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September 7, 2012

Honorable Richard S. Brown
Honorable Lisa S. Neubauer
Honorable Paul F. Reilly
c/o Diane M. Fremgen
Wisconsin Court of Appeals
110 E. Main Street, Suite 215
Madison, WI 53701-1688

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CLERK OF COURT OF APPEALS
OF WISCONSIN

RE: State of Wisconsin v. Abbott Laboratories, et al.
Case No. 2012AP232-AC

This letter is submitted on behalf of the non-Pharmacia defendants, each of whom is a party in this case and each of whom was allowed to participate in this appeal as an amicus. We are responding to the Court's August 1, 2012 Order ("August 1 Order") seeking comments from the parties on which issues in this appeal remain to be addressed in light of the Supreme Court's recent decision.

REQUEST FOR PERMISSION TO FILE THIS LETTER BRIEF

It is not clear to us whether the August 1 Order authorizes a submission by the non-Pharmacia defendants, who, as noted above, are parties in this case but only amici in the pending appeal. To the extent that the August 1 Order does not authorize such a response, the non-Pharmacia defendants hereby seek leave to have this response accepted and considered by the Court.

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As set forth in the motions seeking leave to participate as amicus in this appeal,¹ each of the non-Pharmacia defendants is a defendant in this case. Trial proceedings against each of the non-Pharmacia defendants have been stayed pending final appellate resolution of the issues raised by the judgment against Pharmacia. Therefore, the questions raised in the Court's August 1 Order are of significant interest to the non-Pharmacia defendants. Accordingly, we respectfully request that the Court consider our views.

QUESTION 1: IS THE SEPARATION OF POWERS ISSUE STILL VIABLE AS A STAND-ALONE ISSUE?

The first question this Court asked the parties to address was, "Is the separation of powers issue still viable as a stand-alone issue...?" The Supreme Court answered this question "yes," and we see no reason to override that decision.

Pharmacia's appeal raises a number of grounds for reversing the judgment against it, including arguments based on the separation of powers and political question doctrines. This Court certified three specific questions for the Supreme Court to consider. Neither the separation of powers doctrine nor the political question doctrine was implicated by any of the three certified questions. The Supreme Court accepted the certification. Its order doing so explicitly stated that it would "limit its review to the three issues identified in the certification," and the Supreme

¹ Two motions were filed, one on behalf of the non-Pharmacia brand defendants and one on behalf of the non-Pharmacia generic defendants. On August 10, 2010, this Court granted both motions.

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Court's subsequent opinion addresses only the three certified issues, expressly reserving any decision on the other issues raised in the appeal.

One of the certified questions was, "Was the jury required to speculate in determining damages?" The Supreme Court decided there was credible evidence to support the jury's damage award. Specifically, with respect to brand name drugs, the Supreme Court found that the jury received credible evidence suggesting that "had actual wholesale prices been provided, the legislature would have used them to reimburse pharmacies for brand name drugs." *State v. Abbott Laboratories*, 2012 WI 62, ¶ 60, 341 Wis. 2d 510, 816 N.W.2d 145. Similarly, with respect to generic drugs, the Supreme Court found that there was credible evidence supporting the inference that had actual wholesale prices been reported to it, the State "would have reimbursed Pharmacia's generic drugs consistently with such accurate prices." *Id.* ¶ 79. However, what the Supreme Court did not decide - and very explicitly said it was not deciding - is whether the judicial branch ought to be in the business of making decisions about what the legislature would have done had it been given different information, or whether such an inquiry is barred by either the separation of powers or the political question doctrines.

Pharmacia's appeal raises both of these issues. First, Pharmacia argues that because determining how much pharmacists who agree to participate in the Medicaid program ought to be reimbursed is a decision based on politics and policy, it is within the exclusive core constitutional powers of the legislature. Therefore, the judicial branch has no authority to

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involve itself in such questions beyond construing what the legislature actually did (i.e. the separation of powers argument). (See Pharmacia Appellant's Brief at 15-19; Reply Brief at 9-12.) Second, Pharmacia argued that the case presents a non-justiciable political question because it requires courts and juries to make political and policy judgments entrusted to the legislature. (See Pharmacia Appellant's Brief at 19-23; Reply Brief at 12-14.)

The Supreme Court's decision does not address either of these arguments. To the contrary, it explicitly acknowledged - twice - that the separation of powers issue was not among those issues certified to the Supreme Court and, therefore, was not addressed by the Court's opinion. (*Abbott Laboratories*, 2012 WI 62, ¶ 1 n.2 & ¶ 81 n.24.) In light of these direct pronouncements by the Supreme Court, we believe it would be contrary to the Supreme Court's instructions for this Court to infer that the Supreme Court's decision on the narrow factual issue of whether there was credible evidence to support the State's claimed damages also resolved the broader constitutional and policy questions raised by Pharmacia's appeal. The Supreme Court has never, to our knowledge, made it a practice to issue hidden rulings or to rule on important policy issues by implication. Had the Supreme Court considered the "speculative damages" issue to be so intertwined with the separation of powers issue that a decision on the former necessarily decided the latter, we are confident it would have said so.

We believe that what this Court perceives as a "judicial branch cast" placed by the Supreme Court on the matters discussed in its opinion is merely the result of the Supreme Court's

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having addressed the questions certified for appeal, not the result of any determinations made by the Supreme Court on the separation of powers issues it explicitly stated it was not addressing.

Therefore, we believe that the separation of powers and political question issues raised by Pharmacia are viable stand-alone issues that must be addressed by this Court.

QUESTION 2: WHAT OTHER ISSUES REMAIN TO BE ADDRESSED?

The non-Pharmacia defendants believe that the following additional issues, raised in Pharmacia's May 27, 2010 opening brief, remain unresolved and should be addressed by this Court prior to further trials being conducted in the Circuit Court:

- ISSUE II THE TRIAL COURT ERRED IN NOT DISMISSING THE STATE'S § 100.18 CLAIM**
- ISSUE III THE TRIAL COURT ERRED IN NOT DISMISSING THE STATE'S MEDICAID FRAUD CLAIM**
- ISSUE VI THE TRIAL COURT ERRED BY NOT PERMITTING THE JURY TO CONSIDER WHETHER AND TO WHAT EXTENT THE STATE HAD FAILED TO MITIGATE ITS CLAIMED DAMAGES**
- ISSUE VII THE TRIAL COURT ERRED IN AWARDING DUPLICATIVE DAMAGES**
- ISSUE VIII THE TRIAL COURT ERRED BY ADMITTING CERTAIN DOCUMENTS AND TESTIMONY INTO EVIDENCE AT TRIAL**
- ISSUE IX THE TRIAL COURT ERRED IN ITS AWARD OF ATTORNEYS' FEES AND COSTS**

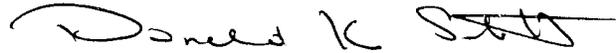
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Thank you in advance for your anticipated consideration of our views regarding these important matters.

Very truly yours,

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