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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
) Plaintiff,)
)
) vs.)
)
) ABBOTT LABORATORIES and DEY, INC.,)
)
) Defendants.)

Case No: 3AN-06-_____ CI

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Clerk of the Trial Courts

COMPLAINT

Plaintiff, the State of Alaska ("the State" or "Alaska"), alleges for its Complaint against the above-captioned defendants as follows:

NATURE OF THE ACTION

1. This lawsuit is brought pursuant to Alaska's Unfair Trade Practices and Consumer Protection Act, AS 45.50.471, et seq. ("the Act").
2. Alaska brings this lawsuit to recover damages and obtain injunctive relief from defendants, who are manufacturers of prescription drugs. As described in this Complaint, defendants have taken advantage of the enormously complicated and non-transparent market for prescription drugs to engage in an unlawful scheme to cause Alaska to pay inflated prices for prescription drugs. The scheme involves the publication by defendants of phony "average wholesale prices" ("AWPs"), which then become the basis for calculating the cost at which "providers" – the physicians and pharmacies who provide these prescription drugs to patients – are reimbursed by Alaska. Defendants reinforce this basic tactic with other deceptive practices described in this complaint, including the use of secret discounts and rebates to providers, and the use of various devices to keep secret the prices of their drugs currently available in the marketplace to other purchasers. By engaging in this unlawful scheme, defendants have succeeded in having Alaska finance windfall profits to these providers. Defendants attempt to profit from their scheme by using the lure of these windfall profits competitively to encourage providers to buy more of their drugs instead of competing in the

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marketplace solely on the basis of legitimate factors such as price and the medicinal value of their drugs.

PARTIES AND JURISDICTION

3. The State is authorized to bring this lawsuit by AS 44.23.020, 45.50.501 and 45.50.551. As described in this Complaint, defendants' unlawful scheme has resulted in higher prices for prescription drugs being paid by Alaska's Medicaid program. The defendants have used and continue to use the methods, acts, and practices set forth in this Complaint that, among other violations, are illegal under the Act.

4. Defendants are pharmaceutical companies whose fraudulent schemes, including the publication of excessive and inflated prices for prescription drugs as described in this Complaint, have caused to be presented to officers and/or employees of Alaska false or fraudulent claims for payment or approval of certain drugs to get these false or fraudulent claims paid or approved by the Alaska Medicaid program, and have resulted in Alaska paying for drugs at inflated prices, as detailed below.

5. At all times material to this civil action, defendant have transacted business in Alaska by, including, but not limited to, selling directly or through wholesalers their drugs, including those identified in this Complaint, to purchasers within the State of Alaska.

6. Defendant Abbott Laboratories ("Abbott") is an Illinois corporation with its principal place of business at 100 Abbott Park Rd., Abbott Park, IL 60064-6400.

7. Defendant Dey, Inc. ("Dey") is a Delaware corporation with its principal place of business at 2751 Napa Valley Corporate Dr., Napa, CA 94558.

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8. Jurisdiction over the subject matter of this action is based on AS 44.23.020, 45.50.501 and 45.50.551, which grant the State authority to file suit against the defendants.

9. Personal jurisdiction over each of the defendants is proper under Alaska's Long Arm Statute, as codified in AS 09.05.015.

10. Venue is proper in the Third Judicial District at Anchorage pursuant to Rule 3 of the Alaska Rules of Civil Procedure because defendants committed unlawful acts and/or practices in Anchorage.

FACTUAL BACKGROUND

A. The market for prescription drugs.

11. The market for prescription drugs is enormously complex and non-transparent. It is composed of over 65,000 separate national drug codes ("NDCs") (there is a separate NDC number for each quantity of each drug manufactured by each defendant). The essential structure of the market is as follows. The drugs are manufactured by enormous and hugely-profitable companies such as defendants. Defendants sell the drugs (usually with intermediaries and agents involved in the process) to physicians, hospitals, and pharmacies. These physicians, hospitals, and pharmacies are commonly referred to as "providers." The providers then, in essence, resell the drugs to their patients when the drugs are prescribed for, administered by, or dispensed to those patients. Most patients have private or public health insurance coverage. Where a patient has such insurance, the payment that is made for the patient's prescribed drug ultimately will be made, in whole or in large part, by a private

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insurance company, a self-insured entity, or a government entity (in the case of the Medicare and Medicaid programs). These private insurance companies, self-insured entities, and government entities are commonly known as "payers." More often than not, the payer makes the reimbursement payment directly to the provider, not to the patient.

12. This market structure means that the market for prescription drugs differs in two crucial respects from most markets.

13. First, in most markets, the ultimate consumers of a product determine the demand for the product. This is not the case for prescription drugs. In the prescription drug market, the decision to use a prescription drug is overwhelmingly made not by the consumer of the drug – the patient – but by physicians, hospitals in which the patient is treated, home health-care agencies, long-term care facilities, or (with respect to the decision to use generic drugs versus brand-name drugs) pharmacies. Because prescription drugs are dispensed only on a physician's order, the physician has the principal say as to what drug will be chosen for the patient. However, hospitals, particularly teaching hospitals, also have considerable influence over this choice. If a hospital decides to put one drug as opposed to a competing drug on its "formulary" (the list of drugs that the hospital stocks), physicians (particularly residents and attending physicians who are employed by the hospital) likely will choose the drug on the formulary rather than a competing drug. Likewise, although pharmacies do not prescribe drugs, pharmacies can exert important influence over the choice of which drug the patient will purchase if there is a choice between a generic version or brand-name version of the drug the physician has prescribed.

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14. A second difference between the prescription drug market and ordinary markets is that in ordinary markets, the ultimate consumer of the product pays for it directly. In the prescription drug market, however, most payments for drugs are made by "payers" through private or public insurance programs.

15. This structure of the prescription drug market produces the following fundamental fact that underlies defendants' unlawful scheme. If a defendant drug manufacturer can cause a "payer" to reimburse the provider for defendant's drug at a higher price than the price the provider paid to buy the drug from the defendant, there will be a "spread" between the two prices, and that "spread" is retained by the provider as additional profit. The larger the "spread" that can be created for a particular drug, the greater the incentive the provider has to choose, or influence the choice of, that drug rather than a drug of a competing manufacturer.

B. The purpose of the Medicaid program and how it responds to the complexity of the drug market.

16. Alaska provides medical assistance to its neediest citizens through the Alaska Medicaid program.

17. The Alaska Medicaid program is an enormous purchaser of drugs, purchasing over \$124.9 million annually (covering the period July 1, 2004 to June 30, 2005), and purchasing over \$686.8 million between 1993 and 2005. Although defendants' participation in the Alaska Medicaid program is purely voluntary, all defendants have chosen to participate and sell drugs to Alaska Medicaid participants because of the size of the Alaska Medicaid

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program. Thus, Alaska may at any given time have to reimburse a provider for any of the drugs of any of the defendants – a universe of many thousands of drugs.

18. Alaska's task is further complicated in that federal law places limits on what Alaska may pay providers for any particular drug. Specifically, Alaska cannot reimburse providers more than "the lower of the – (1) estimated acquisition costs plus reasonable dispensing fees established by the agency; or (2) providers' usual and customary charges to the general public." 42 C.F.R. §447.331. "Estimated acquisition cost" is defined as "the agency's best estimate of the price generally and currently paid by providers for a drug marketed or sold by a particular manufacturer or labeler in the package size of drug most frequently purchased by providers." 42 C.F.R. §447.301. Thus, pursuant to federal law, the highest price Alaska can pay for a drug is the provider's cost to acquire that drug.

19. Because defendants have hidden both the prices at which they sell their drugs to wholesalers, and their knowledge about the prices at which wholesalers sell their drugs to providers (as described in more detail herein), Alaska has no access to the pricing information it needs to estimate accurately the providers' acquisition cost of defendants' drugs. Because neither Alaska nor any other state has sufficient personnel or knowledge required to compile complete and accurate lists of defendants' drug prices, entire businesses have grown up to provide pricing information to the states and others. Three of these are of particular importance in this case. They are First DataBank, the Red Book, and Medispan. These compendia purport to supply accurate price information on defendants' drugs through surveys of wholesalers and information obtained from defendants themselves.

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20. Alaska, like most other states, has chosen First DataBank as its primary cost source. First DataBank purports to supply the states with accurate information about the AWP of all drugs, information it receives from the drug manufacturers themselves. As First DataBank explained AWP to its customers in September, 1991:

Average Wholesale Price (AWP) is perhaps the most misunderstood concept in the pharmaceutical industry. The purpose of this article is to describe what is meant by AWP and to explain some of the underlying concepts involved in the acquisition, determination and maintenance of First DataBank's AWP.

AWP represents an average price which a wholesaler would charge a pharmacy for a particular product. The operative word is average. AWP never means that every purchase of that product will be exactly at that price. There are many factors involved in pricing at the wholesale level which can modify the prices charged even among a group of customers from the same wholesaler. AWP was developed because there had to be some price which all parties could agree upon if machine processing was to be possible.

At First DataBank, all pricing information is received in hard copy from the manufacturers. Catalogs, price updates, and other information reach us by fax, Federal Express, or U.S. mail. In the past two years, fax transmission has streamlined the acquisition of data to a large extent.

See Exh. A.

21. For virtually the entire time period relevant hereto, First DataBank and the other medical compendia have represented that their published AWP's reflect actual average wholesale prices.

22. Because Alaska, like most other states, has no source of comprehensive information about providers' acquisition cost for defendants' drugs, Alaska has relied on the prices defendants reported to the medical compendia. Consistent with First DataBank's suggestion that some providers were paying less than AWP, Alaska agreed to pay providers

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an amount consisting of AWP minus 5%. Alaska has continued to pay a separate dispensing fee to providers to reimburse them for the service provided in dispensing drugs to customers. At no time did Alaska intend systematically to reimburse providers, on the average, at prices higher than the providers' average acquisition costs. Like most other states, Alaska did not appreciate until recently that defendants were reporting AWPs that were not only higher than actual acquisition costs, but higher than any discount percentage that Alaska or any other state was using to estimate providers' acquisition costs.

23. As a practical matter, Alaska, like most other states, is dependent on the medical compendia for pricing reports for the maintenance of its Medicaid claims processing system. When a pharmacy fills a prescription and dispenses a drug to a Medicaid patient, information regarding that prescription is communicated electronically to Alaska through the Point-of-Sales claim processing system. On a weekly basis, First DataBank electronically sends its updated AWPs for the thousands of NDC-numbered drugs listed in its database to First Health to update Alaska's Medicaid file. These prices become the basis for Alaska's reimbursements to providers. There is no other electronic source for this information. Accordingly, Alaska is functionally dependent on the accuracy of the data defendants supply to First DataBank in meeting its obligation to pay providers no more than their actual acquisition cost of defendants' drugs.

C. Defendants' corruption of the government Medicaid assistance programs.

24. Defendants have defeated the intent of the Medicaid program to pay providers no more than their acquisition cost by reporting false and inflated AWPs to the medical

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compendia and/or by reporting prices that they knew, because of the manner of the compendia's operations, would misrepresent defendants' true wholesale prices. One purpose of this scheme was and is to create the spread between a drug's true wholesale price and the false and inflated AWP published by the medical compendia and thereby increase the incentive for providers to choose the drug for their patients, or, at a minimum, to counteract the same tactic used by a competitor.

25. The higher the spread between the AWP and the true wholesale price, the more profit a provider can make. Defendants often market their products by pointing out (explicitly and implicitly) that their drug's spread is larger than the spread of a competing drug.

26. All of the defendants have inflated their drugs' reported AWPs to levels far beyond any real average wholesale price for their drugs. One high-ranking industry executive has described it as the industry practice to do so.

27. In 2004, high-ranking executives of defendants Roxane, Dey, Aventis, and Barr testified before Congress that their AWPs do not reflect the actual selling prices of their drugs. When asked why Dey does not lower its AWP on generic drugs, Dey's chief financial officer testified: "The simple answer is that given the system that now exists our customers won't buy from us if we lower our AWP."

28. Dey sued First DataBank because it published the *actual* AWP of Dey's drugs instead of the false AWP that Dey reported to First DataBank. Dey's principal allegation in that lawsuit was that the publication of the actual prices for its drugs was inconsistent with the

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practice in the industry of accepting and publishing reported, inflated AWP, and that such publication put Dey at a competitive disadvantage because it had no "spread" to advertise.

29. Attached as Exhibit B to this Complaint is a list of drugs manufactured by the defendants and/or their subsidiaries that the U.S. Department of Justice, after an extensive investigation, found to have inflated AWP. The U.S. Department of Health and Human Services concluded, with respect to all drugs utilized in the Medicare program that "[a] general conclusion reached in reviewing GAO [General Accounting Office] and OIG [Office of Inspector General] data is that there is a level of overstatement in the listed AWP for *all* drugs . . ." Payment Reform for Part B Drugs, 68 Fed. Reg. 50,430 (August 20, 2003) (emphasis added).

30. Alaska has obtained the false prices defendants caused to be published by FirstData Bank. Alaska has also obtained data showing the true AWP of defendants' drugs from two of the largest national drug wholesalers: Cardinal and AmerisourceBergen, one of the three largest wholesalers. Attached as Exhibit C to this Complaint is a chart containing additional examples of defendants' drugs that have false and inflated AWP. For each defendant, Exhibit C identifies: (a) the NDC; (b) the name of the drug; (c) the false AWP published by First DataBank as of the end of each year from 2001 to 2003; (d) the average AWP published by First DataBank for each year from 2001 to 2003; (e) a market price for the NDC for each year from 2001 to 2003; and (f) the spread between the market price and the AWP. The AWP and market prices are unit prices. The source of the market prices is AmerisourceBergen. The market price is the average price at which AmerisourceBergen sold

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the NDC numbered drug to the classes of trade that are reimbursed by the Alaska Medicaid program, *i.e.*, retail pharmacies, chain pharmacies, and long-term care facilities. The spread is calculated as average AWP minus the market price, expressed as a percentage of the market price. The NDC numbered drugs on Exhibit C are those for which the Alaska Medicaid program purchased in significant amounts. Plaintiff has similar data for years prior to 2001 and after 2003, which data will be produced to defendants upon request during discovery. The NDC numbered drugs identified in Exhibit C constitute many of the NDC numbered drugs upon which the state is seeking damages.

31. As they have done with their AWPs, defendants have illegally and deceptively misrepresented and inflated the wholesale acquisition cost ("WAC") of their drugs. WAC is the price at which defendants sell their drugs to wholesalers. Defendants have made it appear that any reduction in the purchase price below the listed WAC would result in a loss to the wholesaler and was, hence, unachievable, when in fact defendants secretly discounted the WAC to purchasers other than the Medicaid program through an elaborate charge back system (as described in more detail below).

**DEFENDANTS' EXACERBATION OF THE COMPLEXITIES OF THE
MARKET AND AFFIRMATIVE CONCEALMENT OF THEIR WRONGDOING**

32. Defendants have been able to succeed in their drug pricing scheme for more than a decade by exacerbating the complexities of the huge and complex drug market, and by purposely concealing their pricing scheme from Alaska and other payers, as set forth below.

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33. The published wholesale price of any of the thousands of NDC numbered drugs might, and often does, change at any time. As a consequence, to track the current published prices of drugs utilized by a state's citizens requires resources and expertise that most states do not have.

34. Defendants have further exacerbated the inherent complexities of the drug market by utilizing marketing schemes that conceal the true price of their drugs in the following different ways.

35. First, defendants sell their drugs in a unique manner that hides the true prices. This scheme works as follows. Upon agreeing on a quantity and price of a drug with a provider or group of providers, a defendant purports to sell the agreed-upon drugs at the WAC price to a wholesaler with whom the defendant has a contractual arrangement. The wholesaler then ships the product to the provider, charging the provider the price originally agreed upon by the drug manufacturer and the provider, which price is lower than the WAC. When the wholesaler receives payment from the provider, it sends a bill to the defendant, called a "charge back," for the difference between the WAC and the lower price actually paid by the provider. These charge backs (or "shelf adjustments" or economic inducements with varying names) are kept secret from the payers, including Alaska, so that it appears that the wholesaler actually purchased the drug at the higher WAC price. The effect of this practice is to create the impression of a higher than actual wholesale price paid by the wholesaler and passed on to the provider. Defendants hide other actual price reductions by directly paying

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providers market share rebates and other off-invoice rebates and discounts that are calculated long after the actual purchase date of the drugs.

36. Second, defendants further inhibit the ability of Alaska and other payers and ultimate purchasers to learn the true cost of their drugs by wrapping the sales agreements they negotiate with providers in absolute secrecy, terming them trade secrets and proprietary, to preclude providers from telling others the actual price they paid.

37. Third, defendants further obscure the true prices for their drugs through their policy of treating so-called classes of trade differently. Thus, for the same drug, pharmacies are given one price, hospitals another, and doctors yet another.

38. Fourth, some defendants have hidden their real drug prices by providing free drugs and phony grants to providers as a further means of discounting the overall price of their drugs. For example, defendant AstraZeneca paid \$355 million to settle federal fraud charges that it induced doctors to falsely bill Medicare and Medicaid.

39. Defendants have hidden from the public their motives for utilizing an inflated AWP. Indeed, one official, a high-ranking employee of Dey, even went so far as to lie under oath about Dey's marketing of their spreads. Only with the disclosure of materials secured by litigants in recent discovery has it become apparent that one reason defendants have intentionally manipulated the nation's drug reimbursement system is to compete for market share on the basis of a phony price spread, instead of the true selling price or the medicinal efficacy of their drugs.

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40. Defendants have further concealed their conduct by making sure that all of the entities that purchase drugs directly from the defendants (and thus know the true price of their drugs) have had an incentive to keep defendants' scheme secret. Defendants' scheme permits all providers – pharmacies, physicians, and hospitals/clinics – to make some profit off defendants' inflated spread, because all of them are reimbursed in some manner on the basis of the AWP for at least some of the drugs they sell or administer. For providers, therefore, the greater the difference between the actual price and the published AWP, the more money they make. Thus, providers willingly sign drug sales contracts requiring them to keep secret the prices they pay for drugs.

41. Defendants themselves have continuously concealed the true price of their drugs and have continued to report and cause to be published false and inflated AWPs and WACs as if they were real, representative prices. Indeed, in the 2000 edition of Novartis' Pharmacy Benefit Report, an industry trade publication, the glossary defines AWP as follows:

Average wholesale price (AWP) – A published suggested wholesale price for a drug, based on the average cost of the drug to a pharmacy from representative sample of drug wholesalers. There are many AWPs available within the industry, AWP is often used by pharmacies to price prescriptions. Health plans also use AWP – usually discounted – as the basis for reimbursement of covered medications.

Novartis Pharmacy Benefit Report: Facts and Figures, 2000 edition, East Hanover, NJ, Novartis Pharmaceuticals Corporation, p. 43.

42. Defendants' unlawful scheme has completely corrupted the market for prescription drugs. Instead of competing on price and medicinal value alone, defendants have

deliberately sought to create a powerful financial incentive for providers to prescribe drugs based primarily on the spread between the true price of a drug and its published AWP or WAC. Creating incentives for providers to prescribe drugs based on such a spread is inconsistent with Alaska law and public policy. Large price spreads on higher priced drugs encourage providers to prescribe more expensive drugs instead of their lower priced substitutes, thereby increasing the cost of healthcare. Competition on the basis of such spreads also has the potential to influence providers (consciously or unconsciously) to prescribe less efficacious drugs over ones with greater medicinal value. Because of defendants' concealment of their scheme, Alaska has unknowingly underwritten this perversion of competition in the drug market. In sum, defendants have been, and continue to be, engaged in an insidious, deceptive scheme that is causing Alaska to pay scores of millions of dollars a year more than it should for its prescription drugs, and may well be inducing some providers to prescribe less efficacious drugs.

THE GOVERNMENTAL INVESTIGATIONS OF DEFENDANTS' CONDUCT

43. The first governmental investigation of defendants' conduct began in 1995 when a small infusion pharmacy, Ven-a-Care of the Florida Keys, filed a sealed *qui tam* action with the Federal Government alleging that certain of the defendants were intentionally inflating the reported AWPs of certain drugs, primarily physician administered drugs.

44. In 1997, in response to the Ven-a-Care lawsuit, the Federal Government issued subpoenas to certain of the defendants, including Dey, Abbott, and Warrick, seeking pricing information from them.

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45. In 2000, Congress began its investigation of the pricing practices of some of the defendants in connection with the Medicare Part B program based on the materials it received through its subpoenas. On September 28, 2000, as part of this investigation, U.S. Representative Pete Stark wrote to the president of the Pharmaceutical Research and Manufacturers of America (the main pharmaceutical trade association of which most of the defendants are members) as follows:

Drug company deception costs federal and state governments, private insurers and others billions of dollars per year in excessive drug costs. This corruptive scheme is perverting the financial integrity of the Medicare program and harming beneficiaries who are required to pay 20% of Medicare's current limited drug benefit. Furthermore, these deceptive, unlawful practices have a devastating financial impact upon the states' Medicaid Program

The evidence I have obtained indicates that at least some of your members have knowingly and deliberately falsely inflated their representations of the average wholesale price ("AWP"), wholesaler acquisition cost ("WAC") and direct price ("DP") which are utilized by the Medicare and Medicaid programs in establishing drug reimbursements to providers. The evidence clearly establishes and exposes the drug manufacturers themselves that were the direct and sometimes indirect sources of the fraudulent misrepresentation of prices. Moreover, this unscrupulous "cartel" of companies has gone to extreme lengths to "mask" their drugs' true prices and their fraudulent conduct from federal and state authorities. I have learned that the difference between the falsely inflated representations of AWP and WAC versus the true prices providers are paying is regularly referred to in your industry as "the spread"

The evidence is overwhelming that this "spread" did not occur accidentally but is the product of conscious and fully informed business decisions by certain PhRMA members

146 Cong. Rec. E1622 (daily ed., September 28, 2000) (September 28, 2000 letter from House Committee on Ways and Means, Subcommittee on Health, to Alan F. Holmer, President, Pharmaceutical Research and Manufacturers of America, Washington, D.C.).

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46. On December 21, 2000, Congress passed the Medicare, Medicaid and SCHIP Benefits Improvement and Protection Act of 2000 ("BIPA"), Pub. L. No. 106-554, § 429(c) (2000), which required a comprehensive study of drug pricing.

47. Continuing Congress' investigation of Medicare Part B pricing in 2001, Congressman Stark wrote to defendant Bristol-Myers on February 22, 2001 outlining numerous apparently illegal pricing practices:

The evidence clearly shows that Bristol has intentionally reported inflated prices and has engaged in other improper business practices in order to cause its customers to receive windfall profits from Medicare and Medicaid when submitting claims for certain drugs. The evidence further reveals that Bristol manipulated prices for the express purpose of expanding sales and increasing market share of certain drugs where the arranging of a financial benefit or inducement would influence the decisions of healthcare providers submitting the Medicare and Medicaid claims.

147 Cong. Rec. E244-45 (daily ed., February 28, 2001).

48. In 2003, the House Committee on Energy and Commerce expanded Congress' Medicare investigation into pricing practices in the state Medicaid program. On June 26, 2003, Chairman Billy Tauzin (R.-La.) and Oversight and Investigations Subcommittee Chairman James Greenwood (R.-Pa.) wrote as follows to 26 drug companies, including many of the defendants here:

The Committee on Energy and Commerce is conducting an investigation into pharmaceutical reimbursements and rebates under Medicaid. This inquiry builds upon the earlier work by this Committee on the relationship between the drug pricing practices of certain pharmaceutical companies and reimbursements rates under the Medicare program. In that investigation, the Committee uncovered significant discrepancies between what some pharmaceutical companies charged providers for certain drugs and what Medicare then reimbursed those providers for dispensing those drugs. This price difference resulted in profit incentives for providers to use the drugs of specific companies

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as well as higher costs to the Medicare system and the patients it serves. For example, we learned that one manufacturer sold a chemotherapy drug to a health care provider for \$7.50, when the reported price for Medicare was \$740. The taxpayer therefore reimbursed the doctor almost \$600 for dispensing the drug and the cancer patient had a \$148 co-payment. Such practices are unacceptable in the view of the Committee, which is why we are in the process of moving legislation to address these abuses.

The Committee has similar concerns regarding drug prices in Medicaid, which has a substantially larger pharmaceutical benefit than Medicare.

House Committee on Energy and Commerce Press Release, Tauzin, Greenwood Expand Medicaid Fraud Investigation (June 26, 2003), available at http://energycommerce.house.gov/108/News/06262003_1003.htm.

49. On December 7, 2004, the House Subcommittee of Oversight and Investigation of the Commerce and Energy Committee conducted a hearing on "Medicaid Prescription Drug Reimbursement: Why the Government Pays Too Much." In his opening remarks, Chairman Joe Barton (R-TX) stated:

Data obtained by the committee from five of the largest retail pharmacy chains reveals that during the period of July 1, 2002 to June 20, 2003, the average acquisition costs for seven widely prescribed generic drugs was 22 cents, while the average Medicaid reimbursement just for those drugs alone was 56 cents, more than double the cost . . .

"Medicaid Prescription Drug Reimbursement: Why the Government Pays Too Much," Hearing Before the House Subcommittee on Oversight and Investigations, No. 108-126, at 5 (2004), available at http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.52&filename=97275.pdf&directory=/disk2/wais/data/108_house_hearings.

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50. The importance to Alaska and the other states of the information being sought by this investigation was explained by Henry Waxman during the December 2004 House Committee on Energy and Commerce hearings on Medicaid pricing practices. Congressman Waxman explained that even though the federal government had access to the manufacturers' actual average manufacturers prices ("AMPs"), the states did not:

the drug industry was powerful, and they succeeded in securing a provision in the basic legislation that kept the Best Price and the AMP information a secret. Can you imagine that? The federal government knew this information, but we kept it a secret from the states. This has proved to be a costly error. Without this crucial piece of information, states who were, after all, responsible for establishing the reimbursement rate for prescription drugs could not set their reimbursement rates appropriately. As a result, [the states] continued to rely on the average wholesale price minus the arbitrary amount because they did not have the information needed to set a more appropriate reimbursement rate.

Id. at 23 (emphasis added).

51. As a result of all these investigations, many states began to investigate defendants' drug pricing practices on their own, leading to lawsuits in some 20 separate states, including Alaska. Notwithstanding these investigations and lawsuits, defendants continue to publish, or participate in the publication of, inflated wholesale prices, and continue to hide the true prices of their drugs, including opposing in litigation discovery of the actual prices of these drugs.

**THE INJURY TO THE MEDICAID PROGRAM
CAUSED BY DEFENDANTS' FALSE WHOLESALE PRICES**

52. Medicaid is a joint federal and state health-care entitlement program authorized by federal law, with mandatory and optional provisions for eligibility and benefits covered,

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including pharmacy. The Alaska Medicaid program is administered by the Alaska Department of Health and Social Services.

53. Alaska Medicaid's drug expenditures have increased dramatically. In fiscal year 1999 (covering the period July 1, 1998 to June 30, 1999), Alaska Medicaid had drug expenditures totaling approximately \$38.8 million. In fiscal year 2005 (covering the period July 1, 2004 to June 30, 2005), Alaska Medicaid drug expenditures totaled \$124.9 million, which constitutes approximately 12.8% of Alaska's overall Medicaid budget. As of December, 2004, the number of Alaska citizens enrolled in Medicaid was approximately 116,500, which represented approximately 17.6% of the State's population.

54. During the relevant time period, with some exceptions, reimbursement to pharmacies, physicians, and hospitals for drugs covered by the Alaska Medicaid program has been made at defendants' published AWP minus 5%, plus a dispensing fee.

55. For a minority of the drugs purchased by Alaska, the state sets its reimbursement rate at either the federal upper limit ("FUL") or at a rate established by the state maximum allowable cost ("MAC") program. For multi-source drugs that have at least three suppliers, the Center for Medicaid Services ("CMS") generally establishes FULs, defined as 150% of the least costly therapeutic equivalent (using all national compendia) that can be purchased by pharmacies in quantities of 100 tablets or capsules or, in the case of liquids, the commonly listed size. 42 C.F.R. § 447.332. As a practical matter, CMS has relied on the defendants' inflated prices to set most of its FULs. The states also may set reimbursement rates for these drugs at rates lower than the FUL pursuant to the state MAC

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program and Alaska has done so in a number of instances. Had defendants reported truthful prices, the FULs and state MACs would have been lower. In addition, had defendants reported truthful prices, the State would not have paid based on FULs or MACs, but rather based on truthful AWP.

56. At all relevant times, each defendant was aware of the reimbursement formula used by the Alaska Medicaid program and the dependence of the Medicaid program on defendants' reported AWP.

57. By reporting false and inflated wholesale prices, and by keeping their true wholesale prices secret, defendants have knowingly enabled providers of drugs to Medicaid recipients to charge Alaska false and inflated prices for these drugs, and interfered with Alaska's ability to set reasonable reimbursement rates for these drugs.

58. As a consequence, the Alaska Medicaid program has paid more for prescription drugs than it would have if defendants had reported their true wholesale prices.

**DEFENDANTS' CONDUCT WAS INTENTIONALLY
IN DISREGARD OF ESTABLISHED LAW**

59. Defendants had a duty to deal truthfully and honestly with Alaska and they knew so.

60. Moreover, it has uniformly been the law for over 60 years that it is unlawful for a seller to cause to be circulated a price at which no, or few, sales are actually expected, whether it is called a list price, suggested price, or benchmark price. *E.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 372 (1965); *FTC v. The Crescent Publishing Group, Inc.*, 129

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F.Supp.2d. 311 (S.D.N.Y. 2001). Defendants either knew of this law or acted in reckless and willful disregard of it.

61. Congress has, in its hearings on the subject, excoriated the pharmaceutical industry for causing untrue AWP's to be published.

62. Defendants have willfully ignored, and continue to ignore: (a) their duty to Alaska to behave with scrupulous honesty; (b) case law uniformly holding that their pricing practices are unlawful; and (c) the reprimands of Congress.

63. As a result, penalties and forfeitures, consistent with Alaska's statutory scheme, are mandated in this case.

HARM TO ALASKA

64. Defendants' unlawful activities have significantly and adversely impacted Alaska. Alaska has paid more for the drugs it purchases through its Medicaid program than it would have if defendants had reported the true wholesale prices of their drugs.

COUNT I

(Violation of the Alaska Unfair Trade Practices and Consumer Protection Act)

65. Plaintiff hereby realleges all previous paragraphs.

66. AS 45.50.471(a) prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. Defendants' conduct as alleged above violated and continues to violate this statute.

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67. In addition, AS 45.50.471(b)(11) expressly prohibits “engaging in any other conduct creating a likelihood of confusion or of misunderstanding and which misleads deceives or damages a buyer or a competitor in connection with the sale or advertisement of goods and services.” Defendants’ conduct as alleged above violated and continues to violate this statute.

68. In addition, AS 45.50.471(a)(12) expressly prohibits “using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or omitting a material fact with intent that others rely upon the concealment, suppression or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been misled, deceived or damaged.” Defendants’ conduct as alleged above violated and continues to violate this statute.

69. By committing the acts alleged above, defendants have violated AS 45.50.471.

70. Alaska has been harmed by defendants’ unfair and deceptive conduct in that it has paid far more for defendants’ drugs than it would have paid had defendants truthfully reported the AWP’s of their drugs.

COUNT II

(Unjust Enrichment)

71. Plaintiff hereby realleges all previous paragraphs.

72. As a result of defendants’ misleading pricing information, Alaska purchased drugs at prices greater than they would have had defendants not engaged in unlawful conduct.

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73. Each defendant knew that Alaska was being overcharged by pharmacy providers and physicians as a direct result of defendants' misleading pricing information.

74. Each defendant knew that it was not entitled to the profits it realized from the increased sales and market share that resulted from the excessive payments made by Alaska.

75. As a result of defendants' unlawful conduct, defendants obtained increased sales, market share and profits at the expense of Alaska.

PRAYER FOR RELIEF

WHEREFORE, Alaska prays for judgment as follows:

1. For an award of damages in excess of the \$100,000 jurisdictional limit of this Court;
2. For a declaration that defendants' conduct as described above constitutes unfair and/or deceptive acts or practices within the meaning of AS 45.50.471;
3. For a permanent injunction that defendants and their employees, officers, directors, agents, successors, assigns, affiliates, merged or acquired predecessors, parent or controlling entities, subsidiaries, and any and all persons acting in concert or participation with defendants, from continuing the unlawful conduct, acts, and practices described above;
4. For compensatory, restitution and/or disgorgement damages against each defendant for all excessive prescription-drug payments paid as a result of their unlawful conduct;

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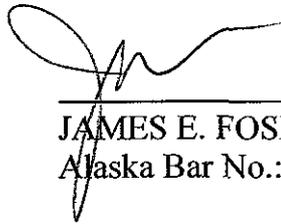
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5. For civil penalties in the amount of \$25,000 for each separate violation of the Act;
6. For punitive damages;
7. For costs, full reasonable attorneys' fees, and prejudgment interest; and
8. For other relief deemed just and equitable by the Court.

DATED: October 6, 2006.

Respectfully submitted,

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