

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In re: Subpoena Duces Tecum Issued to :  
AmerisourceBergen Corporation by the :  
New York State Attorney General :  
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Index No. 111810/06  
Hon. Joan A. Madden

**MEMORANDUM TO OPPOSE MODIFYING AND TO SUPPORT ENFORCING THE  
SUBPOENA SERVED ON THE AMERISOURCEBERGEN CORPORATION BY THE  
ATTORNEY GENERAL**

The State of New York ("State"), by Attorney General Eliot Spitzer, submits this memorandum to oppose modifying and to support enforcing a subpoena served on AmerisourceBergen Corporation ("ABC") on April 6, 2006. The Order to Show Cause dated August 25, 2006 that commenced this action was based on the Lewis Affirmation<sup>1</sup> and the Sturz Affidavit.<sup>2</sup> In addition to this memorandum, the State submits the Ioannou Affirmation.<sup>3</sup>

The central issue in ABC's motion is the procedure applicable if the Attorney General decides to disclose information designated by ABC as confidential to a person other than one expressly covered by the parties' confidentiality arrangement. Under that arrangement, ABC must move for a protective order to bar the Attorney General's proposed disclosure. The specific issue that ABC presents to the Court is the number of days that the State should wait before disclosing materials if ABC serves a motion for a protective order. The State offered to wait an additional five

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<sup>1</sup> Affirmation of Alan Lewis in support of motion to fix conditions to or modify non-party, civil subpoena pursuant to CPLR 2304, and to stay accrual of penalties for noncompliance until the motion has been decided on the merits, dated August 23, 2006 ("Lewis Affirmation").

<sup>2</sup> Affidavit of Jonathan R. Sturz on Behalf of Amerisource Bergen Corporation, dated August 22, 2006.

<sup>3</sup> Affirmation of John A. Ioannou dated September 18, 2006 ("Ioannou Affirmation").

days. ABC never moved below forty-five days, which the State considers entirely unacceptable. Investigations by the Attorney General should not be so burdened. Accordingly, this court should set the relevant time extension at five days, subject to ABC persuading a court to issue a TRO.

In addition to denying ABC's motion to modify the subpoena, the court should grant the State's cross-motion to compel. The State is wholly entitled to the materials it seeks from ABC and ABC does even argue otherwise. The State may, but is not obligated to, provide confidentiality protection for that material. Because the State is wholly entitled to the material, the State's cross-motion to compel should be granted. Finally, the court should reject ABC's argument that ABC is entitled to reimbursement of its expenses.

### **STATEMENT OF FACTS**

The Attorney General is investigating prescription pharmaceutical pricing and reimbursement rates and has subpoenaed various parties in connection with that investigation, including ABC. Pharmaceutical pricing and reimbursement rates have significant impact on New York State and New Yorkers. For example, New York State spends billions of dollars for pharmaceuticals for its Medicaid program each year.<sup>4</sup> The State is investigating how the reimbursement rates are set. ABC is a large pharmaceutical wholesale distributor. The State has served various subpoenas in that investigation: only ABC has sought judicial intervention in the State's investigation. The State has secured responsive documents from all of the subpoenaed parties except for ABC, which has responded to the interrogatories but has not produced any responsive documents.

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<sup>4</sup> Medicaid expenditures for 2004 are available at [http://www.health.state.ny.us/nysdoh/medstat/ex2004/ffs2\\_cy\\_04.htm](http://www.health.state.ny.us/nysdoh/medstat/ex2004/ffs2_cy_04.htm).

The process of trying to secure compliance from ABC for the document requests has been both time-consuming and unsuccessful. The State negotiated the scope of the requests, consented to extensions when ABC said logistical difficulties prevented compliance, worked with ABC's information technology personnel, and otherwise sought the materials the State needed to pursue its investigation, while trying to limit the burdens on ABC. In addition, the State sought to understand and alleviate ABC's confidentiality concerns. *See* Ioannou Affirmation ¶ 5. Despite these efforts and since the subpoena was served in April, ABC always has had a reason why producing materials would remain in the future.

By late August, the State was able to limit ABC's stated reasons for not producing responsive materials to a single dispute. The parties agreed on a confidentiality agreement that included how the State could disclose material that ABC asserted were confidential to other enforcers, experts, witnesses, and in litigation. The parties also agreed that the State could disclose material that ABC asserted was confidential in other circumstances upon notice to ABC and that ABC would have 10 days to seek a court order preventing the disclosure. The only disagreement was how many days, in the absence of a court issued TRO that the State had to wait before disclosing the material. The State offered an additional five days, for a total of 15 days. ABC sought a total of 60 days and never moved below 45 days, which the State considers unacceptable. ABC sought court intervention when an agreement on that single provision could not be reached.<sup>5</sup> As of today, almost half a year after

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<sup>5</sup> The applicable provisions are paragraphs 5 and 5(b) of the confidentiality agreement, which is attached as Exhibit B to the Ioannou Affirmation. Editing to reflect later negotiations and agreements, paragraph 5 provides:

If this office wishes to disclose any Confidential Matter to any person other than those

the subpoena was served. ABC still has not produced a single responsive document.

In its papers to the Court, ABC makes two additional arguments that ABC made but later abandoned during the negotiations of the confidentiality agreement. First, ABC seeks reimbursement of the expenses of complying with the subpoena. Second, ABC seeks to require court action on ABC's motion, rather than the passage of time without court action, before the Attorney General can disclose materials to a person other than one expressly covered by the parties' confidentiality agreement.

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referred to in paragraphs 3(a) through (f) above, this office shall notify [ABC] of its intent to make such disclosure at least [ten (10)] days prior to the disclosure (the "Notice"), identifying with reasonable particularity the Confidential Matter to be disclosed. If ABC seeks to oppose disclosure, ABC may move within that ten (10) day period (the "Notice Period"), on notice to this office, in the Supreme Court of the State of New York, County of New York (the "Court"), for an order barring such disclosure (a "Protective Order Motion").

- (a) On any such Protective Order Motion, [ABC] shall have the burden of demonstrating that the documents or material identified in the Notice are Confidential Matter within the meaning of this agreement and, to the extent that [ABC] satisfies that burden, the documents or material shall not be disclosed.
- (b) Upon service of the Protective Order Motion on this office, the Notice Period shall, without further action, be deemed extended for an additional five (5) days (measured from the expiration of the Notice Period).
- (c) Upon the expiration of the period provided for in paragraph 5(b), this office may disclose the documents or information identified in the Notice unless the Court, in connection with the Protective Order Motion, directs otherwise.
- (d) Absent a Protective Order Motion or a limitation set by this office in the Notice, the documents and information identified in the Notice shall cease to be Confidential Matter for all purposes.

## ARGUMENT

The Attorney General has broad investigatory powers and broad discretion to use those powers. The State has acted well within that authority in seeking materials from ABC, and the time has come to compel ABC to comply with the subpoena that the State served. Indeed, this dispute is not primarily about the scope of the State's investigatory rights: ABC does not contest the scope of the State's investigatory rights. Rather, ABC's arguments are premised on the mistaken application of provisions of the CPLR to the context of the State's broad investigatory rights.

### **I. A Total of Twenty Days' Notice Before Disclosing Allegedly Confidential Material is Reasonable**

As specified above, the core dispute is about a period of time applicable to an exception within the confidentiality arrangement. Before ABC sought judicial intervention, ABC and the State had agreed how the State could disclose materials that ABC asserted were confidential to enforcers, experts, witnesses, and in litigation. ABC and the State also had agreed that the State could disclose materials that ABC asserted were confidential to those other than enforcers, experts, witnesses, and in litigation. The only disagreement was how many additional days the State had to wait in the absence of a court response to a motion for a protective order by ABC.

The State's position of waiting an additional five days (for a total of 15 days) is reasonable. As illustrated in this specific matter and as this Court knows well (and ABC should know), ABC could seek and, if ABC presents a colorable claim, secure court action by order to show cause within that period of time.<sup>2</sup> That order could provide that disclosure not occur until

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<sup>2</sup> N.Y. CIV. PRAC. L. R. § 2214(d).

the hearing on the dispute.

The State is not required to provide notice of disclosure under section 343 and an agreed upon period to wait constrains the Attorney General's ability to further the public interest. The public interest sometimes requires prompt action. A long notice period could significantly hinder the public interest that the Attorney General was seeking to vindicate.

Broadening the dispute beyond the period that the State must wait for judicial action. ABC also argues that the State should not be entitled to disclose materials in that limited circumstance until a court acts on ABC's motion to prohibit disclosure. This argument is inconsistent with the Court of Appeals decision in *LaRossa, Axenfeld & Mitchell v. Abrams*, 62 N.Y.2d 583, 468 N.E.2d 19, 479 N.Y.S.2d 181 (1984), which holds that the State's authority under section 343 may be constrained by a court order, but not by an application for a court order. *LaRossa* stemmed from an antitrust investigation by the Attorney General of the ready-mix concrete industry in New York City. The Court of Appeals considered whether the State could start criminal proceedings after various subpoena recipients moved to quash or modify pursuant to CPLR § 2034. The Court of Appeals held "that the Attorney-General was entitled, consistent with due process, to commence a criminal prosecution against plaintiffs pursuant to section 343 of the General Business Law for refusing to comply with the issued subpoenas **even though a motion to quash the subpoenas was pending.**" *Id.* at 591 (emphasis added). Thus, a request for judicial intervention does not abate the Attorney General's authority under section 343.<sup>7</sup>

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<sup>7</sup> As *LaRossa* illustrates, the State's authority under section 343 is obviously and significantly different than the discovery rights available to litigants in civil judicial proceedings. The Attorney General's investigation is not a "civil judicial proceeding" to which the CPLR

Moreover, as noted above, securing prompt judicial action in New York is not only possible, but common. By permitting disclosure after notice, ABC would be forced to seek prompt judicial intervention and focus its arguments so as to enable the court to address the issues promptly. Permitting disclosure only after judicial action would enable ABC to achieve delay by presenting unfocused arguments and styling its request for judicial intervention so as to delay a judicial decision.

## **II. ABC Has Failed to Comply with the Attorney General's Subpoena and the Court Should Compel Compliance**

ABC does not dispute the Attorney General's authority to issue the subpoena and says it will fully comply with the subpoena. Lewis Affirmation ¶¶ 87-88. Yet, nearly six months have passed since the subpoena was served, and ABC still has not produced any documents, including electronic data, in response to the subpoena. Thus, pursuant to CPLR § 2308(b), the State seeks an order compelling compliance.<sup>8</sup>

### **A. The Attorney General has Broad Investigatory Authority**

The Attorney General is the chief antitrust law enforcer in the State of New York. He represents the State, other governmental units, and the People of the State in actions to secure injunctive and monetary relief, *see* N.Y. Gen. Bus. Law §§ 342, 342-a & 342-b, and can

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generally applies. For that reason, ABC's citation of CPLR § 3103(b) is inapposite.

<sup>8</sup> Failure to comply with the subpoena, without good cause, is a misdemeanor. N.Y. Gen. Bus. Law § 343 ("If a person subpoenaed . . . fails to obey the command of the subpoena without good cause, . . . he shall be guilty of a misdemeanor.").

prosecute antitrust violations criminally, N.Y. Gen. Bus. Law § 341. The Attorney General has similar authority to enforce federal antitrust law. 15 U.S.C. § 15 (right of the State to sue for damages in its proprietary capacity); 15 U.S.C. § 15c (authority of Attorney General to sue for damages on behalf of New York residents); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-60 (1972) (authority to seek injunctive relief on behalf of the general economy of the State).

By statute, the Attorney General is authorized to serve subpoenas to investigate antitrust concerns “or whenever he believes it to be in the public interest that an investigation be made.” N.Y. Gen. Bus. Law § 343.<sup>9</sup> Subpoenas may include interrogatories, *id.* (“a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes is to be to the public interest to investigate”), and document requests, *id.* (“data and information [and] any books or papers which he deems relevant or material to the inquiry”). *See In re American Dental Coop., Inc.*, 127 A.D.2d 274, 283, 514 N.Y.S.2d 228, 235 (1st Dep’t 1987); *Grandview Dairy Inc. v. Lefkowitz*, 76 A.D. 2d 776, 429 N.Y.S.2d 189 (1st Dep’t 1980). As summarized by the Court of Appeals, the “Attorney-General has been given broad investigatory responsibilities to carry out his vital role to protect the public safety and welfare.” *LaRossa, Axenfeld & Mitchell v. Abrams*, 62 N.Y.2d 583, 589, 468 N.E.2d 19, 21, 479 N.Y.S.2d 181, 183 (1984).

How to use that investigatory authority is also left to the discretion of the Attorney General. *LaRossa, Axenfeld & Mitchell v. Abrams*, 62 N.Y.2d 583, 589, 468 N.E.2d 19, 21, 479 N.Y.S.2d 181, 183 (1984) (noting the interest “in maintaining the Attorney-General’s

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<sup>9</sup> A second, independent source of authority for the subpoena is N.Y. Exec. L. § 63(12), which authorizes the Attorney General to investigate “persistent fraud or illegality.” *See, e.g., La Belle Creole Int’l S.A. v. Attorney General*, 10 N.Y.2d 192, 219 N.Y.S.2d 1 (1961).



investigatory powers free from unnecessary hindrances.”). Moreover, the Attorney General enjoys a presumption of good faith in discharge of his investigatory responsibilities. *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332, 520 N.E.2d 535, 537, 525 N.Y.S.2d 816, 818 (1988).

### **B. ABC Has Failed to Comply with the Subpoena and Should Be Compelled**

Reflecting the Attorney General’s broad investigatory authority and discretion, only the rarest of circumstances will justify quashing a subpoena or declining to enforce it. The Court of Appeals has held “[a]n application to quash a subpoena should be granted ‘[only] where the futility of the process to uncover anything legitimate is inevitable or obvious’ or where the information sought is ‘utterly irrelevant to any proper inquiry.’” 71 N.Y.2d 327, 331-32 (citations omitted). Consequently, to support a motion to compel, the Attorney General needs to show only “his authority, the relevance of the items sought, and some factual basis for his investigation.” *American Dental*, 127 A.D.2d at 279, 514 N.Y.S.2d at 232. The Attorney General need not show “probable cause” or “pinpoint exactly what the subpoenaed materials [are] expected to reveal.” *Id.*

The State meets any phrasing of the standard: ABC appropriately does not argue otherwise. The investigation focuses on the reimbursement rates used to determine how much the State and others will pay for pharmaceuticals. The State is investigating how those rates have been set, including whether rates were set pursuant to anticompetitive agreements that violate the antitrust laws. ABC is a major participant in that industry.

### **III ABC Is Not Entitled to Costs or Expenses to Respond to the Attorney General's Subpoena**

Finally, ABC is not entitled to reimbursement for the costs and expenses of responding to the Attorney General's subpoena. ABC again inappropriately assumes that the discovery provisions for general civil litigation apply to the Attorney General's investigation. Lewis Affirmation ¶¶ 97-101. As discussed above, the Attorney General's investigations are not so constrained.

The provision that applies to amounts recoverable for costs incurred in responding to a subpoena is CPLR § 8001(a), which does not provide for the recovery that ABC seeks. Section 8001 is limited and provides only modest reimbursement. The salaries or other measure for the time spent searching for or gathering subpoenaed materials are not included in section 8001, and thus are not compensable. *See* 1985 N.Y. Op. Atty. Gen. 22 (Formal Opinion 85-F5, June 14, 1985) (payment for time spent by persons in finding and photocopying subpoenaed documents is not recoverable from the state department issuing an investigatory subpoena). The costs of electronic production similarly is not within what 8001 provides is compensable.


## CONCLUSION

For the reasons explained above, the Court should provide for a 10 day notice period, deny ABC's motion, and grant the Attorney General's cross motion to compel.

Dated: New York, New York  
September 18, 2006

Respectfully Submitted,

ELIOT SPITZER  
Attorney General of the State of New York  
Antitrust Bureau  
120 Broadway, 26th Floor  
New York, New York 10271  
(212) 416-8262

By:   
ROBERT L. HUBBARD  
Director of Litigation  
Antitrust Bureau  
212 416-8267 (voice)  
212 416-6015 (telecopy)  
[Robert.Hubbard@oag.state.ny.us](mailto:Robert.Hubbard@oag.state.ny.us) (email)

JOHN A. IOANNOU  
Assistant Attorney General  
Antitrust Bureau