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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	Case No.: 3AN-06-12026 CI
vs.	)	
	)	
ALPHARMA BRANDED PRODUCTS	)	**ALASKA'S OPPOSITION TO DEFENDANTS'**
DIVISION INC., et al.	)	**JOINT MOTION TO DISMISS**
	)	
Defendants.	)	

I. INTRODUCTION

The defendant pharmaceutical manufacturers reap enormous benefits from the federal-state Medicaid program. Through Medicaid, the State of Alaska, like other states, buys massive quantities of defendants' drugs on behalf of low-income Alaska consumers by paying the "providers" – the physicians, pharmacies and other entities who dispense the drugs to patients.

Pursuant to federal law, Alaska pays for most drugs dispensed under Medicaid using a formula that depends on Alaska's estimate of what providers are paying to acquire the drugs. Unless Alaska can accurately estimate those "acquisition costs," it may underwrite windfall profits to providers by paying them far more than the providers actually paid for the drugs. Defendants are well aware of this system. They have a duty not to mislead Alaska and other states who must establish providers' actual acquisition costs. Defendants have violated that duty. They have engaged in a scheme to misrepresent to the states what providers' real acquisition costs are, and have made it impossible for the states to estimate those costs accurately. By reporting false and inflated prices for their drugs, defendants have caused the states to reimburse providers at far higher rates than the providers paid to acquire the drugs. Through this scheme, the defendants have induced providers to select drugs based on the artificial state-subsidized profit they receive by prescribing the drug, rather than on cost and the drugs' medicinal value.

Through government investigations, criminal indictments, and civil lawsuits, information has emerged about the purpose of this scheme and the huge overpayments that have resulted from it. As a result, lawsuits have been filed by at least twenty-three state Attorneys Generals; by the federal Department of Justice; and by private class-action litigants. These lawsuits are known as "AWP litigation," taking this name from one aspect of defendants' scheme – their publication of fictitious "Average Wholesale Prices" which states, lacking better information, have used as a starting point to estimate providers' actual acquisition costs for most drugs.

As these lawsuits have piled up, defendants have tried to delay the day of reckoning. First, they have removed nearly all the state cases to federal court – in some states, twice or even three times – only to have virtually all of the cases remanded by federal courts who found the removal petitions untimely, lacking substantive merit, or both.[1] Second, in all these cases, the defendants have presented enormous joint motions to dismiss, supplemented by a barrage of individual motions. All of these motions have made the same basic arguments the defendants make here. The motions have been denied *en masse.*[2] As this brief will show, nowhere are defendants' arguments weaker than in Alaska, where motions to dismiss "are viewed with disfavor and should rarely be granted." *Kollodge v. State*, 757 P.2d 1024, 1026 (Alaska 1988).

II. STATEMENT OF FACTS

When deciding a motion to dismiss under Civil Rule 12(b)(6), the Court presumes all factual allegations of the complaint to be true and makes all reasonable inferences in favor of the non-moving party. *Kollodge*, 757 P.2d at 1026. To survive a motion to dismiss, "it is enough that the complaint set forth allegations of fact consistent with and appropriate to some enforceable cause of action." *J & S Services, Inc. v. Tomter*, 139 P.3d 544, 547 (Alaska 2006). Only if "plaintiff can prove no set of facts in support of his claim which would entitle him to relief" is dismissal proper. *Id*. Most importantly, "The trial court must *only* consider the material contained in the pleadings in a motion to dismiss for failure to state a claim." *Kollodge*, 757 2d at 1026 (emphasis in original).

[1] The out-of-state cases cited in this brief are reprinted in the State's Appendix. Tabs 1 through 12 thereof reprint twelve separate decisions of federal courts in Alabama, Alaska, Florida, Hawaii, Massachusetts, Minnesota, Pennsylvania, Texas, and Wisconsin, rejecting defendants' removals of AWP cases and remanding them to the state courts where they were filed. In most states, defendants have tried twice to remove; in Wisconsin, they tried three times (Tabs 10 - 12).

[2] Tabs 13 through 27 of the State's Appendix contain decisions and orders denying defendants' motions to dismiss in state AWP cases from Alabama, Arizona, Arkansas, Florida, Kentucky, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, West Virginia, and Wisconsin. Tabs 28 through 33 contain federal district court decisions denying motions to dismiss AWP claims under various federal or state laws. Proceedings on defendants' motions to dismiss in many other states' AWP cases have been stalled by defendants' multiple attempts to remove those cases.

Defendants' motion flouts these rules. Instead of accepting the Amended Complaint's (for convenience, hereinafter referred to as "Complaint") allegations, defendants ask the court to take judicial notice of a huge appendix of documents which, they assert, show that their conduct failed to deceive the State. This tactic is improper. The allegations of the Complaint, not the defendants' documents, control this motion. The State will now briefly summarize those allegations.

A. The Complexity Of The Prescription Drug Market.

Defendants manufacture prescription drugs. They sell them (with varying numbers of intermediaries and agents) to "providers" – physicians, hospitals, and pharmacies – who then provide the drugs to patients. Most patients' prescription drugs will be paid for in whole or part by a "payer," which, for Medicaid patients, is the State. Amended Complaint (hereafter "AC"), ¶28.

The prescription drug market is enormously complex and nontransparent. The U.S. Food and Drug Administration has given each drug made by each manufacturer a separate "National Drug Code" ("NDC"). There are over 65,000 NDCs. The published wholesale price of any NDC-numbered drug may and often does change at any time. AC ¶¶ 40, 49.

B. Federal Medicaid Law Requires The State To Estimate Providers' Actual Acquisition Costs.

Alaska provides medical assistance to needy citizens through Medicaid, a joint federal and state collaborative program. AC ¶¶33, 67. In 2004, 17.6% of Alaskans were enrolled in the Alaska Medicaid program. AC ¶69. The program pays for over $124.9 million of prescription drugs annually. AC ¶¶34, 69.

Under federal Medicaid regulations, Alaska cannot pay providers more than "the lower of (1) estimated acquisition costs plus reasonable dispensing fees established by the [Alaska Department of Health and Social Services]; or (2) providers' usual and customary charges to the general public." 42 C.F.R. §447.331. The regulations define "estimated acquisition costs" as the Department'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." AC ¶¶35, 42, *citing* C.F.R. §447.301. Thus, Alaska's payment to providers should be no more than (1) the "ingredient cost" – that is, the provider's cost of acquiring the drug, plus (2) a reasonable fee to cover the costs of the provider associated with dispensing the drug to patients. *Id.*

To comply with these regulations, Alaska must estimate *what the providers are paying to acquire their drugs*, and must do so for each of the 65,000 NDC-numbered drugs. As described below, defendants have hidden the prices at which they sell their drugs to wholesalers and have hidden their knowledge about the prices at which wholesalers sell their drugs to providers. Thus, Alaska has no access to the pricing information it needs to estimate accurately the providers' cost to acquire defendants' drugs. And in any event, neither Alaska nor any other state has the personnel or knowledge to compile a complete and accurate list of defendants' drug prices. Thus, entire businesses have grown up to provide pricing information to the states and others. Three such businesses are First DataBank, the Red Book, and Medispan. AC ¶¶36, 47, 49.

Alaska, like most other states, has chosen First DataBank as its primary source of acquisition cost information. First DataBank purports to supply accurate price information on the AWPs of defendants' drugs. It gets that information *from the defendants*. AC ¶37. First DataBank has explained that "AWP represents an average price which a wholesaler would charge a pharmacy for a particular product." *Id*. Every week First DataBank electronically sends updated AWPs for the thousands of NDC-numbered drugs in its database to a third-party administrator, to update Alaska's Medicaid file. These prices become the basis for Alaska's reimbursements to providers. AC ¶40.

Consistent with the suggestion from First DataBank that some providers were paying less than AWP, Alaska by regulation pays providers an amount consisting of AWP minus 5%, and also pays them a separate dispensing fee. At no time did Alaska intend systematically to pay providers more, on average, than their average acquisition costs. AC ¶39.

C. Defendants Have Engaged In A Scheme To Mislead The State Into Paying Excessively For Prescription Drugs.

Defendants have reported false and inflated AWPs to the medical compendia, and have reported prices that they knew, because of the manner of the medical compendia's operations, would misrepresent defendants' true wholesale prices. AC ¶41. All of the defendants have inflated their drugs' reported AWPs to levels far beyond any real average wholesale price for their drugs. AC ¶43. Defendants reported AWPs to the compendia that were not only higher than providers' real acquisition costs, but higher than any discount percentage from AWP that Alaska or any other state was using to estimate those costs. AC ¶39. Exhibit C to the Amended Complaint details the extent of the defendants' false AWPs. Organized by defendant, the exhibit lists NDC-numbered drugs which Alaska has purchased in significant amounts under the Medicaid program, and contains data for the 2001-2003 time period. The median "spread" – the difference between the reported AWP and the real market price at which the drug was typically available to providers – was *twenty-seven percent*. The State has similar data for other periods which it is prepared to produce in discovery. AC ¶46; *see also* AC Ex. B.

Reporting inflated AWPs is just one part of defendants' scheme to lead states to overpay providers. For example, through an elaborate and secret charge-back system, defendants have reported meaningless and inflated "Wholesale Acquisition Costs" (WAC's) – the price at which defendants sell their drugs to wholesalers. AC ¶¶47, 51. Defendants have wrapped their sales agreements with providers in absolute secrecy to preclude providers from telling others the price they actually paid. AC ¶52. Some defendants have hidden their real drug prices by providing free drugs and phony grants to providers as a means of discounting their drug prices. AC ¶54.

The Complaint states one reason *why* defendants have engaged in this scheme to have states overpay providers. Defendants compete for the business of providers, not patients, because generally providers, not patients, decide what drug will be prescribed or dispensed. AC ¶¶30-31. If a defendant drug manufacturer can cause the State to pay the provider more 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 profit. AC ¶32. Thus, one purpose of defendants' scheme has been to create a spread between a drug's true wholesale price and the false and inflated AWP published by the medical compendia, and thereby to increase providers' incentive to choose the drug for their patients, or, at a minimum, to counteract the same tactic used by a competitor. AC ¶41. 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. AC ¶42. This motive for using inflated AWPs has emerged only recently with the disclosure of documents secured in other cases. AC ¶55.

D. Defendants' Scheme Has Damaged The State.

Since, with some exceptions, payment to providers of drugs under the Alaska Medicaid program is made at the reported AWP minus 5%, defendants' scheme has enabled providers to obtain windfall profits, and has interfered with Alaska's ability to set reasonable payment rates for these drugs. AC ¶73. As a consequence, Alaska's Medicaid program has paid more for prescription drugs than it would have paid if defendants had published their true wholesale prices. AC ¶74. The scheme has also led Alaska to pay excessive amounts for the minority of defendants' drugs that are not paid for on the basis of a formula depending on published AWPs. AC ¶71. These allegations are discussed in the State's separate brief answering the separate motion to dismiss of the manufacturers of "generic" drugs.

On the basis of these allegations, Count I of the Complaint alleges that defendants have violated the Unfair Trade Practices and Consumer Protection Act (UTPA), AS

45.50.471 *et seq.* Count II alleges that defendants are liable for common-law unjust enrichment.

III. ARGUMENT

A. THE UTPA CLAIM OF COUNT I CANNOT BE DISMISSED

The UTPA bans unfair and deceptive practices in commerce. As remedial legislation, the UTPA must be "liberally construed." *State v. First Nat. Bank of Anchorage*, 660 P.2d 406, 412 (Alaska 1982).

The UTPA's basic prohibition is AS 45.50.471(a), which provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful." An act need not be deceptive to be "unfair." *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 535 (Alaska 1980). Alaska Statute 45.50.471(b) supplements .471(a). Subsection .471(b) specifies that the term "unfair methods of competition or deceptive acts or practices" "includes, but is not limited to," a list of 51 specifically prohibited methods, acts, or practices. The words "but is not limited to" make clear that an "unfair or deceptive act or practice" violates .471(a) even if it does not fit within one of the 51 specific examples of .471(b).

As Section 1 below shows, the Complaint alleges "unfair or deceptive acts or practices," both as a general matter under .471(a) and under two specific subsections of .471(b). As Section 2 shows, defendants' arguments to dismiss or limit the UTPA claims have no merit.

1. The Complaint Alleges Violations Of Both The General Prohibition Of .471(a) And Two Illustrative Examples In .471(b)

(a) The Complaint Pleads "Deceptive" Acts Or Practices Under .471(a).

An act is "deceptive" under .471(a) "if it has the capacity or tendency to deceive." *O'Neill Investigations,* 609 P.2d at 534. "Intent to deceive need not be proved. All that is required is a showing that the acts and practices were capable of being interpreted in a misleading way." *Id.* at 535. Likewise, the State need not prove actual injury as a result of the deception. *Id.* at 534-535.

Under these standards, Count I overwhelmingly satisfies the State's burden of pleading a "deceptive practice." The defendants provide phony, inflated "average wholesale price" data to the compendia, leading them to publish AWPs which have no relationship to reality and which result in providers being reimbursed for defendants' drugs at rates which greatly exceed the costs providers paid to acquire the drugs. To say that such conduct has the "capacity or tendency to deceive" is an understatement. Indeed, Count I goes far beyond what it needs to allege. As discussed above, the State need not allege that defendants intended to deceive anyone, or that the deception actually worked. Count I nonetheless alleges both facts.

(b) The Complaint Alleges "Unfair" Acts or Practices Under .471(a).

Whether an act is "unfair" under .471(a) is determined by "a variety of factors, including (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." *O'Neill Investigations,* 609 P.2d at 535, *quoting F. T. C. v. Sperry & Hutchinson Co.,* 405 U.S. 233, 244-245 n. 5 (1972). Interpreting identical provisions in their states' versions of the UTPA, courts elsewhere have held that a practice "may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." *Cheshire Mortgage Service, Inc. v. Montes,* 612 A.2d 1130, 1145 (Conn. 1992) (State's Appendix, Tab 34); *accord, Robinson v. Toyota Motor Credit Corp.,* 775 N.E.2d 951, 960-961 (Ill. 2002) (State's Appendix, Tab 35).

Count I alleges facts satisfying all three criteria. First, defendants' practice violates Alaska public policy. Alaska Statute 47.07.01 states that it is "a matter of public concern" that medical care furnished at public expense be "cost-effective to the state" and "in a manner that promotes effective, long-term cost containment of the state's medical assistance expenditures while providing medical care to recipients." The scheme described in Count I slaps this policy in the face. Second, defendants' scheme is an obvious example of "immoral, unethical, oppressive, or unscrupulous" behavior. Third, the Complaint alleges harm to consumers. Prescription drugs are an indispensable consumer product. Defendants' corruption of the market for prescription drugs induces physicians and other providers to choose drugs on the basis of the State-financed "spread" between providers' acquisition cost and the State's payment, rather than on the basis of legitimate factors such as price and medicinal value. AC ¶55.

(c) The Complaint Pleads Violations Of .471(b)(11) and (12).

In addition to pleading violations of .471(a)'s general prohibition, the Complaint pleads conduct that violates two of the illustrations in .471(b) of "unfair or deceptive acts or practices."

First, .471(b)(12) proscribes:

> 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.

To allege a violation of this subsection, the State need only allege (1) a "deception" or "misrepresentation" (2) in connection with the sale of goods. The State alleges both elements. It alleges defendants' scheme to deceive the State about what the providers' real acquisition costs were for defendants' drugs. It also alleges that defendants made these representations "in connection with the sale" of drugs, since the defendants' scheme aims to have the sale of drugs by providers occur at an inflated price.

Second, .471(b)(11) 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." Under this subsection, the State must allege (1) conduct creating a likelihood of confusion or misunderstanding, and (2) that the conduct misled or deceived a buyer in connection with the sale of drugs. Again, the State alleges both elements. The defendants' scheme created not just a "likelihood of misunderstanding" but actual misunderstanding. And the scheme misled or deceived a "buyer" in connection with the sale of drugs. As discussed above, the State provides the money and is therefore the *de facto* buyer when providers dispense defendants' drugs to Medicaid recipients.

2. Defendants' Arguments For Dismissing The UTPA Count Have No Merit

(a) The "Exhaustion of Remedies" and "Primary Jurisdiction" Arguments

Defendants' Joint Motion to Dismiss ("DJM") argues that even if Count I states a violation of the UTPA, it must be dismissed, because the State has failed to exhaust "available administrative remedies." DJM, 6-7. The argument has no merit. First, defendants never articulate the "available administrative remedy." In fact, there is no available administrative remedy. Thus, defendants' citation to *Eidelson v. Archer*, 645 P.2d 171 (Alaska 1982), is off base. In *Eidelson*, the court dismissed a suit challenging termination of a physician's hospital staff privileges, because he had not exhausted a specific due-process administrative procedure in the medical staff by-laws. 645 P.2d at 176-177. Second, Count I is brought under a statute, the UTPA, that specifies a *court* remedy for violations and never mentions, much less requires exhaustion of, an "administrative remedy." Defendants cite no case that imposed an exhaustion requirement on a statutory damage remedy that does not mention prior administrative proceedings. Third, "only actions challenging administrative decisions give rise to the requirement that complainants exhaust their administrative remedies. If the complaint does not allege any error in an administrative action, the doctrine does not apply." *State Dept. of Transp. & Pub. Facilities v. Fairbanks North Star Borough*, 936 P.2d 1259, 1261-1262 (Alaska 1997).

The State does not allege error in any administrative action. This is not a case about administrative "error," but about how defendants committed unfair and deceptive practices that resulted in the State overpaying providers.

Defendants also argue that the doctrine of "primary jurisdiction" requires the State to present its claim to the Alaska Department of Health and Social Services (DHSS) before presenting it to this Court. DJM 6-7. This argument, too, has no merit. For starters, the primary jurisdiction doctrine does not "require" a court to do anything, because even where an administrative agency *does* have primary jurisdiction, the trial court need not defer to the agency and may decide the suit directly. *Matanuska Electric Ass'n v. Chugach Electric Ass'n*, 99 P.3d 553, 559-560 (Alaska 2004. But in fact, the doctrine does not apply here, as the main case cited by defendants makes clear:

> Under the so-called "doctrine of primary jurisdiction," a court may, in appropriate cases, stay or dismiss pending litigation so as to enable a proper agency to initially pass upon an aspect of the case calling for administrative expertise. In order for such a judicial reference to be valid, at least some part of the case must fall within the exclusive jurisdiction of the administrative agency. The jurisdiction of the agency, in turn, depends upon the administrative authority conferred upon it by the relevant statutes.

Greater Anchorage Area Borough v. City of Anchorage, 504 P.2d 1027, 1032-1033 (Alaska 1972) (footnote citations omitted). Defendants identify no part of the State's claim that falls under the "exclusive jurisdiction" of DHSS, and no statute confers any jurisdiction on DHSS to decide any issue in this case. In the cases defendants cite, an administrative agency was empowered by statute to decide the issue in question. *See Matanuska Electric Ass'n, supra*, 99 P.3d at 559-560 (Alaska 2004) (Public Service Commission had jurisdiction over the rate-making dispute between the parties); *C.G.A. v. State of Alaska*, 824 P.2d 1364, 1368-1369 (Alaska 1992) (Social Security Administration had jurisdiction to interpret Social Security regulations on which the dispute depended); *State of Alaska v. Zia, Inc.*, 556 P.2d 1257, 1262-1263 (Alaska 1976) (statute governing the claim required it to be presented first to the appropriate administrative officer).

Nor does the rationale of the doctrine – to take advantage of agency expertise – apply here. No special expertise is needed to determine whether defendants have provided phony, nonexistent "average wholesale prices" to independent medical compendia.

(b) The Argument That Alaska Was Not In Privity With Defendants

Defendants argue that because the State "did not purchase goods from or compete with the defendants, and was not a party to any business transaction with the defendants," the State cannot sue. DJM 9.

Nothing in the statute supports a "privity" requirement, whether the suit is brought by the State or by a private plaintiff. Alaska Statute 45.50.501(a) allows the State to bring an action whenever it "has reason to believe that a person has used, is using, or is about to use an act or practice declared unlawful" by the UTPA. Nothing in .501(a) requires the defendant to have been in any kind of "privity" with whoever the State is suing on behalf of. Likewise, AS 45.50.531 enables any "person" to sue under UTPA so long as the person "suffers an ascertainable loss of money or property as a result of another person's act or practice declared unlawful" by .471. This "as a result of" language merely requires that the defendant *cause* the plaintiff's loss. It does not require privity of contract between defendant and plaintiff.

To support their "privity" argument, defendants argue that the UTPA's "focus" is "providing remedies and protection, for *buyers* and *competitors* from conduct that deceives or causes damages in connection with the sale or advertisement of goods or services." DJM 9 (emphasis in original), *citing* .471(b)(11). This argument has no merit. First, no limitation on the UTPA's coverage (much less the sweeping limitation argued by defendants) can be inferred from .471(b)(11), which, as discussed above, is merely one of 51 non-exclusive examples of unlawful acts under .471(a). Second, even if the UTPA limited its protection to "buyers and competitors" (and it does not), such a limitation would not imply a "privity" requirement, because a buyer can be injured by the acts of someone who was not in privity with the buyer. Such is the case here. Alaska – the *de facto* buyer of drugs on behalf of Medicaid recipients – was injured by defendants scheme even though it did not buy drugs directly from them.

Defendants argue that no Alaska decision has allowed a UTPA suit on behalf of someone who did not buy from or compete with the defendant. DJM 9. This argument proves nothing. The UTPA's plain language imposes no "privity" requirement, and no case holds that one exists.

(c) The Argument That The State Pleads No Violation Of .471(b)(11) or (12)

Defendants argue that Count I fails to plead various elements required by .471(b)(11) and (12). DJM 10-15. Even if defendants were right, Count I could not be dismissed. As discussed above, since Count I alleges conduct that is "unfair or deceptive" under .471(a), it does not matter whether that conduct falls under any of .471(b)'s non-exclusive list of examples.

In any case, however, defendants' arguments under .471(b)(11) and (12) have no merit, as will now be shown.

The "First DataBank" arguments. The State alleges that First DataBank and other compendia "have represented that their published AWPs reflect actual average wholesale prices." AC ¶38. Seizing on this allegation, defendants argue that "pleading a representation from First DataBank does not . . . plead a misrepresentation by the defendants." Hence, defendants conclude, the complaint alleges no "misrepresentation" under .471(b)(12). DJM 10. This argument is empty. The State relies on *defendants*' misrepresentation of AWP data to First Data Bank, not First DataBank's regurgitation of that data.

Defendants also argue that .471(b)(12) requires "reliance" on defendants' misrepresentations, and argues that the State "allegedly relied on representations made by [First DataBank], not by the defendants." DJM 10. This argument also has no merit. First, .471(b)(12) does not require that the State rely on defendants' misrepresentations. Its text distinguishes between conduct of commission and omission. Conduct of commission – "using or employing deception, fraud, false pretense, false promise, [or] misrepresentation" – violates .471(b)(12), without regard to whether it induces reliance. In contrast, conduct of omission – "concealing, suppressing, or omitting a material fact" – is only unlawful if committed "with intent that others rely upon the concealment, suppression or omission." Since the State alleges outright misrepresentations, it need not plead its reliance on those misrepresentations.

Second, the State *does* plead reliance on defendants' misrepresentations, even though it need not do so. It alleges in substance that defendants intended that First DataBank publish inflated AWP data for defendants' drugs, that they intended the State to rely on that data in its payment formula, and that the State overpaid providers as a result.

The "no misrepresentation" argument. Defendants argue that "The State has not pled that the defendants ever represented that their reported AWPs reflect actual average wholesale price or that the understanding of AWP in the pharmaceutical industry was that AWP reflected actual wholesale price." DJM 11. This argument asserts that the words "average wholesale price" are meaningless in themselves, and that defendants therefore make no representation whatsoever when they call a price an "average wholesale price." This argument flouts common sense. By reporting these prices under this name, defendants represent that they are *prices*; that they are an *average* of prices; and that they are an average of prices at the *wholesale level*. As the State alleges, all three statements are false.

Defendants have made and lost this argument in every AWP motion to dismiss that has been ruled on to date. Judge Saris, who presides over all AWP cases that have been consolidated in the federal Multi-District Litigation (MDL), recently explained in detail why this argument is wrong. The MDL defendants moved for summary judgment, arguing that the term "average wholesale price" in the federal Medicare statute had no established meaning and hence they were free to report any prices they wanted as "average wholesale prices" without violating that statute. Judge Saris disagreed. She held that the words "average wholesale price" in the statute would be given their plain meaning, which is "the average price at which wholesalers sell drugs to their customers, including physicians and pharmacies." *In re Pharmaceutical Industry AWP Litigation,* 460 F.Supp.2d 277, 278, 284-288 (D. Mass. 2006) (State's Appendix, Tab 31).

In a footnote, defendants try to fend off this decision by arguing that Judge Saris was merely interpreting the Medicare statute. DJM 4 n. 6. This is true, but irrelevant. What counts is that Judge Saris held that, contrary to defendants' argument, the words "average wholesale price" have a plain meaning. It follows that when defendants communicated data about "average wholesale prices," they were making a meaningful, and false, statement about what those prices represented.

The "government knowledge" argument. Defendants argue that the State "was well aware AWP did not equal actual acquisition cost" and therefore cannot prove the purported "reliance" requirement of .471(b)(12). DJM 11. Defendants make this argument by asking the Court to make findings of fact by taking judicial notice of documents in which certain federal officials have stated at different times that AWPs were higher than what providers were paying for drugs. DJM 11-13. This "no reliance" argument – central to defendants' motions to dismiss in every AWP case in the country – has never succeeded. In Alaska, it is hopeless.

First, .471(b)(12) has no "reliance" requirement for misrepresentations, as discussed in Section I(B)(3)(a) above.

Second, defendants' argument abuses the concept of "judicial notice." Defendants cite *Hebert v. Honest Bingo,* 18 P.3d 43 (Alaska 2001). But *Hebert* did not take judicial notice of anything, and says nothing about what materials a court may judicially notice on a motion to dismiss. Alaska Rule of Evidence 201 only allows a court to take judicial notice of a fact "not subject to reasonable dispute in that it is either (1) generally known within this State or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The assertions relied on by defendants in their documents fit neither category. They deal with matters of extreme controversy. That these documents are to or from public agencies does not make the assertions in them appropriate for wholesale judicial notice.

Third, it is no defense to the State's case to assert that the State knew that providers could pay less than AWP to acquire defendants' drugs, or that the State reimbursed providers at AWP less 5%. Knowing that AWPs could be discounted is not the same as knowing that AWPs were meaningless. It is one thing to understand that an announced price can be discounted. It is quite another to understand that the price has been set at purely fictitious levels for the purpose of "gaming" payment levels for providers. As the Complaint makes explicit, the State only recently learned of defendants' scheme and their secret motive for engaging in it. AC ¶55.

For this reason, the State need not allege, as defendants assert (DJM 13), that it believed that providers were paying published AWPs. The State's UTPA claim does not depend on whether the State believed all providers were actually paying AWP to acquire drugs. Instead, the claim depends on the fact that by misleadingly misrepresenting AWPs as real prices, and through other deceptive conduct described in the Complaint, defendants consistently and deliberately caused the State to overestimate providers' acquisition costs and therefore to overpay providers. Fourth, the fact that the State reimbursed at a modest discount off of AWP in no way proves (much less on a motion to dismiss) that the State knew that the AWPs were meaningless. Since all states under Medicaid (and the federal government under Medicare) pay at AWP less a discount, defendants have made this argument in every AWP case, but never successfully. For example, in the federal AWP case involving the drug Lupron, defendants argued that because Congress set Medicare drug payment rates at a discount from AWP, Congress must have known that AWP did not represent a real price. The Court replied:

> It is far more likely that by setting the Medicare reimbursement rate below the AWP, Congress took a tentative step towards using Medicare's purchasing power as a means of driving down the cost of prescription drugs to the Medicare program.

> "Average," after all, means that in a competitive market, some prices will be higher and some lower than the median. Congress might reasonably have wished to put Medicare on the lower rung of the equation.

In re Lupron Mktg. & Sales Practices Litig., 295 F.Supp.2d 148, 1634 (D. Mass. 2003) (State's Appendix, Tab 33). In the MDL proceedings, Judge Saris agreed with and quoted this reasoning, relying among other things on an *amicus curiae* brief from the Department of Justice supporting the plaintiffs. *In re Pharmaceutical Industry AWP Litig.*, 460 F.Supp.2d at 286 (State's Appendix, Tab 31).

Fifth, defendants' "government knowledge" argument erroneously assumes that knowledge by Alaska officials of discounting from AWP is a *per se* defense to a UTPA claim. Defendants cite no authority for this argument, which implicitly treats governments in the same way as the law might treat an individual who was considering purchasing a horse. This is an invalid analogy. In *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984), the Secretary of Health and Human Services sued a provider to recover a Medicare overpayment. Like defendants here, the provider claimed that the Department knew of and acquiesced to the level of payment. The United States Supreme Court rejected this argument:

> Justice Holmes wrote: "Men must turn square corners when they deal with the government." *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920). This observation has its greatest force when a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of the law . . .

Id., at 63.

Alaska law agrees. The defendants are really arguing that the State is estopped from suing under the UTPA because of the supposed knowledge of unspecified government officials that the defendants were lying about their AWPs. But the rule in Alaska is that estoppel can only be invoked against the government in exceptional circumstances, in which "the balance of equities manifestly favors the requesting party and estoppel is necessary to avoid further injustice." *Alaska Trademark Shellfish, LLC v. State*, 91 P.3d 953, 960 (Alaska 2004). This is the rule everywhere. For example, under the federal False Claims Act ("FCA"), which allows suits to recover money paid out under false claims to the federal government, the fact that a governmental official knew of the fraud is not a defense to a FCA claim. *U. S. ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1156 (2d Cir. 1993); *U.S. ex rel. Hagood v. Sonoma Cty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991).

The holding in these cases makes sense. It can take years for a State to put a reimbursement structure into place for a program like Medicaid, and years to change the structure once in place. States cannot simply pass a law overnight once facts come to light suggesting that defendants are "gaming" reimbursement formulas. Defendants' scheme has created huge interest groups who will fight reform efforts because of the inflated profits defendants' scheme produces for them.

In summary: even if the documents submitted by defendants could be relied upon by the Court on this motion – and they cannot be – they provide no basis to dismiss the UTPA claim.

The "buyer or competitor" argument. Defendants argue that they did not violate .471(b)(11) because the sales of their drugs did not "mislead[], deceive[], or damage[] a buyer or competitor." According to defendants, the State cannot be considered the "buyer" of drugs on behalf of Medicaid recipients, even though it pays for them. DJM 13-14. Defendants cite no authority for this argument, which violates the command to give a liberal interpretation to this remedial statute. *State v. First Nat. Bank of Anchorage*, *supra*, 660 P.2d at 412. The UTPA does not define "buyer," but by any common-sense notion, the State fits within that term for purchases of drugs for its Medicaid recipients. The recipient is the consumer, but the State is in any real sense the buyer. It determines (by its AWP formula or otherwise) the price it is willing to pay, and pays that price.

The "in connection with the sale of goods" argument. Both .471(b)(11) and (12) deal with conduct "in connection with the sale or advertisement of goods." Defendants argue that their conduct is not "in connection with the sale" of goods because "the sales alleged in the Complaint are not between the defendants and the State." DJM 14. This is simply a rehash of the "privity" argument answered above. Neither .471(b)(11) nor (12) requires such privity. So long as the defendants' deception or creation of a "likelihood of confusion" occurs "in connection with the sale of goods," that conduct is unlawful. As discussed above, the defendants' scheme clearly occurred "in connection with" the sale of drugs, because its purpose was to manipulate and inflate the ultimate sale price of those drugs.

In sum, none of the defendants' arguments under .471(b)(11) and (12) has merit.

3. The Arguments That The State May Not Sue For "Actual Damages."

Defendants argue that even if their scheme violated the UTPA and caused the State Medicaid program to make huge overpayments on drugs, this Court has no power to hold defendants liable in damages. If this assertion were true, it would be shocking. But it is false.

The argument under .501. Alaska Statute 45.50.501(a) authorizes the Attorney General to seek injunctive relief against any person who has used, is using, or is about to use an act or practice declared unlawful in .471. In such suits, AS 45.50.501(b) authorizes the court to "make additional orders or judgments that are necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of an act or practice declared to be unlawful [by .471]."

Defendants argue that .501(b) does not permit the Attorney General to obtain a judgment against defendants for the overpayments that the State made to providers on account of defendants' deceptive scheme. Defendants concoct this argument out of the word "restore." According to them, "restore" can only mean "to 'give back' or 'return' money to another from whom it was acquired." DJM 21. Because the State made the overpayments to providers rather than to defendants, defendants claim immunity from any monetary remedy under .501(b). *Id.*

This argument gives .501(b) a crabbed reading, rather than the liberal interpretation it must be given. The word "restore" plainly allows Alaska to recover overpayments. Before the overpayment, the State had the money at issue; after the overpayment, it did not; the remedy the State seeks will restore the overpayment to it. This cycle fits no less than three of the dictionary definitions of "restore" quoted by defendants themselves. The order sought by the State will (1) "bring back" the money it overpaid, (2) "bring [the State] back into some former state"; and (3) "make amends or compensation for" the defendants' wrongdoing. Webster's Third New International Dictionary of the English Language (3d ed. 1961) (1986 printing), *quoted* at DJM 21. While the money restored to the State will come from defendants rather than from the providers to whom that money was paid in the first instance, that fact in no way changes the fact that the overpayments have been "restored" to the State.

Defendants also note that .501(b) allows the Court to restore money that "may have been acquired by means of an act or practice declared to be unlawful." Defendants argue that because the overpayments were "acquired" by providers rather than the defendants, defendants are not subject to a restoration order under .501(b). This argument adds words to .501(b) that are not there. Subsection .501(b) says "acquired by means of an act or practice declared to be unlawful," not "acquired *by defendant* by means of an act or practice declared to be unlawful." So long as the State's money was acquired by *someone* as a result of defendants' unlawful conduct, .501(b) authorizes an order that makes the party who was responsible for that unlawful acquisition restore that money to the State.

The argument under .531. AS 45.50.531(a) provides:

> A person who suffers an ascertainable loss of money or property as a result of another person's act or practice declared unlawful by AS 45.50.471 may bring a civil action to recover for each unlawful act or practice three times the actual damages, or $500, whichever is greater. The court may provide other relief it considers necessary

> and proper. Nothing in this subsection prevents a person who brings an action under this subsection from pursuing other remedies available under other law, including common law.

Defendants argue that under .531(a), the State is not a "person" and therefore cannot sue under this provision. DJM 20-21. But .531(i) shows that this argument has no merit. Subsection .531(i) authorizes punitive damages in .531(a) suits, and requires 50% of any punitive damages to be deposited into the general fund of the State. It then adds: "This subsection does not grant the state the right to file or join a civil action to recover punitive damages." This Court must construe every part of the UTPA, if possible, so that no part will be inoperative. *Homer Elec. Ass'n v. Towsley*, 841 P.2d 1042, 1045 (Alaska 1992). This principle requires the conclusion that the State may sue as a "person" under .531(a), because the only other provision authorizing the State to sue, .501(a), does not authorize punitive damages. It therefore would have been pointless for the legislature to forbid the State from seeking punitive damages in .531(i) unless the State were authorized to sue under .531(a).

Defendants' arguments that the State is not a "person" under .531(a) are weak. First, defendants invoke AS 01.10.060(a)(8), which provides: "In the laws of the state, unless the context otherwise requires, * * * "person" includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person." Defendants argue that the omission of "the State of Alaska" from this list shows that it cannot be a "person" within the meaning of the UTPA. DJM 19. This argument has no merit, because as defendants acknowledge, AS 01.10.040(b) provides: "When the words "includes" or "including" are used in a law, they shall be construed as though followed by the phrase "but not limited to." Thus, the fact that AS 01.10.060(a)(8) does not include "the State of Alaska" means nothing.

Second, defendants argue that allowing "person" in .531(a) to include the State would render pointless the authorization to the Attorney General in .501(a) to sue for injunctive and other relief. DJM 20. Defendants also note that AS 45.50.535 allows a "person" to sue for injunctive relief, and argue that if the State can be a "person," this provision would duplicate the authority to the Attorney General in .501 to sue for injunctive relief. Both arguments are wrong. As applied to the authority granted to the Attorney General, .531 and .535 do not merely duplicate .501. When the Attorney General brings a UTPA suit, .501 gives him an important power that he does not have when he brings a .531 or .535 suit: the *parens patriae* power of suing on behalf of others, not just on behalf of the State.

Third, defendants point out that .531(c) requires the clerk of the court, on commencement of the action, to mail a copy of the complaint to the Attorney General. They argue that if .531 allowed the State to sue as a "person," this requirement would result in mailing a copy of the State's complaint to the Attorney General, a result which they imply is absurd. DJM 20. This argument has no force. Subsection .531(c)'s requirement sensibly keeps the Attorney General informed of all lawsuits under the UTPA. In the occasional case where the Attorney General sues to recover damages for the State, this can result in the clerk mailing a copy of the complaint to the Attorney General who filed the suit. But this unimportant oddity in no way makes .531(c) pointless.

Fourth, citing a 1970 House Judiciary Committee report, defendants argue that "the focus of the private action is not 'enforcement,' but rather, to provide a means of *reimbursing* the person actually damaged." DJM 20, *citing* House Journal, March 31, 1970, p. 2. The Report says no such thing, and never suggests that if the *State* was damaged, it cannot sue under .531.

Fifth, defendants cite *State v. Grogan*, 628 P.2d 570 (Alaska, 1981), to suggest that the State cannot be a "person" under .531. In *Grogan,* the State, under .501, sued defendants who had charged two private consumers excessive prices and vandalized their property. The Court declined to decide whether the State could use .501 to recover the expenses that the vandalism had caused to the consumers. In a footnote, the Court stated that the consumers themselves could file a .531 action to recover damages for the vandalism. 628 P.2d at 572 n. 2. This remark in no way implies that the State cannot, in a proper case, sue for itself under .531.

In short, the State is a "person" who can sue under .531(a) for damage to itself.

4. The "Particularity" Argument. Few defendants understand the allegations against them better than the defendants in this case. Their AWP practices have been investigated by Congress, the Department of Justice, the Office of the Inspector General of the U.S. Department for Health and Human Services, the National Association of Medicaid Fraud Control Units, and the Attorney Generals of numerous states. All of the defendants have been sued in AWP lawsuits dozens of times, whether by the Department of Justice, by states, or by private payors. Several of the defendants have been indicted for federal crimes and have pled guilty in connection with these practices.

Yet defendants claim that the State's complaint violates Rule 9(b) by failing to tell them what they have done wrong. They have made this argument in every AWP case. As they correctly note, a handful of courts have made plaintiffs replead certain parts of their complaints. DJM 24-25. What defendants do not say is that, in the majority of AWP cases, the "particularity" argument has been rejected altogether. *See, e.g.*, *Lupron Marketing and Sales Practices Litigation*, *supra*, 295 F. Supp.2d at 170 (SA Tab 33).

In Alaska, the argument is especially weak. First, Alaska's Rule 9(b) does not apply to the UTPA claim. Second, even if it did, the Complaint more than satisfies the rule.

(a) Rule 9(b) does not govern the UTPA claim. Rule 9(b) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The defendants argue that the State's claims are "akin to fraud claims" and therefore are subject to Rule 9(b). DJM 22-23. No Alaska case supports this purported "akin to fraud claims" standard.

The State's UTPA claim is not an "averment of fraud" within the meaning of Alaska's Rule. First, the elements of a UTPA claim differ from those of common law fraud. A plaintiff alleging common law fraud must allege that defendant's act has caused an injury and that the defendant had the intent to deceive. *Lightle v. State Real Estate Com'n*, 146 P.3d 980, 983 (Alaska 2006). But under the UTPA, .471(b)(12) makes deceptive conduct unlawful "whether or not a person has in fact been misled, deceived or damaged." And under the UTPA, "[i]ntent to deceive need not be proved." *O'Neill Investigations, supra,* 609 P.2d at 534.

Second, the UTPA's prohibition of "unfair, deceptive or misleading practices" is modeled on §5(a) of the Federal Trade Commission Act, and AS 45.50.545 states that "due consideration and great weight" should be given to interpretations of that Act. Federal courts interpreting that Act and similar laws like the Lanham Act have rejected applying federal Rule 9(b) to claims under them. *See, e.g., FTC v. Communidyne, Inc*., No. 93 C 6045, 1993 WL 558754 (N.D.Ill. 1993) (State's Appendix, Tab 36). In *John P. Villano Inc. v. CBS, Inc.*, 176 F.R.D. 130, 131 (S.D.N.Y. 1997), the court wrote:

> [N]othing in the language or history of Rule 9(b) suggest that it is intended to apply, willy-nilly, to every statutory tort that includes an element of false statement. No matter how parsed, a claim of false advertising under the Lanham Act … is not identical to a claim of fraud. Fraud requires, not just the making of a statement known to be false, but also, *inter alia*, a specific intent to harm the victim and defraud him of his money or property . . . Consequently, a claim of false advertising under § 1125 (and parallel provisions of New York State law) falls outside the ambit of Rule 9(b) and may not be the subject of any heightened pleading requirement. [Citations omitted.]

Third, not only has no Alaska case applied Rule 9(b) to UTPA claims, but the law elsewhere is at best split, with the more persuasive decisions rejecting such a requirement. A particularly thorough discussion is found in *State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111 (Del. Ch. 2001) (State's Appendix, Tab 37). *Brady* held that cases applying heightened pleading requirements to consumer protection statutes do so with no meaningful analysis; that better-reasoned cases refuse to apply the "particularity" requirement; that consumer protection statutes are not sufficiently analogous to common law fraud causes of action to justify setting aside a state's notice pleading requirements; and that the remedial goals of consumer protection acts are inconsistent with a particularized pleading requirement. 787 A.2d at 115-118. *See also*, *e.g.*, *Petitt v. Celebrity Cruises, Inc.*, 153 F. Supp.2d 240, 265 (S.D.N.Y.2001) and cases cited there; *Omega Eng'g, Inc. v. Eastman Kodak Co.*, 908 F. Supp. 1084 (D. Conn. 1995); *Freeman v. Time, Inc.*, 68 F.3d 285 (9th Cir. 1995).

(b) Even if Rule 9(b) applied to the State's Claims, The Complaint Would Satisfy It.

Where it applies, Rule 9(b) "simply requires a claim of fraud to specify the time and place where the fraud occurred; it seeks to prevent conclusory pleading by requiring a complaint to do more than 'recit[e] without specificity that fraud existed' . . ." *Williams v. Engen*, 80 P.3d 745, 749 (Alaska 2003). This modest requirement is in harmony with decisions elsewhere, since overzealous application of the rule "may permit sophisticated defrauders to successfully conceal the details of their fraud." *Christidis v. First Pennsylvania Mortg. Trust*, 717 F.2d 96, 99-100 (3d Cir. 1983). Another court wrote:

> We will not demand clairvoyance from pleaders. Corporate entities who jealously guard the names of their clients or other information, as they should, would forever be victorious in their motions to dismiss under Rule 9(b) if courts demanded the level of specificity at issue in this stage of the case. We are reluctant to punish plaintiffs for their ignorance of a specific factual detail, as long as defendants have adequate notice of why they are being sued and are capable of preparing a responsive pleading.

Michaels Building Co. v. Ameritrust Co., 848 F.2d 674, 681 (6th Cir. 1988).

Under these principles, defendants' Rule 9(b) arguments fail. First, defendants claim that the Complaint fails to tell them the time at which they are alleged to have violated the UTPA. DJM 25. But as the Complaint makes clear, the State's claims are based on a continuing course of conduct. The defendants report, on an ongoing basis, inflated AWPs to First DataBank; those inflated AWPs get translated, on a continuing basis, into published AWPs; and the State pays, on an ongoing basis and thousands of times a week, for Medicaid recipients' drugs on the basis of those inflated AWPs. Thus, defendants' "when" argument merely amounts to arguing that the State fails to identify the date on which this scheme first started. Even if the State knew the precise date that a given defendant began using this scheme, providing that date would not put the defendant in a better position to answer the Complaint. One can be confident that when they are ordered to answer the Complaint, defendants will *not* say that they started deceiving the State only after a certain point in time.

Second, defendants argue that the Complaint fails to tell it which drugs "are at issue in this case" and that the State's claims are "too vague and incomplete to permit defendants to prepare an adequate response or this Court to manage discovery without knowing which drugs are at issue in this case" (DJM 26, 27). This claim is hollow, because in the many AWP cases where courts have rejected defendants' "particularity" argument and denied their motions to dismiss, defendants have answered without skipping a beat, and discovery is proceeding. DJM 26. Exhibit C to the Complaint lists drugs of defendants that the Alaska Medicaid program purchases in significant quantity, and gives precise data over a prolonged period on the amount of inflation between the published AWPs (which resulted from defendants' data) and actual wholesale prices. This more than satisfies Rule 9(b). Defendants seem to demand that the State attach to its Complaint the annually published medical compendiums listing the purported AWP of each of defendants' drugs at each moment in time. Such an appendix would bury the Complaint in an avalanche of useless paper.

Third, defendants argue that the Complaint impermissibly "lumps all 41 defendants into a single group without specifying what conduct by each defendant constituted part of the 'scheme' that allegedly violated the UTPA." DJM 27. However, there can be no confusion among the defendants about who is charged with what. The Complaint makes clear that *each* defendant reported false and inflated AWPs, and gives detailed data in Exhibits B and C. Contrary to defendants' argument, there is nothing *per se* wrong with attributing conduct to "all defendants" in a pleading. Rather, it depends on the context. Sometimes, as in the cases defendants cite, the conduct being alleged involves varying kinds of statements and conduct, and fairness makes it necessary to associate particular defendants with particular statements. But in the present case, the fundamental misrepresentation concerns a uniform *practice* – feeding phony data to pricing compendia, including purported AWPs that are not prices at all, much less averages of real wholesale prices. No purpose of Rule 9(b) is served by requiring the Complaint to repeat this allegation dozens of times as to each defendant. In the very few instances where the Complaint alleges actions by some but not all defendants (*e.g.*, ¶54), the actions are pled with sufficient specificity that each defendant can readily ascertain whether it committed that practice or not, and say so in its answer.

5. The Limitations Argument

Defendants argue that the State's UTPA claim is barred by the six-year statute of limitations applicable to the State's claims under AS 09.10.120(a). This argument rests entirely on Exhibit B to the Complaint, which is a report from the federal Health Care Financing Administration dated September 8, 2000. Although defendants' limitations theory is murky, they seem to argue that (1) this Court must find as a fact that this report should have put the State on notice that defendants were engaged in the massive scheme alleged in the Complaint; (2) hence the statute started running on September 8, 2000 on *all* of the State's claims, including claims based on defendants' conduct *after* that date; and (3) since the State did not file this lawsuit until more than six years later, the entire lawsuit is time-barred. DJM 29.

If this is what defendants are arguing, the argument has no merit. A claim brought by or in the name of the State becomes time-barred under .120(a) only six years after the cause of action has "accrued." The State has pled a continuing violation, meaning "that there are a series of related acts causing damage to a plaintiff and that each successive act marks the accrual of a new claim." *Alakayak v. British Columbia Packers, Ltd*., 48 P.3d 432, 461 (Alaska 2002). The effect of a continuing violation "is to provide a new, and perhaps perpetually rolling, date from which the statute of limitations may begin." *Id.* at 462. This rule means that, as to every instance of defendants' continuing violation, the State had at least six years from the date of that instance in order to file suit. Thus, at a minimum, all instances of defendants' continuing course of conduct that occurred within six years of the State's filing this lawsuit – that is, all instances that occurred on or after October 6, 2000 – are within the six-year statute of AS 09.10.120(a).

The State says "at a minimum," because it will likely be able to extend the six-year period by invoking the discovery rule in AS 09.10.120(a), which provides that "if the action is for relief on the ground of fraud, the limitation commences from the time of discovery by the aggrieved party of the facts constituting the fraud." *See City of Fairbanks v. Amoco Chemical Co*., 952 P.2d 1173, 1179 (Alaska 1998).

Whether the State will be entitled to invoke the discovery rule provided in .120(a) is not presently before the Court, because at a minimum the State can sue for the defendants' continuing conduct over the six years preceding the filing of the Complaint. Here, the State will limit itself to saying that the HHS report cited by defendants could never suffice under the discovery rule to put the State on notice, much less suffice to give it actual knowledge, of its claims against defendants. The report in question provides certain wholesale price data for a grand total of only 44 drugs and three "clotting factors" for which the federal Medicare program pays. (As opposed to Medicaid, which pays for most prescription drugs, Medicare until recently paid only for limited categories of medicines administered by doctors, such as chemotherapy treatments.) *See* 42 U.S.C. §1395k(a)(1). The HHS report provides no information about any other drug, does not reveal that First DataBank derives its AWPs mainly from data supplied by defendants, does not reveal that defendants that were using the "spread" between published and real AWPs to market their drugs to providers, and in fact contains no criticism whatsoever of defendants. The report merely says that some drugs are available to providers at lower prices than previously published AWPs, but as the Complaint itself says, this is something that the State has known. AC ¶39. *See* Section I(B)(c) above.

In sum, none of defendants' UTPA arguments has merit. Count I cannot be dismissed.

IV. COUNT II'S UNJUST ENRICHMENT CLAIM CANNOT BE DISMISSED

To state a claim for unjust enrichment, the State must prove that it conferred a benefit on defendants; that defendants had an appreciation of the benefit; and that they accepted and retained the benefit under such circumstances that it would be inequitable for them to retain it without paying the value thereof. *Alaska Sales & Serv. v. Millet*, 735 P.2d 743, 746 (Alaska 1987). Count II alleges these elements, and defendants' contrary arguments have no merit.

A. The State Conferred A Benefit On Defendants. The Complaint alleges that its overpayments to providers caused defendants to realize, at Alaska's expense, profits from increased sales and market share. *See* AC ¶90. These alleged profits are clearly a "benefit."

Defendants argue that since the State paid providers rather than defendants themselves, the benefit of the overpayments flowed to the providers, not the defendants. DJM 16. While the providers certainly benefited from these overpayments, the Complaint alleges that defendants did too, in the form of increased sales and market share. Indeed, as the Complaint makes clear, this was one of defendants' motivations in creating a "spread."

Defendants argue that the allegation of profits is "too remote and speculative" to be accepted. DJM 17. But there is nothing intrinsically speculative in the idea that the artificial spreads to providers that defendants created through their deceptive conduct increased the defendants' profits. Defendants also argue that the complaint does not identify which of them had their profits increased and for which specific drugs. *Id.* This is equivalent to arguing that an unjust enrichment claim is governed by Rule 9(b). No case anywhere supports this argument. In any event, clearly the State cannot be expected before it has taken discovery to make more precise allegations about the extent to which this scheme increased each defendant's profits.

B. Defendants Knew That The State Was Conferring A Benefit. Defendants do not argue that the Complaint fails to allege this element.

C. Retention Of The Benefit Would Be Unjust. It seems undeniable that, if the defendants profited from unlawfully inducing Alaska to overpay providers, it is unjust to let defendants retain those profits and thereby leave Alaska powerless to recover its overpayments. Nonetheless, the defendants argue that to be "unjust," defendants must receive a "true windfall" or "something for nothing." DJM 18, *citing Alaska Sales*, 735 P.2d at 746. Defendants argue that they received no "windfall" because they gave "fair consideration or value" for the benefits obtained." DJM 18, *citing Soules v. Ramstack*, 95 P.3d 933, 940 (Alaska 2004). Defendants say that they provided fair value to the providers to whom they sold their drugs and got back nothing more than payment for their products. *Id.* This argument focuses on the wrong "benefit." The benefit that it is unjust for defendants to retain is not the amounts they were paid for their drugs. It is the increase in profits that they enjoyed by virtue of increased sales because of their scheme, which used State overpayments to induce providers to choose their drugs. These incremental profits truly represent a "windfall."

Defendants also argue that, where a plaintiff confers a benefit on a defendant "incidental to its own duty," it cannot obtain restitution. DJM 18. According to defendants, the State paid providers pursuant to its duty "to reimburse providers for prescription drugs and to ensure that the reimbursement amount did not exceed the bounds established by federal law." *Id.* This argument is not just wrong, but offensive. The State alleges that it conferred the benefit of increased profits on defendants because it was led by their scheme to *violate* its duty under federal law to reimburse providers at no more than providers' average acquisition cost for their drugs.

Defendants' "unjust enrichment" arguments have been rejected in other AWP lawsuits. *Commonwealth of Massachusetts v. Mylan Labs.*, 357 F.Supp. 314, 323-324 (D. Mass. 2005) (State Appendix, Tab 32); *State of Ohio v. Dey*, No. A0402047 (Ct. Common Pleas, Hamilton Cty., Ohio, June 13, 2005) (State's Appendix, Tab 22), at pp. 14-15.

V. CONCLUSION

The State respectfully requests that defendants' joint motion to dismiss be denied.

FOSLER LAW GROUP, INC.
Attorneys for Plaintiff

DATED:__________________ By: /s/ James E. Fosler
James E. Fosler
Alaska Bar No.: 9711055

CERTIFICATE OF SERVICE

Pursuant to Case Management Order No. 1, entered by the Court in this case on December 14, 2006, the undersigned certifies that a copy of the foregoing document was served through the LexisNexis File and Serve ("LNFS") system on February 9, 2007.

/s/ James E. Fosler
James E. Fosler

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