



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

CHRIS KOSTER
ATTORNEY GENERAL

P.O. Box 899
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October 3, 2014

Dear Mr. Lipton,

When you spoke with our press office on the phone, you inquired about four specific issues:

1. Missouri's settlement with Pfizer regarding allegations of off-label marketing of Zyvox and Lyrica by the drug company;
2. Missouri's criminal prosecution of Lorraine Brown, president of DocX, and Missouri's case against DocX's parent company, LPS;
3. An internal policy process implemented by the AGO regarding review of multistate actions; and
4. Legislation filed in the Missouri General Assembly regarding regulation of online lenders.

We address each issue in turn:

Pfizer settlement

On the telephone, you asked about Missouri's settlement with Pfizer for claims of off-label marketing of Zyvox and Lyrica, which Missouri pursued separately from the multistate action that, as you note, Missouri did not join. You noted Missouri's ultimate settlement was less favorable to the state than the result would have been had Missouri joined the multistate action. You asked why Missouri did not join the multistate, but instead chose to pursue an independent lawsuit against the company. Further, you said you find it "odd" that Attorney General Koster spoke at an April 2013 Pfizer conference while attorneys from our office were conducting settlement discussions with the company.

Missouri did not join the multistate investigation regarding Zyvox and Lyrica because an Assistant Attorney General in our Consumer Protection division missed the

deadline for doing so. Missouri, in fact, had every intent of joining the Zyvox/Lyrica multistate, just as we have joined other multistate actions against Pfizer before and since (see below).

The failure regarding the missed multistate deadline was our own fault—the result of a lack of communication between outgoing and incoming staff following several personnel changes during this time period. If you wish to speak with a manager within the Consumer Division to verify this account, our press office can arrange for such a discussion. However, it is important to understand that the unspoken conclusion implied by your question is untrue.

An interview with the relevant manager within our Consumer Division will reveal that Missouri, after realizing that our office had missed the multistate sign-on deadline, attempted unsuccessfully to join the multistate action. By that time, the multistate negotiations were in their final stages. We were told by the multistate executive committee that allowing Missouri into the agreement at such a late juncture would undermine the process by affording Missouri the benefits of the multistate without having contributed to the underlying work of the group. Consequently, the executive committee offered Missouri no better option than an opportunity to obtain the injunctive relief contained in the agreement and a token \$15,000 settlement.

After digesting the situation we had placed ourselves in because of the missed deadline, the Attorney General's Office ("AGO") threatened to sue Pfizer in a separate action outside of the multistate process. Despite the fact that Missouri's case had been weakened by time delays and legal challenges, Pfizer nonetheless engaged in negotiations separately with Missouri.

Had Missouri participated in the multistate as we had intended, Missouri would have received between \$900,000 and \$1.1 million under the terms of the multistate. During the negotiations between Missouri and Pfizer as part of our separate lawsuit, Pfizer maintained they would not give Missouri the full benefit of the multistate agreement because doing so would undermine the incentive all parties share in fostering multistate actions (as opposed to pursuing 50 individual actions brought on behalf of each state). Therefore, a negotiated settlement to Missouri's separate lawsuit was reached providing Missouri 75% of the multistate financial settlement and injunctive relief identical to the multistate. This amount came to \$750,000 in restitution to the State of Missouri. Missouri agreed to the terms.

It should be noted that 16 other states that did not join the multistate and did not sue or threaten to sue Pfizer received nothing. While the AGO regrets the situation that led to the separate lawsuit, we aggressively pursued Pfizer once the mistake was discovered and attempted to obtain the best possible resolution.

The Zyvox/Lyrica case is only one of many suits Attorney General Koster's office has brought against Pfizer during his tenure. Indeed, Missouri has participated in several multistate actions against Pfizer during this administration – including the largest nationwide Medicaid-fraud settlement in history, for which Missouri received \$22 million.¹ Most recently, Missouri received \$690,000 in August 2014 as part of a multistate settlement regarding Pfizer's marketing practices relating to the drug Rapamune.^{2 3}

You also indicated that you find it “odd” that Attorney General Koster appeared at a Pfizer conference in Chicago on April 10, 2013, at the invitation of Dickstein Shapiro.

The Attorney General frequently receives and accepts, schedule permitting, invitations to speak at conferences for groups oriented around particular businesses, professions, civic organizations, educational institutions, and so forth. In this instance, Attorney General Koster appeared at the event and gave a biographical speech about himself to the participants, most of whom were visitors from countries outside the United States. Contrary to your assertion regarding the purported content of the speech, the Attorney General spoke primarily about growing up as the son of a sportswriter in St. Louis, his memories of various childhood experiences, and the events in his life that drew him to government service.

No fundraising was conducted and no contributions were received at the event. The hotel and flight expenses were paid by Missourians for Koster. Deputy Attorney General Joe Dandurand, who supervised the settlement negotiations with Pfizer, did not attend the event in Chicago.

LPS/DocX Prosecution and Settlement

Your second inquiry concerned Missouri's settlement with Lender Processing Services (“LPS”) in July 2012. As you acknowledged, Missouri aggressively sought to prosecute those who committed fraud as part of the robo-signing crisis. Missouri was, in fact, the first state to criminally convict a corporation or high-level executive in connection with robo-signing, pursuing forgery charges against both DocX, a subsidiary of LPS, and DocX's former president Lorraine Brown. Missouri's actions were the first

¹ This settlement comprised a number of separate *qui tam* cases, including, for example, *United States, et al ex rel. Collins v. Pfizer, Inc.*, Case No. 04-1170-DPW.

² *State ex rel. Koster v. Wyeth Pharmaceuticals, Inc.*, Case No. 14AC-CC00415 (Pfizer acquired Wyeth while litigation was pending).

³ See also *State ex rel. Koster v. Pfizer, Inc.*, Case No. 09AC-CC00493, in which the multistate, including Missouri, reached a settlement with Pfizer regarding its marketing practices regarding the drug Geodon.

of their kind in the nation. If you would like to confirm this, we suggest that you speak to Gretchen Morgenson about the matter.

As a direct result of Attorney General Koster's efforts, Ms. Brown was convicted on both state and federal charges and is now in prison.

The DocX corporation entered into a Deferred Prosecution Agreement that required it to pay Missouri \$2 million upfront, plus a second payment of \$536,506 to make up the difference Missouri would have received had it pursued DocX as part of the multistate (a consequence of the "most favored nation" provision Missouri insisted on including in the Deferred Prosecution Agreement). This case remains one of the very few successful prosecutions in the nation entered into following the mortgage meltdown and banking crisis of 2008.

Remarkably, you suggested that Missouri's success is somehow lacking compared to Nevada's civil settlement with LPS. We disagree. There are a few critical distinctions between the two states' actions. First, Missouri focused on criminal prosecution, and our attorneys achieved an unprecedented success in difficult and document-intensive complex litigation. In contrast, Nevada's criminal case ended when the court dismissed over 600 felony counts for prosecutorial misconduct by outside counsel.

Second, Nevada's civil claim was larger in scope because Nevada suffered measurably larger damages attributable to robo-signing. Unlike Missouri, Nevada consistently ranked among the top five states for foreclosures. Additionally, Nevada's civil case pertained to a much broader time frame—a three-year period of January 1, 2008 – December 31, 2010—whereas Missouri's claims were limited to just March through October 2009, due to statute-of-limitations issues specific to Missouri state law.

You also inquired about Missouri's response to an Open Records request by the State of Nevada, in which Missouri shared documents relating to DocX, but not documents relating to the parent company, LPS.

As was indicated in the documents Missouri produced for your Open Records request, the LPS documents were not shared outside our Office because "these [documents] were received pursuant to Grand Jury subpoenas or during settlement negotiations." As a matter of practice and law, documents obtained from adverse parties under such circumstances are not distributed publicly. LPS was entitled to know that the documents it provided to Missouri as part of grand jury proceedings were not being disseminated illegally or inappropriately.

Policy Change; AT&T and 5-Hour Energy

Your third line of inquiry concerned an AGO policy change regarding the manner in which the AGO handles requests to join multistate actions, as explained by Attorney General Koster at a speech to the National Association of Attorneys General. You specifically asked whether it was appropriate to thank the Chamber of Commerce, and whether the change resulted from pursuing matters against AT&T and 5-Hour Energy, which you noted were both clients of Dickstein Shapiro. You also asked why we “failed to join the formal multistate against AT&T” regarding cramming.

We must first correct a mistake in your research: In December 2012, Missouri did, in fact, join the multistate action against AT&T relating to cramming and we remain a part of that multistate action to this day. Missouri also participated in a separate multistate action against AT&T, Verizon, and T-Mobile that resulted in the November 2013 agreement by these three defendants to exit the so-called “cramming business” entirely. Missouri is also one of the few states to pursue separate state cases against various crammers: In March 2012, Missouri sued five content providers that engaged in cramming and obtained judgments against the companies totaling over \$200,000.

You are correct that Missouri made an internal policy change regarding the manner in which multistate prosecutions are authorized within our office. The change was instituted after Attorney General Koster learned, through an outside third-party (as opposed to through internal organizational communications), that a civil investigative demand was issued without his knowledge to AT&T, one of America’s largest companies. During the same time period, the office also became involved in a multistate investigation of 5-Hour Energy without the knowledge of the Attorney General. Those instances exposed a weakness in our review system, which we changed to ensure that the Attorney General has the opportunity to review and approve the initiation of legal action against major companies before the office becomes involved.

As a result of the policy change, our Consumer Division now completes a basic form seeking approval for each multistate action we are asked to join. The form is reviewed by the office’s executive team at its weekly meeting. The executive team considers the merits of the proposed action, in addition to considering the availability of staffing and financial resources within the office, in deciding whether to authorize our state to join any multistate effort. Since the inception of this policy change, the office has routinely pursued multistate actions in a timely manner and without missing a deadline.

The U.S. Chamber of Commerce did not play a role in the policy shift. Rather, the policy shift was driven by the Attorney General’s frustration of learning that his office had decided to investigate the nation’s 24th largest company without his knowledge and approval.

After Missouri implemented this safeguarding procedure, the U.S. Chamber of Commerce learned of Missouri's action. Believing that such communication failures happened in many AG offices around the country, Attorney General Koster was asked by NAAG and the US Chamber of Commerce if he would describe the process to his colleagues in a short presentation at the NAAG annual meeting. He agreed to do so. At the beginning of his presentation, Koster thanked the Chamber for the encouragement to share the process. He considered the brief recognition to be a routine matter of professional courtesy, nothing more.

Online Lending/Danny Pfeifer

Your final inquiry concerned whether a gift in excess of \$200 from Danny and Maria Pfeifer, reported on Attorney General Koster's personal financial disclosure report filed in April 2013, influenced Attorney General Koster's decision not to support a bill to increase penalties for payday lending. You noted Danny Pfeifer was a former campaign aide of Attorney General Koster and that he now represents many clients, including clients in the payday-lending industry.

Attorney General Koster has known Danny Pfeifer since 1996, when Koster, then Prosecuting Attorney of Cass County, Missouri, prosecuted the two killers of Danny's father. At the time of the prosecution, Koster was 32 years old and Danny, the victim's only son, was 18. Koster and Danny became close friends over the nearly 20 years since the murder trial. Cass County is a small community, and both men pursued professions related to government.

The gift in question related to a birthday party that Danny and Maria Pfeifer held in celebration of Danny Pfeifer's 35th birthday. The couple invited about 20 friends, including Koster and a guest, to attend a music concert at the Sprint Center in Kansas City. Though Danny invited Koster purely because of their long and close friendship, it is nonetheless the case that Koster is a state-wide elected official and Danny is a registered lobbyist. Accordingly, Attorney General Koster reported the value of the tickets to the Missouri Ethics Commission as a gift.

Attorney General Koster's attendance at Danny Pfeifer's birthday party had nothing to do with the decision (more accurately "non-decision") of the Attorney General's Office not to expend resources advocating for the payday lending bill you reference in your question. Please note that neither did the Attorney General's Office oppose the bill you are referencing. The AGO took no position whatsoever on the legislation, as it is the AGO's posture regarding the vast majority of legislation filed in the General Assembly to serve as counsel to the legislature and only rarely as advocate.

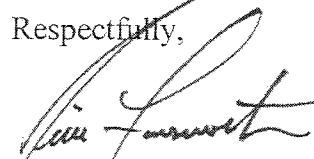
Missouri has very permissive banking and lending laws, including for online lenders. The legislature's position on such lending institutions is unlikely to change in a

body controlled by strong Republican super-majorities. In fact, the bill you are referencing did not even receive enough votes to be voted out of committee.

The Attorney General's legislative efforts have focused on other significant consumer protection and public safety issues. For example, in 2011, this office promoted three major legislative initiatives: a consumer protection bill resulting from Attorney General Koster's Task Force on the Motor Vehicle Service Contract Industry (a.k.a. automobile repair bill insurance) passed nearly unanimously; recommendations from the Attorney General's Task Force on Domestic Violence passed unanimously in both chambers; and though the legislation the AGO supported in an attempt to save the state's failing Second Injury Fund did not pass that year, it did successfully pass two years later.

We hope this information is helpful in clarifying the issues you raised when we spoke. Please contact us if you have any additional questions.

Respectfully,

A handwritten signature in black ink, appearing to read "Jim Farnsworth", written over a horizontal line.

JAMES B. FARNSWORTH

Chief of Staff

Missouri Attorney General's Office

Slusher, Eric

From: Slusher, Eric
Sent: Friday, October 10, 2014 3:24 PM
To: 'Lipton, Eric'
Subject: RE: Missouri AG Koster response

To address his question about the Oregon settlement:

There are a number of differences between the Oregon and Missouri actions that may account for the disparate outcomes. First, as you'll note in the press release you included, Oregon announced its settlement in March 2011, a year and a half before the multistate resolved (in Dec. 2012) and more than two years before Missouri reached its separate settlement (in April 2013). Thus, whereas Missouri took a penalty for missing the multi-state deadline, Oregon received a premium for leading the pack. Additionally, we understand that Oregon law is much more favorable to prosecutions of fraud in the pharmaceutical industry than is Missouri law. Oregon can recover up to \$25,000 in penalties per violation and asserts that it has no statute of limitations in pursuing such fraud. Missouri, on the other hand, may recover a maximum of \$1,000 in penalties per violation and often bumps up against short limitations periods that reduce the number of available claims. Obviously, the possibility of facing penalties 25 times greater in Oregon rather than Missouri increased Pfizer's litigation risk in the former case exponentially. Given Oregon's powerful tools in pursuing fraud in this area, I think your research will reveal that Oregon frequently separates from multi-state actions against pharmaceutical companies and often has successful recoveries as good as or better than those obtained through the multi-state process.

From: Lipton, Eric [mailto:lipton@nytimes.com]
Sent: Thursday, October 09, 2014 10:43 PM
To: Slusher, Eric
Subject: Re: Missouri AG Koster response

Hello Eric.

Thank for that response last week. I will be getting back in touch to walk through some outstanding items.

One thing I wanted to raise now.

In speaking with officials from Texas, who led the multistate, they said two states negotiated their own deal: Oregon and Missouri.

I wanted to ask, why is it that Oregon, with a population of 3.9 million, compared to 6 million in Missouri as of 2013, received such a large payment, if it too negotiated outside the multistate? Can you address this on Friday, please.

Eric

**OREGON AG KROGER ANNOUNCES \$3.34M
AGREEMENT WITH PFIZER**

OREGON AG KROGER ANNOUNCES \$3.34M AGREEMENT WITH PFIZER

(The following is a reformatted version of a press release issued by the Office of Attorney General John Kroger and received via electronic mail. The release was confirmed by the sender.)

March 20, 2011

OREGON DEPARTMENT OF JUSTICE REACHES LANDMARK \$3.34 MILLION AGREEMENT WITH PFIZER

Agreement marks the largest ever consumer drug settlement reached independently by the Oregon Department of Justice

Attorney General John Kroger today announced a \$3.34 million agreement with the world's largest research-based pharmaceutical company, Pfizer, Inc., over allegedly deceptive marketing claims related to its prescription drug Zyvox®. This is the largest ever consumer drug agreement that Oregon has achieved with a prescription drug manufacturer.

“Oregon will act when drug companies put public health at risk just to boost their profits,” said Attorney General Kroger.

Today's settlement follows a two-year investigation by the Oregon Department of Justice into evidence that suggested Pfizer was using unreliable and unsubstantiated claims to promote Zyvox®, a relatively new and expensive antibiotic used for treating certain types of pneumonia and bacterial skin infections. Despite lacking evidence required by the Food and Drug Administration (FDA) to make such claims, Pfizer allegedly relied upon flawed clinical studies to substantiate assertions that Zyvox® was a superior to vancomycin, a comparatively inexpensive generic drug that holds the largest market share and has been available for more than 40 years. Pfizer's sales representatives detailed and distributed thousands of copies of these faulty studies throughout Oregon to promote the sale of Zyvox®.

Besides threatening the pocketbooks of consumers by misrepresenting that an expensive branded drug was superior to an existing generic, Pfizer's conduct was a potential threat to public health because it increased the danger of microbial resistance to a second generation antibiotic while the first generation antibiotic was still effective. To conserve the effectiveness of new antibiotics for the time when microbes inevitably develop resistance to antibiotics, infectious disease specialists advise using older antibiotics while they are still effective while holding the newer antibiotics in reserve. This is called “antimicrobial stewardship.”

Under the settlement filed today in Marion County Circuit Court, Pfizer must pay over \$3.34 million to Oregon to fully reimburse the State Accident Insurance Fund and Oregon Department of Corrections for purchases they made of Zyvox and to fund a new Consumer Education and Antimicrobial Stewardship Program administered by the Oregon Public Health Division/Office of Disease Prevention and Epidemiology and the Oregon Patient Safety Commission. Over \$617,000 of the settlement fund will finance efforts to promote antimicrobial stewardship in Oregon and to teach consumers about proper use of antibiotics. The remainder of the settlement money will be deposited into the Protection and Education Account to fund the state's consumer protection activities. The agreement also provides for injunctive relief that will prevent similar future misconduct with respect to other Pfizer drugs.

In addition to the Zyvox settlement, Oregon also reached a settlement with Pfizer relating to its Internet marketing practices. Under Oregon's 2008 settlement with Pfizer relating to the promotion of its pain killer Bextra, all Pfizer promotional claims are required to comply with the federal Food, Drug and Cosmetic Act (FDCA). However, following the Bextra settlement, Pfizer received notice of violation letters from FDA on March 26, 2009 and again on August 31, 2011 alleging that Pfizer violated the FDCA by promoting various drugs through the use of "sponsored links" without disclosing required risk information. Under today's settlement, Pfizer is required to comply with FDA's interpretation of the law. This is the first time a state has moved to enforce a consumer protection settlement with Pfizer.

Senior Assistant Attorney General David Hart, Assistant Attorney in Charge of Financial Fraud/Consumer Protection, handled both cases for the Oregon Department of Justice.

Attorney General John Kroger leads the Oregon Department of Justice. The Department's mission is to fight crime and fraud, protect the environment, improve child welfare, promote a positive business climate, and defend the rights of all Oregonians.

Contact: Tony Green 503-602-9882 tony.green@doj.state.or.us

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202 370 7951 cell

On Fri, Oct 3, 2014 at 6:43 PM, Slusher, Eric <Eric.Slusher@ago.mo.gov> wrote:

Eric,

Please find attached our written response to the questions you posed to us in telephone conversations last week. We look forward to speaking with you further on Monday if you have follow up questions.

Best,

Eric

Eric Slusher

Press Secretary

Office of Missouri Attorney General Chris Koster

Jefferson City, MO

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Slusher, Eric

From: Slusher, Eric
Sent: Friday, October 17, 2014 4:49 PM
To: 'Lipton, Eric'
Subject: RE: A couple of small follow ups.

Eric,

- 1) Typically, AG Koster does not attend such dinners, because he uses the evenings at events for other meetings. He does not recall attending one in several years, but over the past six years has probably has attended one or two.
- 2) Deputy AG Dandurand did not attend the NAAG Presidential Initiative Summit in Milwaukee September 16-18, 2013.

Best,

Eric

From: Lipton, Eric [<mailto:lipton@nytimes.com>]
Sent: Thursday, October 16, 2014 2:10 PM
To: Slusher, Eric
Subject: A couple of small follow ups.

Hi Eric.

Here is that item I told James Farnsworth and Mr. Koster I wanted to ask about.

- 1) Has Mr. Koster attended any of the dinners that Dickstein Shapiro has hosted during the NAAG meetings or DAGA or even CWAG? And if so, the cost of those dinners is covered by the firm.
- 2) I was told that Mr. Dandurand had dinner in Milwaukee with Bernie Nash, and others, during the NAAG Presidential Initiative Summit, which was Sept. 16-18, a dinner covered by Mr. Nash. Just checking that fact.

Small points I realize. But wanted to check. Will be in touch again before the piece runs and will let you know when it is running.

Eric

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Slusher, Eric

From: Slusher, Eric
Sent: Tuesday, October 21, 2014 8:43 AM
To: 'Lipton, Eric'
Subject: RE: Was looking at campaign contributions by ETC Capital

Each of the three companies you asked about (Pfizer, AT&T, and 5 Hour Energy) has contributed to AG Koster's political efforts. Nonetheless, two of those three companies have been the subject of legal action on multiple occasions – Pfizer at least six times, and AT&T at least twice.

Eric

From: Lipton, Eric [<mailto:lipton@nytimes.com>]
Sent: Monday, October 20, 2014 5:28 PM
To: Slusher, Eric
Subject: Was looking at campaign contributions by ETC Capital

This struck me as interesting...

AG Koster has taken more in donations from this company--controlled by the owner of 5-Hour Energy--than any other AG candidate in the United States, except for Sam Olens. Granted, it is not a lot. But there obviously is some kind of relationship with the company that you have not shared with me.

Eric Lipton
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