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Phone records lead to victory

Wyeth prevails in trade secrets case after key discovery.

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FOR 40 YEARS pharmaceutical giant Wyeth closely guarded the secret process it uses to create a drug called Premarin. So when an upstart Minnesota company named Natural Biologics Inc. began producing the key ingredients of Premarin in 1997, Wyeth thought its trade secret had been stolen.

In an effort to preserve what would become \$2 billion in yearly sales of Premarin, Wyeth filed suit in 1998. But it wasn't until a paralegal, poring through thousands of pages of the defendant's edited phone records during discovery, made an incriminating finding that Wyeth began to realize what had happened.

On Sept. 15, U.S. District Judge Joan N. Ericksen in Minneapolis ruled that a theft had occurred. The judge issued a permanent injunction against Natural Biologics that could put the young Minnesota company out of business, since the Premarin ingredient is its only product.

Natural Biologics was granted a stay and has filed a notice of appeal. Its lead defense attorney, Richard G. Mark, said he has never

seen a remedy so sweeping as this injunction.

"There was never any direct evidence that in fact trade secret information was passed," said Mark, president of the Minneapolis law firm Briggs & Morgan.

But Ericksen filed a written opinion on Oct. 2 supporting her ruling and ripping the defendant for "brazen and unconscionable conduct [including] destroying evidence, giving false testimony, and improperly redacting evidence." *Wyeth v. National Biologics Inc.*, Civ. No. 98-2469.

Most of the case court documents have been sealed so as to protect the trade secret.

Ericksen's written ruling, along with interviews with attorneys on both sides, reveal details of how Wyeth solved the mystery of the theft.

The story began in 1993 when an agricultural salesman named David Saveraid and his brother, Steve, started Natural Biologics LLC and a related company called Natural Biologics Inc.

Both firms are based in Albert Lea, Minn., and the court treats them as one, with David Saveraid



SECRET UNCOVERED: Calvin Litsey, left, and David Gross got a permanent injunction against Wyeth's adversary.

as president and the key player in this case.

Saveraid did not return several phone calls, and Mark said he did not expect his client to comment.

Production effort

In 1994, Saveraid decided to try to produce the key ingredients of Premarin for use in a generic equivalent—something that several large drug companies like Merck had tried and failed to do for decades, according to court documents.

At the time, Natural Biologics had no income, no employees, one leased truck, some urine-collection equipment and a barn for seven or eight horses, court documents say.

Premarin is a hormone-replacement therapy drug used primarily to treat



FRANCES M. ROBERTS/PHOTOGRAPHER SHOWCASE

severe symptoms of menopause and to prevent osteoporosis. Its key ingredients are natural estrogens found in pregnant mare urine.

The trade secret at issue was a chemical process, called the Brandon Process, which Madison, N.J.-based Wyeth uses to extract the estrogens.

In 1997, Natural Biologics built a processing plant in Albert Lea, using some of the same vendors that Wyeth had used to build its Brandon processing plant.

In November 1998, before any generic drug had hit the market, Wyeth filed suit based primarily on circumstantial evidence, claiming misappropriation of its trade secret. Wyeth did not seek money damages but asked for an injunction banning Natural Biologics from the field and from ever disclosing the process.

This began a legal battle in which Wyeth's lawyers assembled a forensics evidence team that analyzed thousands of notes, records and scientific documents for months.

Then came the breakthrough: In February 2001, a paralegal, searching the defendant's phone records, spotted a strange number.

It belonged to Dr. Douglas Irvine, a retired Wyeth scientist who had played a key role in developing and refining the Brandon Process.

The discovery "broke the case open.... It was the classic smoking gun," said David J.F. Gross, Wyeth's co-lead counsel and a partner at Minneapolis-based Faegre & Benson.

Court documents say that in

depositions Saveraid and Irvine had denied having had any contact with each other. Irvine could not be reached for comment.

After Wyeth's find, the judge allowed a broader discovery that turned up 17 hours of phone conversations and an exchange of faxes between Saveraid and Irvine that had been concealed.

At that point, "instead of a circumstantial case of misappropriation, we had a direct case of trade secret theft," said Calvin Litsey, co-lead counsel for Wyeth and also a partner at Faegre & Benson.

Defense attorney Mark said that Saveraid and Irvine had legitimate reasons for not revealing the phone calls because they had never discussed trade secret information.

The judge ruled otherwise, saying, "The contacts between David Saveraid and Dr. Irvine coincided with dramatic changes to Natural Biologics' process without any testing or experimentation." In addition, she said, Natural Biologics presented no credible record of having developed its own process, and Saveraid lacked the necessary chemistry background or other qualifications.

Mark said he was surprised by the judge's sweeping remedy of a permanent injunction. Injunctions in trade secrets cases typically last only for the length of time it takes someone to duplicate a process by independent means, he said.

"Our expert said that would be a year to a year and a half," Mark said. "We think the remedy went way beyond what the record will support."

Jerrold Reilly, a partner and trade secret litigator in the Los Angeles office of Jones Day, said courts are reluctant to issue permanent injunctions that put companies out of business, but it is not unprecedented when the facts warrant.

"The judge's key finding was that these people are not to be trusted," Reilly said, "and that finding is copiously supported by the facts. It will be difficult to reverse on appeal."

Also important, Reilly said, was the judge's finding that Natural Biologics' process could cause Wyeth to lose revenue, resulting in layoffs of 3,000 to 4,000 employees and a cut of several hundred million dollars in research spending. At the time, Wyeth sold about \$2 billion worth of Premarin annually.

"It's a cautionary tale," said Reilly, who wasn't involved in the litigation. "No matter how badly someone has behaved, it has to stop at the courthouse door."

For Wyeth's lawyers, it's about perseverance. "When litigants try to cover up their bad behavior, they usually leave behind a telltale clue," Gross said. "It's rarely easy to find. If you want to uncover the needle in the haystack, you have to go through the whole haystack." **NLJ**

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