

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DIGENE CORPORATION,

Plaintiff,

v.

THIRD WAVE TECHNOLOGIES, INC.,

Defendant.

ORDER

3:07-cv-00022-bbc

This case is before the court on the motion of defendant Third Wave Technologies, Inc. for reconsideration of one portion of the court's January 11, 2008 order denying defendant's antitrust counterclaims. Defendant had argued in support of its counterclaims that plaintiff had engaged in a number of anti-competitive acts, including offering its customers free equipment in violation of the Anti-Kickback Act, 42 U.S.C. § 1320A-7b(b). I concluded that the Act did not apply in civil litigation, West Allis Memorial Hospital, Inc. v. Bowen, 852 F.2d 251, 255 (7th Cir. 1988), and that even if it did, the Act did not cover discounts disclosed to the customer in writing. I found also that the allegedly free equipment was not free but was included in the unit prices that plaintiff charged for its test kits.

In moving for reconsideration, defendant contends that these rulings were error, that

they run counter to the U.S. Department of Health and Human Services Discount Exception Regulations, 42 C.F.R. 22 1001.952(h)) and that letting them stand may have “powerful consequences for the future enforcement of the Act and the Discount Exception Regulations.” Plaintiff opposes reconsideration or clarification of the ruling, pointing out that it argued in its reply brief in support of its motion for summary judgment that defendant had failed to proffer any evidence that plaintiff had not made proper disclosure of any allegedly free or discounted items or that any customer had not accounted for any such items.

Nothing in defendant’s motion persuades me that reconsideration of the January 11 order is necessary. I remain convinced that defendant failed to show that plaintiff’s sales of equipment and test kits were anticompetitive or in violation of the Anti-Kickback Act. As to the effect of this decision, it seems wholly improbable that anyone would rely on the January 11 order to argue that the holding in this case applies in an enforcement action.

ORDER

IT IS ORDERED that defendant Third Wave Technologies, Inc.’s motion for

reconsideration of this court's January 11, 2008 order is DENIED.

Entered this 6th day of February, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge