this case, there is no question that each of these five factors support the conclusion that the Court would have jurisdiction over GSK.

a. GSK's quantity of contacts with Minnesota

GSK cannot dispute that it has extensive contacts with the State of Minnesota. It advertises extensively within the State. It also has numerous employees in the State and generates enormous revenues based on the sale of its drugs to Minnesotans. *See Marshall v. Inn on Madeline Island*, 610 N.W.2d 670, 675 (Minn. Ct. App. 2000) (holding that the quantity of

contacts with Minnesota support the exercise of personal jurisdiction where the Inn advertised and solicited in Minnesota, contracted for services with Minnesota residents, corresponded by mail and phone with Minnesotans, purchased items from Minnesota and its employees traveled to Minnesota); *Walker and Company, Ltd. v. Lawrence*, 416 N.W.2d 154, 157 (Minn. Ct. App. 1987), *rev. denied* (Minn. Feb. 12, 1989) (holding that assertion of personal jurisdiction was appropriate where party prepared and distributed brochures to businesses and solicited sales in Minnesota even though quantity of contacts was minimal); *State v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 718-19 (Minn Ct. App. 1997), *aff'd*, 576 N.W.2d 747 (Minn. May 14, 1998) (finding that quantity of contacts with Minnesota supports jurisdiction where Minnesotans accessed and received transmissions from party's websites).

b. Nature and quality of GSK's contacts with Minnesota

In evaluating the nature and quality of a defendant's contacts with the forum state, Minnesota courts consider whether a defendant has "purposefully availed himself of the privilege of conducting activities in this state." *Trident Enters.*, 502 N.W.2d at 415. *See also Stanek v. A.P.I.*, 474 N.W.2d 829, 834 (Minn. Ct. App. 1991). Indeed, the "purposeful availment" consideration is perhaps the key factor in the personal jurisdiction analysis. *Burger King*, 471 U.S. at 474 (the constitutional touchstone is "whether the defendant purposefully established 'minimum contacts' in the forum state") (citation omitted).

There is no question here that GSK has purposefully availed itself of the privilege of conducting business in Minnesota. GSK is licensed to sell its drugs in the State. GSK has a sales force in the State and regularly solicits substantial business here. GSK also extensively advertises its products in Minnesota. It simply cannot argue that it has not purposefully availed itself of the benefits and protections of Minnesota laws.

c. Connection between the State's cause of action and GSK's contacts with Minnesota

Minnesota courts regularly exercise jurisdiction over defendants who defraud Minnesota residents or who make representations to Minnesota residents to induce them to enter into a particular transaction. *Marquette*, 270 N.W.2d at 296-97; *Kopperud v. Agers*, 312 N.W.2d 443, 445 (Minn. 1981); *Trident Enters.*, 502 N.W.2d at 415-16. For example, in *Kopperud*, the Minnesota Supreme Court exercised jurisdiction over a defendant who purposefully availed himself of the privilege of doing business in the state "to carry out a scheme to defraud investors." 312 N.W.2d at 445. "Although his direct contacts with this state were limited, he was instrumental in setting in motion the fraudulent scheme and in keeping it going." *Id.* In *Trident Enters.*, the court exercised jurisdiction based on alleged misrepresentations the defendant made during less than ten phone, mail and facsimile contacts with Minnesota. 502 N.W.2d at 415-16.

As discussed above, fewer contacts are required in specific jurisdiction cases and a single transaction can form the basis for jurisdiction. *McGee*, 355 U.S. at 221-24; *Marquette*, 270 N.W.2d at 295. As outlined above, GSK's contacts with the State underlie any antitrust claim the Attorney General might bring against GSK. Any anticompetitive conduct by GSK that might violate the State's antitrust laws is directly and inextricably connected with GSK's many and extensive contacts with the State in regard to the sale of its prescription drugs.

The federal district court in Minnesota upheld the exercise of specific jurisdiction where the defendant's sole contacts with Minnesota were the airing of national television programs which were carried by local ABC affiliates in Minnesota. *Tonka Corp. v. TMS Entertainment, Inc.*, 638 F. Supp. 386, 390-91 (D. Minn. 1985) (although exercising jurisdiction, the court ultimately determined venue was improper and transferred the case). The court emphasized that

the defendant's broadcast contact with Minnesota was the precise conduct upon which the plaintiff based its trademark infringement claim. *Id.* at 390.

Furthermore, this Court could also readily assert general jurisdiction over GSK. GSK unquestionably has "systematic and continuous" contacts with the State of Minnesota. *See, e.g., Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 448 (1952) (holding Ohio courts properly asserted jurisdiction over Philippine company where company set up office, kept files, carried out correspondence, drew and distributed salary checks, and maintained bank accounts in Ohio); *Hardrives, Inc. v. City of LaCrosse,* 307 Minn. 290, 295, 240 N.W.2d 814, 817 (1976) (exercise of general jurisdiction is proper where a nonresident party held solicitations of bids, inspections, and negotiations in Minnesota).

d. State's interests in providing a forum

Where the State is seeking to enforce its own laws, fewer contacts may be required to find jurisdiction. In exercising jurisdiction over out-of-state sellers, courts have consistently emphasized that state courts can constitutionally exercise jurisdiction over foreign defendants to enforce the regulations of that state. *State ex. rel. Miller v. Baxter Chrysler Plymouth, Inc.*, 456 N.W.2d 371, 373, 377 (Iowa 1990). As the New York Court of Appeals explained in *La Belle Creole Int'l v. Attorney General*, 176 N.E.2d 705, 708 (N.Y. 1961), when a state is acting to enforce its own regulations, fewer contacts may be required than if the case were brought by a private litigant.

> [T]he right of a litigant to bring an action against a foreign corporation is not necessarily the measure of the State's power to regulate it. . . . Where the purpose of the proceeding is to protect the citizens of the State from potentially dangerous consequences, less is required [for jurisdictional purposes] than might otherwise be the case . . . .
>
> [E]ven if the petitioner's contacts with this State were deemed to be less than necessary to justify the maintenance of a civil suit, it is our view that it would still

be amenable to [an investigative] subpoena [issued by the Attorney General's office].

Id. at 708 (citations omitted).

As in *La Belle Creole*, the antitrust statutes the Attorney General would be seeking to enforce were he to bring an action against GSK were enacted to protect Minnesota citizens from potentially harmful anticompetitive behavior -- namely, the injury GSK may have caused in this case. *See State ex rel. Humphrey v. Alpine Air Products*, 490 N.W.2d 888, 892-93 (Minn. Ct. App. 1992), *aff'd*, 500 N.W.2d 788 (Minn. 1993).

At least one state court considering a jurisdictional challenge in a consumer enforcement case recognized that the state is a unique plaintiff which serves the distinct function of protecting its citizens. *State v. Reader's Digest*, 501 P.2d 290, 303 (Wash. 1972). "If our courts are not open, the state will be without a remedy in any court and the Consumer Protection Act will be rendered useless." *Id.*

Furthermore, the Court should recognize that it would have personal jurisdiction over GSK because Minnesota's courts are the only place where the State could bring an action to protect Minnesota consumers from any conduct by GSK in violation of the State's antitrust laws. Most personal jurisdiction disputes raise the issue of whether the State has an interest in providing one of its citizens a venue for resolving a dispute. In this case, however, it is the State itself, through its Attorney General, that is seeking to enforce Minnesota laws on behalf of Minnesota consumers. In most instances, if a court declines to exercise personal jurisdiction, the individual plaintiff has the option, albeit often an unattractive one, of suing the defendant at the defendant's locale. In this case, on the other hand, Minnesota courts are the *only* place where the Attorney General can bring this action to enforce Minnesota's antitrust laws. Minnesota unquestionably has a vital interest in protecting its consumers from unlawful anticompetitive

practices that cause Minnesota consumers to pay excessive prices for their prescription drugs. *See, e.g., Alpine Air*, 490 N.W.2d at 892. Minnesota would not simply be inconvenienced if the Court could obtain jurisdiction over GSK -- it would, in fact, be unable to pursue any causes of action necessary to protect the interests of Minnesota consumers.

e. Convenience of the parties

The final factor in the personal jurisdiction analysis is the convenience of the parties. Many years ago, the U.S. Supreme Court noted that as technology draws world markets closer together, "progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome." *Hanson*, 367 U.S. at 251.

In this case, the Attorney General is exercising one of his core functions -- protecting Minnesota consumers. As such, the interests of the State in this case are paramount. Given the communications devices available today, there is scarcely a hardship on GSK in having to produce documents and information to the Attorney General over which it indisputably has possession, custody and control. Further, any inconvenience this would entail pales in comparison to the State's strong public interest in protecting consumers from paying grossly excessive prescription drug prices as a result of unlawful anti-competitive behavior.

In sum, GSK's personal jurisdiction argument is not only premature and inapplicable to the issue of its duty to comply with the State's CID, it is also erroneous on the merits. There is simply no question that this Court would have personal jurisdiction over GSK given GSK's extensive contacts with the State directly related to any state antitrust claims the State might bring.

CONCLUSION

The State respectfully requests that the Court order GSK to produce to the State, within 14 days, all documents and information responsive to the State's CID that are in the possession, custody or control of GSK and are located in Canada and the United Kingdom.