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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RECEIVED
NOV 18 2011
CHAMBERS OF
ALVIN K. HELLERSTEIN
U.S.D.J.

BAYER HEALTHCARE LLC,

Plaintiff,

v.

ELI LILLY AND COMPANY,

Defendant.

11 Civ. 3047 (AKH)
ECF CASE

CONSENT DECREE

Plaintiff Bayer HealthCare LLC ("Bayer") and Defendant Eli Lilly and Company ("Lilly"), having consented to the entry of this Consent Decree, and with reference to the following facts:

A. Bayer's Animal Health Division produces pet medicines, including flea and tick preventatives such as Advantage® II and K9 Advantix® II, and sells its products throughout the United States.

B. Lilly's Elanco Companion Animal Health division ("Elanco") produces pet medicines, including flea and heartworm preventatives such as Comfortis, Assurity and Trifexis, and sells its products throughout the United States.

C. In April 2011, Elanco sent veterinarians, veterinary clinics, distributors and distribution agents the letter attached hereto as Exhibit A (the "Letter").

D. On May 2, 2011, Elanco notified Bayer that it no longer distributed the Letter, but refused to retract the Letter.

E. On May 4, 2011, Bayer filed the complaint in this action against Lilly challenging statements in the Letter; alleging that Elanco sales representatives have also stated to distribution agents and veterinarians during detailer and sales visits that Bayer's sale of certain pet medicines to pet retailers and websites has caused a decline in sales of pet medicine by veterinarians, and have urged distribution agents and veterinarians to stop purchasing and distributing Bayer's products; and alleging that such statements amounted to false and misleading advertising and unfair competition. On May 25, 2011, Lilly filed its Answer and Affirmative Defenses and denied the allegations set forth in Bayer's Complaint.

F. Elanco represents that, since May 2, 2011, it has not disseminated advertising repeating the statements in the Letter.

G. This Court has original jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1332 and 1338 and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367. The amount in controversy is alleged by Bayer to be in excess of \$75,000, exclusive of interest and costs. This Court has personal jurisdiction over Elanco pursuant to N.Y. Civ. Prac. L. & R. §§ 301 & 302(a). Venue is proper in this District pursuant to 28 U.S.C. § 1391.

H. Without admission of liability, Bayer and Lilly have reached agreement to settle this dispute as set out in this Consent Decree.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. Lilly, including its sales force, employees and agents, (a) will not communicate, distribute, circulate, disseminate or use the Letter in the future; and (b) will not disseminate advertisements, detailers, letters and any other forms of communication, distribution, circulation or dissemination, communicating the following messages without adequate substantiation:

- i. that there is a direct correlation between Bayer's sales of pet medicines through retail stores and a decline in veterinary-dispensed flea medication; or
- ii. that Bayer does not support veterinarians; or
- iii. that Elanco's pet medicines cannot ever be purchased by pet owners from Internet pharmacies; or
- iv. that distributors, distribution agents, veterinarians, veterinary clinics or consumers, or any member of the professional or consuming public, should cease doing business with Bayer because Bayer is disrespecting the veterinary profession.

2. Lilly will not direct any other person to make any statements that are contrary to paragraph 1, above.

3. Subject to the foregoing, nothing in this Consent Decree shall limit Lilly's right and ability to:

- i. communicate and advertise concerning the impact of the retail availability of flea and tick products on the veterinary channel,

provided that Lilly has, and references, adequate substantiation for such a claim; or

- ii. communicate and advertise concerning the availability of Bayer's Advantage[®] II and K9 Advantix[®] II through retail channels and/or over the counter; or
- iii. communicate with veterinarians, veterinary clinics, distributors and distribution agents regarding Elanco's Track and Trace program and Elanco's sales policy of selling its products only to veterinarians (so long as Elanco does not communicate that Elanco's pet medicines cannot ever be purchased by pet owners from Internet pharmacies); or
- iv. promote its companion animal health products, or to encourage distributors, distribution agents, veterinarians, veterinary clinics or consumers, or any member of the professional or consuming public to stock and/or sell Elanco products as opposed to the products of its competitors.

4. Dismissal: This lawsuit is dismissed with prejudice. This is a non-monetary resolution, and each party will bear its own costs and fees.


5. Continuing Jurisdiction: Jurisdiction of this cause is retained by the Court to enforce compliance with this Consent Decree. In any dispute concerning compliance with the requirements of this Consent Decree, the prevailing party shall recover its attorneys' fees and costs. Punitive, exemplary, and/or special damages may not be recovered.

SO ORDERED this 18 day of November, 2011

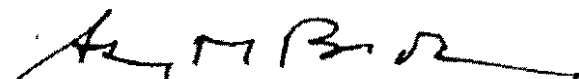


Alvin K. Hellerstein, U.S.D.J.

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EXHIBIT A



elancopet.com

PO Box 708
2500 Innovation Way
Greenfield, IN 46140
U.S.A.

Companion Animal Health

April 2011

Dear Doctor,

The veterinary trade media is making us all aware of the decline in veterinary visits over the past few years. This is important news. You may be feeling the impact of the slowdown on your practice. Another lesser known fact is that the total number of doses of parasiticide products dispensed by veterinarians also has declined by 5 percent — approximately 4 million fewer doses — from 2009 to 2010.¹ We are committed to preventing that trend with Elanco Companion Animal products.

At Elanco, the foundation of our business is built on two things: innovation and a commitment to the veterinarian. Since launching Elanco Companion Animal Health, we have introduced four products into the marketplace — each sold exclusively to veterinarians through our veterinary distributor partners.

To retain the dispensing of these products within the veterinary channel, Elanco has implemented Track and Trace technology with our parasiticide products. Unique identification numbers and bar coding on boxes and cartons help ensure product integrity and guard against theft, while helping to keep these products within the context of the veterinary/client/patient relationship. If our products are discovered outside that relationship, our process allows us to track the point of diversion. Since the implementation of the Elanco Sales Policy and the Track and Trace Technology in January 2010, Elanco has revoked the ability of more than 230 veterinarians to purchase our products because they failed to meet our corporate sales policies.

Some companies clearly do not feel the way we do. In the past year, Bayer began selling Advantage[®] and K9 Advantix[®] products directly to pet retailers and websites.² There appears to be a direct correlation between the decline in veterinary-dispensed flea medication and the availability of these products outside the veterinary channel. Sales at Bayer Animal Health rose by 14.6 percent in 2010.³ According to Bayer's financial statements this came as a result of strong increases in North America. In a report to stockholders, Bayer made the following statement: "There was a gratifying improvement in sales of our Advantage[®] line of flea, tick and worm control products, due particularly to initial stocking of a new distribution channel in the United States."⁴

Not only has Bayer chosen to distribute product outside the veterinary channel, they have shifted their support for veterinarians by working directly with large retailers. In December 2010, a marketing manager for Bayer Animal Health acknowledged, "Advantage has enjoyed the recommendation of veterinarians worldwide for the control of fleas on dogs and cats." When asked how pet specialty stores can compete effectively with veterinarians in selling these products, he responded, "With direct support from Bayer Animal Health, we can help pet retailers leverage our expertise in parasite prevention and treatment to get the message to their customers."⁵

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April 2011

Bayer is not the only company which has enjoyed the support of veterinarians for years that now has products available outside your office. Merial stands by their policy that products are not distributed outside the veterinary channel,¹ yet Frontline® can be found in many retail outlets nationally. Is Merial taking the steps necessary to address the issue of diversion?

We at Elanco believe veterinarians are the best resource for pet owners for all pet healthcare decisions. We continue to keep our sole focus on veterinarians and their practices, and that includes directing our efforts at keeping our product dispensed only by veterinarians.

Your business is at a crossroad. Will you stand by and watch while industry "leaders" redirect patients outside your office for veterinary products? Will you endorse companies which disrespect your profession and redirect patients to other sources? Or will you support companies whose words are supported by action? At Elanco, we believe it is critically important to align actions and words. We believe our unwavering commitment to veterinarians, demonstrated through innovative product introductions and methods of keeping our products within the veterinary channel, demonstrate our support to you and your practice.

For information about our products, our tracking system and sales policy, or our commitment to you, please contact me or one of our sales representatives at 1 (888) 545 5973. We value your feedback and look forward to a long relationship with you in helping pets live longer, healthier, higher quality lives.

Sincerely,



Eric Graves
Senior Director
Companion Animal Health

¹ B-K Kynectra 2011

² Bayer media release, February 9, 2010

³ Bayer Annual Report 2010

⁴ Bayer Stockholders Newsletter, June 30, 2010

⁵ <http://www.petbusiness.com/articles/2010-12-01/An-Advantage-for-Pet-Stores>

⁶ Merial letter to veterinarians, February 11, 2010