



**TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTRODUCTION .....	1
I. CONSIDERATION OF THE STATE'S CLAIMS IN THE FIRST INSTANCE BY THE DEPARTMENT IS WARRANTED. ....	1
II. THE STATE'S ALLEGATIONS ARE NOT SUFFICIENT TO BRING ITS CLAIMS WITHIN THE SCOPE OF THE UTPA.....	3
A. The State's Claims Do Not Bring It Within the Class of Persons Protected by the UTPA. ....	3
B. The State Has Not Pled a Valid Prima Facie Case that the Defendants Violated the UTPA. ....	4
(1) The State's Knowledge that AWP's Were Not Acquisition Prices Precludes Its UTPA Claim. ....	5
(a) The Federal OIG Reports are Appropriate Subjects for Judicial Notice. ....	6
(b) The State Has Failed to Explain How It Could Have Been Deceived Under the UTPA.....	6
(2) The State Still Has Not Alleged It Is a Buyer or Competitor.....	8
(3) The State Has Not Pled Facts Supporting Its Claims That the Defendants Engaged in Misleading or Deceptive Acts in Connection with a Sale Under Subsections .471(b)(11) or (12). ....	8
III. THE STATE FAILS TO STATE A COGNIZABLE CLAIM FOR DAMAGES. ....	9
A. The State May Not Bring a Claim for Actual Damages. ....	9
(1) The UTPA Does Not Permit Actual Damages in a Public Action.....	9

(2)	The State Is Further Barred from Private Action Remedies Because It Brought Its Claims in Its Public Capacity as an Attorney General, Not as a Private Individual. ....	10
B.	The Remedy of Disgorgement Applies Only to Restore Money Acquired by an Unlawful Act. ....	11
IV.	THE AMENDED COMPLAINT FAILS TO PLEAD FRAUD WITH PARTICULARITY. ....	12
A.	Both Of The State’s Claims Contain “Averments of Fraud” that Must Be Pleaded with Particularity.....	12
B.	The State’s Contention That Defendants “Know What They Did” Does Not Excuse Particularized Pleading.....	14
V.	THE “BENEFIT” THE STATE CONTENTS IT CONFERRED ON DEFENDANTS IS TOO SPECULATIVE TO SUPPORT A CLAIM FOR UNJUST ENRICHMENT. ....	17
VI.	THE STATUTE OF LIMITATIONS BARS THE STATE’S CLAIMS. ....	18
	CONCLUSION.....	20

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

<i>Adams v. NVR Homes, Inc.</i> 193 F.R.D. 243 (D. Md. 2000) .....	13
<i>Alakayak v. B.C. Packers, Ltd.</i> 48 P.3d 432 (Alaska 2002) .....	19
<i>Alaska Wildlife Alliance v. State</i> 74 P.3d 201 (Alaska 2003) .....	5
<i>Belarde v. Anchorage</i> 634 P.2d 567 (Alaska 1981) .....	10
<i>Burton v. R.J. Reynolds Tobacco, Inc.</i> 884 F. Supp. 1515 (D. Kan. 1995) .....	13
<i>Chandler v. American Gen. Fin., Inc.</i> 768 N.E.2d 60 (Ill. App. 2002) .....	14
<i>Cooper v. Blue Cross &amp; Blue Shield of Fla.</i> 19 F.3d 562 (11th Cir. 1994) .....	15
<i>Crowhorn v. Nationwide Mut. Ins. Co.</i> 2002 WL 1767529 (Del. 2002) .....	13
<i>Duran v. Clover Club Foods Co.</i> 616 F. Supp. 790 (D. Col. 1985) .....	13
<i>Dworkin v. First Nat'l Bank of Fairbanks</i> 444 P.2d 777 (Alaska 1968) .....	4
<i>F.T.C. v. Spectrum Res. Group, Inc.</i> 1995 WL 215331 (D. Nev. 1995) .....	12
<i>Fid. Mortgage Corp. v. Seattle Times, Co.</i> 213 F.R.D. 573 (D. Wash. 2003) .....	13
<i>G &amp; A Contractors, Inc. v. Alaska Greenhouses, Inc.</i> 517 P.2d 1379 (Alaska 1974) .....	3
<i>Garr v. U.S. Healthcare, Inc.</i> 22 F.3d 1274 (3d Cir.) .....	15

<i>In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.</i> 155 F. Supp. 2d 1069 (S.D. Ind. 2001).....	13
<i>In re Pharm. Average Wholesale Price Litig.</i> 263 F. Supp. 2d 172 (D. Mass. 2003).....	16
<i>In the Matter of Cliffdale Assocs., Inc.</i> 103 F.T.C. 110 (1984) .....	7
<i>John's Heating Svc. v. Lamb</i> 129 P.3d 919 (Alaska 2006) .....	18
<i>Kreindler &amp; Kreindler v. United Technologies Corp.</i> 985 F.2d 1148 (2d Cir. 1993) .....	6
<i>Legg v. Castruccio</i> 642 A.2d 906 (Md. App. 1994).....	7
<i>Odom v. Fairbanks Mem. Hosp.</i> 999 P.2d 123 (Alaska 2000).....	7
<i>Patel v. Holiday Hospitality Franchising Inc.</i> 172 F. Supp. 2d 821 (N.D. Tex. 2001).....	13
<i>Ranney v. Whitewater Eng'g</i> 122 P.3d 214 (Alaska 2005) .....	19
<i>Rouse v. Philip Morris, Inc.</i> 2003 WL 22850072 (S.D. W. Va. Nov. 18, 2003).....	13
<i>San Francisco v. Phillip Morris, Inc.</i> 957 F. Supp. 1130 (N.D. Ca. 1997).....	17
<i>Shooshanian v. Wagner</i> 627 P.2d 455 (Alaska 1983) .....	4
<i>Standard Alaska Prod. Co. v. State Dep't of Revenue</i> 773 P.2d 201 (Alaska 1989) .....	3
<i>State ex rel. Brady v. Publishers Clearing House</i> 787 A.2d 111 (Del. Ch. 2001).....	13
<i>State v. O'Neill Investigations, Inc.</i> 609 P.2d 520 (Alaska 1980) .....	7
<i>Stires v. Carnival Corp.</i> 243 F. Supp. 2d 1313 (M.D. Fla. 2002) .....	14

<i>TLH Int'l v. Au Bon Pain Franchising Corp.</i> 1986 WL 13405 (D. Mass. Nov. 13, 1986) .....	13
<i>United Parcel Service, Inc. v. Chadwicks of Boston, Inc.</i> 900 F. Supp. 557 (D. Mass. 1995).....	3
<i>United States ex rel. Hagood v. Sonoma County Water Agency</i> 929 F.2d 1416 (9th Cir. 1991).....	6
<i>Vess v. Ciba-Geigy Corp. USA</i> 317 F.3d 1097 (9th Cir. 2003).....	13
<i>Witherspoon v. Philip Morris, Inc.</i> 964 F. Supp. 455 (D.D.C. 1997).....	13

**Statutes**

42 U.S.C. § 1396a(a)(30)(A) .....	2
7 AAC 43.590 .....	1
7 AAC 43.591(d) .....	8
7 AAC 43.950 .....	2
7 AAC 43.955 .....	2
7 AAC 43.970 .....	2
7 AAC 43.980 .....	2
AS 09.10.120(a) .....	18
AS 09.17.020(j) .....	11
AS 44.23.020 .....	10
AS 45.50.471 .....	11
AS 45.50.471(b)(11).....	8, 9
AS 45.50.471(b)(12).....	8, 9
AS 45.50.501 .....	9, 10, 11
AS 45.50.501(a) .....	4
AS 45.50.501(b) .....	9, 11
AS 45.50.531 .....	10

AS 45.50.531(a).....	11
AS 45.50.531(f).....	18
AS 45.50.531(i).....	11
AS 45.50.537(d).....	9
AS 45.50.545.....	7
AS 45.50.551.....	10
AS 45.50.551(b).....	9
AS 45.50.588.....	19
AS 47.07.040.....	1

**Other Authorities**

5A Charles Alan Wright & Arthur R. Miller <i>Federal Practice &amp; Procedure</i> § 1296 (3d ed. 2004).....	16
<i>Black’s Law Dictionary</i> 131-32 (7th ed. 1999).....	12

**Rules**

Alaska R. Civ. P. Rule 8(b).....	12
Alaska R. Civ. P. Rule 9(b).....	passim
Alaska R. Evid. Rule 201.....	6

## INTRODUCTION

The State's Complaint and opposition brief highlight that this case challenges the level of payments made to providers within Alaska Medicaid's administrative system, but neither the opposition brief nor the State's Amended Complaint identifies a valid reason for ignoring the Department of Health and Social Service's expertise in managing that system. Instead, the State creates excuses for avoiding the Department's jurisdiction, hoping to stretch Alaska's consumer protection law, the common law of unjust enrichment, and Alaska's statutes of limitation beyond recognition. If the Court declines to rule that the Department has primary jurisdiction over the State's Complaint, the Court should dismiss the Amended Complaint outright for the reasons stated in defendants' moving papers. In sum, the State could not possibly have been "deceived" into believing that published AWP's reflected providers' acquisition costs when its Medicaid program had been informed by the federal government for decades of the difference between AWP and actual acquisition cost.

### **I. CONSIDERATION OF THE STATE'S CLAIMS IN THE FIRST INSTANCE BY THE DEPARTMENT IS WARRANTED.**

At the heart of the State's complaint is its contention that it at no time intended "to reimburse providers, on average, at prices higher than the providers' average acquisition cost." Am. Compl. ¶ 39. It complains to have paid "windfall profits" to providers (Opposition Brief ("Opp.") 7) -- not to defendants -- though the State has chosen not to seek repayment from the providers. This challenge to the level of reimbursement paid and the "reasonableness" of Alaska's reimbursement rates should be considered in the first instance by the Department of Health and Social Services ("the Department"). The Department is the exclusive agency charged with determining the reimbursement methodology and rates for Alaska Medicaid and resolving claims of overpayment. See App. Ex. AB (Alaska Medicaid State Plan § 1.1(a)); AS 47.07.040; 7 AAC 43.590 *et seq.*

The State contends that the principles of primary jurisdiction and exhaustion of remedies are inapplicable for three principal reasons, none of which is persuasive. First, it contends that "there is no available administrative remedy." Opp. 11. This contention is incorrect. Alaska Medicaid regulations provide numerous procedures for

recouping overpayments allegedly made to Medicaid providers. See, e.g., App. Ex. AC (7 AAC 43.950, .955, .970, .980). Indeed, if the State truly did not intend to pay providers more than their acquisition costs, but unintentionally did, the State presumably would be compelled to seek such remedies.

Second, the State argues that it does not allege any error in an administrative action and that therefore the doctrine of exhaustion of remedies does not apply. Opp. 11. But the State clearly alleges that Alaska Medicaid inadvertently overpaid for prescription drugs because of defendants' alleged interference "with Alaska's ability to set reasonable reimbursement rates." Am. Compl. ¶ 39. This constitutes an allegation of an "error in administrative action" to which the doctrine of exhaustion of administrative remedies should apply.

Finally, the State asserts that the doctrine of "primary jurisdiction" is not applicable because "no statute confers any jurisdiction on [the Department] to decide any issue in this case." Opp. 12. This argument overstates the requirements for application of the doctrine and understates the Department's authority. The Department has sole authority to regulate the Alaska Medicaid prescription drug program and to balance the competing interests of providers, beneficiaries, and the State. See Defendants' Joint Motion ("DJM") at 6. Before this Court is tasked with determining whether the defendants' alleged conduct has actually interfered with the Department's ability to set reasonable reimbursement rates (rates that have not been modified since the initiation of this lawsuit) the Department should be asked to lend its expertise on this subject so peculiarly within its field.

Application of the primary jurisdiction doctrine is especially important here because the State's sweeping claims threaten to upset the Department's duty to comply with the requirements of the federal Medicaid statute. Federal law requires states to reimburse providers at levels that are "consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A). Achieving the balance between "economy and efficiency," on the one hand, and "quality of care" and "equal access" on the other hand, is obviously a task for the Department,

which has requisite expertise.

There is no legitimate reason for this Court not to exercise its discretion to dismiss the case under the primary jurisdiction doctrine.<sup>1</sup> The purpose of the doctrine is to “help a court decide whether it should refrain from exercising its jurisdiction until after the agency has determined some question or an aspect of some question arising in the proceedings before the court.” *G & A Contractors, Inc. v. Alaska Greenhouses, Inc.*, 517 P.2d 1379, 1383 (Alaska 1974). Pursuing “a ruling on the legal issues will not necessarily be dispositive of the whole controversy [but] an administrative ruling on the factual issues may moot the legal issues.” *Standard Alaska Prod. Co. v. State Dep’t of Revenue*, 773 P.2d 201, 207-08 (Alaska 1989). Thus, an administrative remedy is both prudent and appropriate to afford the Department the opportunity to review its Medicaid reimbursement protocol, make a factual record, decide how to correct its alleged errors in overpayment, and perhaps moot any judicial controversy. The policy considerations inherent in setting Medicaid reimbursement rates are not within the ordinary experience of courts. And as the State alleged in its opposition brief, “the prescription drug market is enormously complex.” Opp. 4. As in *United Parcel Service, Inc. v. Chadwicks of Boston, Inc.*, 900 F. Supp. 557 (D. Mass. 1995), the question to ask when evaluating whether to defer to an agency “is whether the issue is one within the [administrative agency’s] primary jurisdiction because the determination of the inferences to be drawn, in the circumstances of this case, either (a) involves prudential considerations to which the [agency’s] expertise is relevant, or (b) involves ‘issues of . . . policy’ that ought to be considered by [the agency] in the interests of a uniform and expert administration of the regulatory scheme laid down by the [governing statutes.]” 900 F. Supp. at 563. Here, deferral is the obvious choice.

## **II. THE STATE’S ALLEGATIONS ARE NOT SUFFICIENT TO BRING ITS CLAIMS WITHIN THE SCOPE OF THE UTPA.**

### **A. The State’s Claims Do Not Bring It Within the Class of Persons Protected by the UTPA.**

In response to defendants’ argument that the UTPA exists to protect those who

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<sup>1</sup> The defendants do not dispute that the primary jurisdiction doctrine is discretionary, and courts may dismiss or stay cases under the doctrine. See DJM at pp. 6-7.

were actually involved in an allegedly unfair business transaction, the State raises a red-herring argument that the UTPA has no “privity” requirement. All that is required, the State contends, is that the defendant “cause” the plaintiff’s loss. Opp. 13-14.

As a threshold matter, the defendants did not and do not contend that the UTPA requires privity of contract before a plaintiff can state a valid claim. But that is not the issue at hand. More significantly, the State cannot merely rely on the Attorney General’s rights under AS 45.50.501(a) as the source of its entitlement to assert a claim, without sufficiently alleging that it suffered an injury proximately caused by the defendants’ conduct and cognizable under the UTPA. The State has not adequately tied any of its allegations of unfair or deceptive conduct by the defendants to a transaction in which it was injured. And it concedes that the actions of the providers -- who were the actual purchasers of the drugs and who pocketed what the State contends were its “overpayments” -- were the actual “cause” of its losses. The defendants at most “enabled” the providers. Am. Compl. ¶ 73 (“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”). Under these circumstances, the State does not state a claim under the UTPA.

**B. The State Has Not Pled a Valid Prima Facie Case that the Defendants Violated the UTPA.**

Both the State’s Complaint and its opposition brief are short on facts and long on conclusory allegations of secret schemes and fraudulent intentions. In ruling on the defendants’ motion to dismiss, however, the Court should not accept as true the plaintiff’s hyperbole and supposition, but instead must “examine whether conclusory allegations follow from the description of facts as alleged by the plaintiff.” *Shooshanian v. Wagner*, 627 P.2d 455, 461 (Alaska 1983). Real facts are key. “Unwarranted factual inferences and conclusions of law are not considered” when resolving 12(b)(6) motions. *Dworkin v. First Nat’l Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968). The few facts actually alleged in the Complaint fail to show “a set of facts consistent with and appropriate to some enforceable cause of action,” as required by *Alaska Wildlife*

*Alliance v. State*, 74 P.3d 201, 205 (Alaska 2003).

**(1) The State's Knowledge that AWP's Were Not Acquisition Prices Precludes Its UTPA Claim.**

The State tries to ignore decades worth of judicially noticeable reports demonstrating it knew AWP's were only reference prices that did not come close to estimating providers' actual acquisition costs. DJM 10-15, Exs. A, H-V. Contrary to the State's contention, however, what warrants dismissal of its claims is not that it did not pass new laws "overnight" (or ever) once the "facts" came to light. Opp. 19. Rather, dismissal is warranted because the State cannot claim it was deceived by AWP's when, over the course of many years, it received a flood of government reports that explained in detail, with specific examples, the extent to which published AWP's do not reflect actual acquisition costs.

The breadth of information in the government reports regarding the extent of difference between AWP and actual acquisition cost is substantial. The reports summarized in defendants' opening memorandum informed every state Medicaid agency that AWP means "non-discounted list price" (DJM App. Ex. A); that actual prices are "significantly below AWP" (*Id.*); that "AWP reflects a list price and does not reflect several types of discounts" (*Id.*); that pharmacies purchase drugs at large discounts below AWP (*Id.*); and that "AWP is not the average price charged by wholesalers" (*Id.* Ex. V), to reiterate just a few. Alaska Medicaid was clearly on notice that AWP was well above actual acquisition cost.

Contrary to the State's argument, defendants are not "arguing that the State is estopped from suing under the UTPA because of the supposed knowledge of unspecified government officials [.]" Opp. 18. Defendants' argument is much simpler: the State cannot show that defendants' alleged conduct created "a likelihood of confusion or of misunderstanding" or could have been intended to induce reliance upon "concealment, suppression or omission," when the facts allegedly being concealed, suppressed and omitted were published throughout the land. Moreover, the State cannot show that defendants' reporting of allegedly "false" AWP's proximately caused its injuries when it is beyond dispute that it knew that published AWP far exceeded actual acquisition costs. The only reasonable inference from these judicially noticeable facts is that the State Medicaid Agency, applying its expertise, knowingly set its

reimbursement rates at the levels it did for its own good and valid reasons. It is not for the Attorney General to ask this Court to second-guess that judgment.

**(a) The Federal OIG Reports are Appropriate Subjects for Judicial Notice.**

As the State concedes, judicial notice is appropriate where a fact is “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.” Evid. Rule 201. Judicial notice of the government reports cited by the defendants is appropriate to establish that Alaska was on notice that AWP is a “non-discounted list price,” and “not the average price actually charged by wholesalers to their customers.” DJM 10-13, Exs. A, V. The defendants do not, as the State suggests (Opp. 16-17), ask this Court to take judicial notice of the reports for the purpose of weighing competing inferences or evaluating the strength of their contents. To the contrary, the very fact that Alaska received the reports establishes that Alaska was on notice of the significant difference between AWP and actual acquisition cost. That simple fact is easily subject to determination (as the State has not even refuted it received the reports), and judicial notice should be granted.

**(b) The State Has Failed to Explain How It Could Have Been Deceived Under the UTPA.**

Trying to save its UTPA claim (*i.e.*, that the State was deceived by defendants regarding AWP even though the State was informed about the extent of the difference between AWP and actual acquisition cost for more than two decades), the State relies on *Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993), and *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991). Both cases are materially different from the case before this Court. *Kreindler* was a *qui tam* action brought under the False Claims Act. The case involved a manufacturer’s alleged concealment of a defect in its helicopters and its submission to the government of allegedly false claims. It turned out the government knew of the alleged defect, and the question before the *Kreindler* court was thus whether the False Claims Act cause of action could survive. Relying on *Hagood*, the *Kreindler* court determined that, under that specific statute, the question of intent must focus on the defendant’s conduct, rather than the government’s reaction. See *Kreindler*, 985 F.2d at

1156 (citing *U.S. ex rel. Hagood*, 929 F.2d at 1421).

By contrast, this case is brought under Alaska's UTPA, not the False Claims Act. A UTPA claim focuses on whether the complained-of conduct had a tendency to deceive. To determine if conduct is deceptive, the F.T.C. follows a three-part "rational consumer" test, which it developed to cure weaknesses in the "tendency to deceive" standard that it deemed too circular for practical use by courts.<sup>2</sup> Under the F.T.C.'s test, an act is deceptive if it is material and likely to mislead consumers *acting reasonably under the circumstances*. See *In the Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984). The reasonable consumer requirement in the F.T.C. test dooms the State's UTPA claim because it is anything but reasonable for the State to claim it was deceived into relying on AWP's to reimburse providers at actual acquisition cost after receiving scores of reports that AWP did not come close to approximating actual acquisition cost to providers.

Analysis of the "unfairness" prong of the UTPA as interpreted by the F.T.C., in light of the State's extensive knowledge of AWP, also reveals the infirmity of that aspect of the State's claim. The F.T.C. has determined that, "to justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." App. Ex. AE (F.T.C. Policy Statement on Unfairness (Dec. 17, 1980), at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>). An injury is avoidable if the plaintiff was aware of the complained-of practice but failed to take action to end or mitigate it. See, e.g., *Legg v. Castruccio*, 642 A.2d 906, 918 (Md. App. 1994). The State's failure to change its policy of basing some Medicaid reimbursement on AWP after receiving

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<sup>2</sup> Alaska case law currently applies the F.T.C.'s previous "capacity or tendency to deceive" standard (see *Odom v. Fairbanks Mem. Hosp.*, 999 P.2d 123, 132 (Alaska 2000)). The F.T.C., however, abandoned that standard more than 20 years ago, finding it "inadequate to provide guidance on how a deception claim should be analyzed." It instead adopted a "reasonable consumer" standard. *In the Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984). The UTPA requires that "due consideration and great weight" be afforded the F.T.C.'s interpretation. See AS 45.50.545; *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 532 (Alaska 1980). This Court should therefore apply the modern "reasonable standard consumer" favored by the F.T.C.

scores of notices over a period of decades advising that AWP is not actual acquisition cost, is the very definition of "failure to act." Thus, contrary to the State's argument, its knowledge regarding AWP is not irrelevant to the Court's evaluation of the validity of the UTPA claims.<sup>3</sup>

**(2) The State Still Has Not Alleged It Is a Buyer or Competitor.**

In response to the defendants' argument that the State is neither a "buyer or competitor" for purposes of UTPA Subsection .471(b)(11), the State argues only that the UTPA must be liberally construed in its favor. See Opp. 19-20. The argument misses the point that the "buyers" with whom the defendants do business are the wholesalers or providers who purchase their products.<sup>4</sup> The State has not alleged that the defendants' conduct in any way misled, deceived, or damaged those buyers. Implicitly recognizing that the State does not buy from the defendants, the State instead asks this Court to extend the statute beyond its own words and accept that the State – several times removed from the defendants and with whom defendants have no interaction – was an eventual buyer and therefore has stated a claim. This tortured reading of the statute should be rejected.

**(3) The State Has Not Pled Facts Supporting Its Claims That the Defendants Engaged in Misleading or Deceptive Acts in Connection with a Sale Under Subsections .471(b)(11) or (12).**

In response to the defendants' argument that the Complaint does not allege that defendants' alleged wrongdoing was "in connection with" a sale, the State simply points back to its privity argument. Opp. 20. The two arguments are somewhat related, but the State misses the point. Subsections .471(b)(11) and (12) expressly require that the defendant's alleged misconduct occur "in connection with" a sale or advertisement. To

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<sup>3</sup> The State also relies on Judge Saris' opinion that the term "average wholesale price" in the federal Medicare statute has a "plain meaning," Opp. 16, but the term "average wholesale price" does not appear in the federal Medicaid statute. No federal or Alaska Medicaid statute or regulation imposed any duty on pharmaceutical companies to calculate AWP in any way or report AWPs to any governmental body. Indeed, the only apparent definition of AWP in Alaska law is that it was the "average wholesale price accepted monthly by the department from the American Druggist Blue Book." 7 AAC 43.591(d).

<sup>4</sup> The State concedes that the "defendants sell their drugs to wholesalers" (Am. Compl. ¶ 34) and that "wholesalers sell their drugs to providers." (Am. Compl. ¶ 36).

the extent that the State contends that the “sales” that form the basis of its .471(b)(11) and (b)(12) claims are the sales from wholesalers to the Medicaid providers reimbursed by the State, or from the providers to the Medicaid recipients, the Complaint and opposition brief are silent as to how the defendants’ alleged misrepresentations were made in connection with such sales. In the situations where the defendants were actually involved in sales (i.e., selling to wholesalers or to health care providers directly) the State has not identified any alleged misrepresentation or unfairness to those buying parties. Accordingly, the State’s claims under these sections should be dismissed.

### **III. THE STATE FAILS TO STATE A COGNIZABLE CLAIM FOR DAMAGES.**

#### **A. The State May Not Bring a Claim for Actual Damages.**

##### **(1) The UTPA Does Not Permit Actual Damages in a Public Action.**

The State contends that the UTPA entitles it to bring a private action for actual damages, but nowhere does the UTPA permit such a remedy. As defendants explained in their opening brief, the UTPA distinguishes between the goals of, and remedies available in, public versus private actions. Also, the legislative history of the UTPA makes clear that the legislature intended the Act to include different types of relief for public and private actions. DJM, Ex. G at 1-2. The State legislature did not make a damages remedy available to the State.

Under the UTPA, the Attorney General was “established as the primary enforcement officer.” In civil actions, the primary enforcement officer may “seek an injunction against unlawful practices, the violation of which could incur a civil penalty, and to accept an assurance of voluntary compliance with respect to any unlawful practice . . . . The bill also provides for a civil action on behalf of the state with a civil penalty [which at the time of the UTPA’s enactment was] \$5000.” *Id.* This legislative history is reflected in the language of the Act itself, which provides that the State may seek four specific forms of relief: (1) injunctive relief; (2) civil penalties; (3) orders necessary to restore to a person property acquired by means of an unfair trade practice; and (4) attorneys fees and costs. DJM 20 (*citing* AS 45.50.501, .551(b), .501(b), .537(d)). Neither the legislative history nor the language of the UTPA permits the State to seek actual damages.

By contrast, in its provisions dealing with private actions, the UTPA permits an

additional remedy in the form of an action for “treble damages or \$500, whichever is greater.” AS 45.50.531. Though the State attempts to avoid it, the legislative history of the UTPA expressly provides that the goal of private remedies is to: “reimburse the parties actually damaged rather than merely putting an end to the action.” Opp. 23, DJM, Ex. G at 2. (emphasis added). Moreover, the legislature expressly identified the need to ensure an actual damage award in private actions specifically, stating:

These features recognize that the average transaction involving a consumer fraud are generally so small as to prevent all but the most outraged consumer who can afford the expense of a law suit from bringing an action . . . The provision for treble damages is one of long standing in consumer matters and operates to deter fraudulent practices, encourage injured parties to come forward, and to reasonably compensate those individuals for their trouble in bringing suit. . . .

DJM, Ex. G at 2. This statement demonstrates that the legislature intended actual damages to be available to injured private individuals, who would require some “encouragement” in the form of a minimum monetary recovery in order to compensate them for their time and effort in bringing a claim. Interpreting the statute with the required “reasonable and common sense construction, consonant with the objectives of the legislature” demonstrates that the “consumers” contemplated by the UTPA’s private action provisions do not include the State, which operates under an entirely different set of rules within the same statute. *Belarde v. Anchorage*, 634 P.2d 567 (Alaska 1981) (statutory language should be given reasonable or common sense construction, consonant with objectives of legislature).

**(2) The State Is Further Barred from Private Action Remedies Because It Brought Its Claims in Its Public Capacity as an Attorney General, Not as a Private Individual.**

Even if the State could somehow establish that the UTPA permits it to bring an private action for actual damages, it would still lack standing to seek actual damages here because it brings its claims not as a “person,” but rather in its public capacity as the Attorney General. In its Complaint, the State claims authority to bring this case under Alaska Statutes 44.23.020, 45.50.501 and 45.50.551. Am. Compl. ¶ 3. Section .020 merely defines the duties and powers of the Attorney General. Section .501 provides that the Attorney General may bring an action in the name of the State for violations of the UTPA, and Section .551 provides that the Attorney General

may request civil penalties for actions brought under section .501. The Complaint itself thus shows the State is bringing a public action for which the UTPA does not allow actual damages.<sup>5</sup>

**B. The Remedy of Disgorgement Applies Only to Restore Money Acquired by an Unlawful Act.**

In arguing that the remedy of disgorgement is applicable here, the State analyzes the statute piecemeal and contorts its plain meaning, resulting in an interpretation that defies logic. Subsection .501(b) provides that: "The court may 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 AS 45.50.471." AS 45.50.501(b). By its plain language, the statute contemplates that the court may make orders to *restore* monies which may have been acquired by an unlawful act.

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<sup>5</sup> The State's argument that Subsection .531(i) demonstrates that it is a "person" is unpersuasive. Subsection .531(a) permits a "person" to bring an action for punitive damages, and Subsection .531(i) provides that 50 percent of any award "be deposited into the general fund of the state under AS 09.17.020(j)." Subsection .531(i) then clarifies that it "does not grant the state the right to file or join a civil action to recover punitive damages." *Id.* at 531(i). The State argues that this prohibition somehow proves that it is a "person" under Subsection .531(a), because it "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)." *Opp.* at 22. This is a wildly ambitious interpretation of these provisions. Read logically, Subsection .531(i) does nothing more than make clear that the State's entitlement to 50 percent of punitive damages awarded to persons who successfully sue under .531(a) does not give the State any right to participate in a suit to collect those punitive damages.

The language of AS 45.50.531(i) is the same as AS 09.17.020(j), an Alaska statute that governs the award of punitive damages in tort cases. AS 09.17.020(j) was enacted in 1997. The first sentence in AS 09.17.020(j) says that the State gets 50 percent of any punitive damages awarded in a tort case. The second sentence in AS 09.17.020(j) was intended to make clear that just because the State has a right to get 50 percent of the punitive damages, this does not mean that the State can file someone else's tort claim, or intervene in someone else's case, to secure the State's rights to a piece of the plaintiff's punitive damage award. In 1998, the legislature added this identical language to the UTPA, so that the State would also receive a 50 percent share of punitive damages awarded under this statute, but also confirming that this right to a share of the plaintiff's punitive damages does not give the State the right to file a suit or intervene in it.

The State's proposed remedy is completely disconnected from its alleged overpayments because it focuses on the wrong transactions and defendants. Pared down to the basics, there are two main transactions at issue here: (1) the defendants' sale of drugs to providers; and (2) the State's reimbursement to providers for those drugs. In the first transaction, the defendants sell their product to wholesalers (or other intermediaries), or to providers directly, and the wholesalers/providers compensate the defendants. The State does not allege any unfair or deceptive trade practices in connection with that transaction. In the second transaction, providers seek reimbursement from the State for the drugs they purchased from defendants. The providers submit claims, and the State reimburses the providers according to the reimbursement formulae it has established (with no input from the defendants). It is in this second transaction that the State claims it has made "overpayments." The State concedes that the providers are the recipients of these overpayments -- not the defendants. Opp. 21. Accordingly, defendants have none of the State's "overpayments" to "disgorge." The State's disgorgement remedy is simply too removed from the "excess profits" it seeks to "recover." See, e.g., *F.T.C. v. Spectrum Res. Group, Inc.*, 1995 WL 215331, \*9 (D. Nev. 1995) (unpublished) (disgorgement remedy permissible for violation of FTC Act, because profits were causally related to violations and disgorgement figure reasonably approximated amount of unjust enrichment).

#### **IV. THE AMENDED COMPLAINT FAILS TO PLEAD FRAUD WITH PARTICULARITY.**

##### **A. Both Of The State's Claims Contain "Averments of Fraud" that Must Be Pleaded with Particularity.**

The State contends that its Complaint is not subject to Rule 9(b) because its "UTPA claim is not an 'averment of fraud' within the meaning of Alaska's Rule." Opp. 25. This argument has no merit. First, Rule 9(b) applies to all "averments of fraud". An "averment" is defined as a "positive declaration or affirmation of fact," not just an express claim or a cause of action. *Black's Law Dictionary* 131-32 (7th ed. 1999); see also Alaska R. Civ. P. 8(b) (distinguishing averments from claims). By its plain language, Rule 9(b) applies, therefore, not only when a pleading asserts a claim for fraud, but also when it alleges that the adverse party made a knowing misrepresentation to the detriment of another. See *Vess v. Ciba-Geigy Corp. USA*,

317 F.3d 1097, 1105 (9th Cir. 2003) (“Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word ‘fraud’ is not used”). In this case, there are clearly averments of fraud. The State even labels the defendants’ alleged conduct “fraudulent schemes.” Am. Compl. ¶ 4.<sup>6</sup>

Second, the majority of courts that have addressed the question have held that Rule 9(b) applies to UTPA-type claims. See DJM App. Ex. AA (*Commonwealth of Massachusetts v. Mylan Lab.*, Order granting motion to dismiss). While the State notes a few decisions declining to apply Rule 9(b) to a deceptive trade practices claim, the overwhelming majority of courts construing similar statutes hold differently.<sup>7</sup> The State’s principal case, *State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111 (Del. Ch. 2001), conflicts with prior decisions of the Delaware Superior Court (the Chancery judge acknowledges the conflict (*Id.* at 115)), and the Delaware Superior Court rejected *Brady’s* holding just a year after it was decided. See *Crowhorn v. Nationwide Mut. Ins. Co.*, 2002 WL 1767529, at \*9 (Del. 2002) (“Although the elements

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<sup>6</sup> The State argues that its UTPA count is not a claim of fraud for purpose of Rule 9(b), but constitutes fraud for purpose of the discovery rule. Opp. 24, 29. It cannot have it both ways.

<sup>7</sup> See, e.g., *Fid. Mortgage Corp. v. Seattle Times, Co.*, 213 F.R.D. 573 (D. Wash. 2003) (dismissing state Consumer Protection Act claim because plaintiff failed to plead with particularity); *Rouse v. Philip Morris, Inc.*, 2003 WL 22850072, at \*5 (S.D. W. Va. Nov. 18, 2003) (holding that particularized pleading is required for fraudulent and deceptive business practices or unfair deceptive acts or practices); *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 252 (D. Md. 2000) (holding that state deceptive trade practices claim “must satisfy Rule 9(b)"); *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 155 F. Supp. 2d 1069, 1107 (S.D. Ind. 2001) (holding that particularized pleading is required for state consumer protection claims); *Patel v. Holiday Hospitality Franchising Inc.*, 172 F. Supp. 2d 821, 825 (N.D. Tex. 2001) (same); *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 464 (D.D.C. 1997) (“[C]ourts in other jurisdictions analyzing similar provisions of similar [state consumer protection] statutes have concluded that allegations supporting the claim ‘must be pleaded with particularity because they are akin to allegations of fraud.’”); *Burton v. R.J. Reynolds Tobacco, Inc.*, 884 F. Supp. 1515, 1524 (D. Kan. 1995) (“[A]llegations of deceptive trade practices under the [Kansas Consumer Protection Act] are subject to Rule 9(b)’s requirement of particularity.”); *Duran v. Clover Club Foods Co.*, 616 F. Supp. 790, 893 (D. Col. 1985) (holding that particularized pleading is required under the Colorado Consumer Protection Act); *TLH Int’l v. Au Bon Pain Franchising Corp.*, 1986 WL 13405 (D. Mass. Nov. 13, 1986) (dismissing state deceptive trade practices claim for failure to plead with particularity).

of a cause of action for consumer fraud under the CFA are significantly different than those elements of common law fraud, a particularity requirement still applies”).<sup>8</sup>

*Third*, the State’s unjust enrichment claim avers conduct akin to fraud in that the State alleges that the defendants intended the State to rely on allegedly misleading pricing information. Am. Compl. ¶¶ 88-91. Thus, the State’s contention that the unjust enrichment claim is not subject to Rule 9(b), (Opp. 30-31), is unavailing under the circumstances of this case.

**B. The State’s Contention That Defendants “Know What They Did” Does Not Excuse Particularized Pleading.**

The State contends it need not provide details regarding the time frame of its claims, the specific drugs at issue, or the acts of particular defendants because, “[f]ew defendants understand the allegations against them better than the defendants in this case.” Opp. 24. In other words, the State exempts itself from particularized pleading by claiming, in essence, that because defendants are aware of their “deceptive” conduct, it need not plead those acts with any detail. This argument should be rejected. There is no exception in Rule 9(b) for defendants who have been sued elsewhere. Indeed, if defendants’ alleged wrongdoing is so clear from other cases or investigations, as the State contends, the State should have no difficulty pleading the details.

The State also argues that it is not required to allege the conduct of particular defendants because “there can be no confusion among the defendants about who is charged with what” (Opp. 27). It then seeks to bolster its generalized allegations by again referring to pleadings in other jurisdictions. See *id.* at 24. Courts are very reluctant, however, to permit pleading based on the allegations of other cases and have

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<sup>8</sup> The State argues that Rule 9(b) should not apply to UTPA claims because some courts have held that actions under the F.T.C. Act do not require Rule 9(b) pleading. Opp. 25. But other states that give deference to decisions under the F.T.C. Act have held that Rule 9(b) applies. See *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313, 1322 (M.D. Fla. 2002) (“Most courts construing claims alleging violations the Federal Deceptive Trade Practices Act or its state counterparts have required the heightened pleading standard requirements of Rule 9(b).”); *Chandler v. American Gen. Fin., Inc.*, 768 N.E.2d 60, 65 (Ill. App. 2002) (“[A] complaint alleging a violation of the [state Consumer Fraud and Deceptive Business Practices Act] must be pled with the same particularity and specificity as that required under common law fraud.”).

gone so far as to penalize those who attempt to rely on such allegations. See, e.g., *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1280 (3d Cir.) (affirming Rule 11 sanctions against law firm that filed a securities action based on allegations of another complaint). This argument only illustrates the insufficiency of the State's pleading – it assumes that if certain of the defendants have been subject to an investigation or suit in another part of the country, then all 41 defendants in this Alaska action are, by virtue of their association in this Complaint, full participants in every activity conducted by every other defendant in every other case. Such shotgun pleading fails to comport with Rule 9(b) by relying on a general theory of guilt by association, rather than providing the defendants with adequate notice of the allegations against each of them, or with a reasonable ability to prepare a responsive pleading based on those allegations. See *Cooper v. Blue Cross & Blue Shield of Fla.*, 19 F.3d 562, 566-67 (11th Cir. 1994) (holding that Rule 9(b)'s requirement that the plaintiff's pleading include "facts as to time, place, and substance of the defendant's alleged fraud . . . guards against 'guilt by association.'").

The State also offers a unique excuse for its failure to plead with particularity, contending that providing more specificity is impossible because "the State pays, on an ongoing basis and thousands of times a week, for Medicaid recipients' drugs." *Id.* at 27. Summarizing this argument is simple. The State filed a massive lawsuit against an entire industry and maintains that, because of the scope of its own grossly overbroad pleading, it should be allowed to ignore the rules of civil procedure.

This Court should see past the State's exaggerated concern that the defendants are demanding that the State present an immense amount of data in order to plead with particularity. The State claims it has data similar to that in Exhibit C, "for years prior to 2001 and after 2003, which data will be produced to defendants upon request during discovery." Am. Compl. ¶ 46. The State would not be greatly inconvenienced by providing in its pleading information it already has. Furthermore, until the State defines the time period in question, the defendants will have to guess when, if ever, differences in reported AWP and the actual prices charged could constitute "false" reporting or a "misrepresentation" under the State's undefined theory of liability (e.g., is a 1% difference between AWP and actual price "false" or must an alleged "spread" rise to

some higher level before it is actionable under the State's reading).

Similarly, the State contends that it need not specify the drugs at issue because Exhibit C of the Complaint, which provides "examples" of the drugs at issue, provides enough particularity. These examples are not sufficient to satisfy Rule 9(b). "[The] need for particularity is especially persuasive, of course, when the defendant is a business entity that engages in a high volume of transactions and might have difficulty in identifying the one that is being challenged." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1296, at 39 (3d ed. 2004). Here, the defendant manufacturers produced many varieties of prescription drugs over the course of several decades. As the State acknowledges, more than 65,000 separate National Drug Codes ("NDCs") for prescription drugs exist. Am. Compl. ¶ 25. Moreover, identification of the drugs at issue here is particularly important given the State's theory that its damages should be measured by the alleged increased sales and market share of these drugs. The defendants are entitled to know the drugs for which the State contends it subsidized the defendants' sales.

Other courts have recognized the importance of specifying the drugs at issue in similar AWP cases in which a plaintiff has engaged in this type of "group pleading". In the multi-district AWP litigation, for example, Judge Saris required the plaintiffs to "clearly and concisely allege with respect to each defendant: (1) the specific drug or drugs that were purchased from defendant, (2) the allegedly fraudulent AWP for each drug, and (3) the name of the specific plaintiff(s) that purchased the drug." *In re Pharm. Average Wholesale Price Litig.*, 263 F. Supp. 2d 172, 194 (D. Mass. 2003); see also DJM, Ex. AA (*Commonwealth of Massachusetts v. Mylan Lab.* Order) (requiring plaintiff to amend its complaint to identify each drug at issue, the AWP, and the alleged "spread" created by discounting the drug).<sup>9</sup> In these two cases the court did not express any concern that particularized pleading would "bury the Complaint in an avalanche of useless paper" (Opp. 27), as the State now frets.

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<sup>9</sup> In certain AWP cases, many of which are cited by the State, the courts did not require such repleading because the complaints specified a limited number of drugs at issue.

**V. THE “BENEFIT” THE STATE CONTENDS IT CONFERRED ON DEFENDANTS IS TOO SPECULATIVE TO SUPPORT A CLAIM FOR UNJUST ENRICHMENT.**

The State’s unjust enrichment claim rests on the premise that the State “conferred” increased sales and market share on each and every defendant. As defendants showed in their opening memorandum, this remote and speculative benefit is insufficient under Alaska law to support the State’s claim. See DJM 16-17.

First, every payment made by the State for one of defendants’ drugs went to a provider, not the defendants, as the State concedes. Opp. 30. In addition, these providers often buy their drugs from wholesalers and other intermediaries, not the defendants. See, e.g., Am. Compl. ¶ 46. The notion that the State “conferred” a benefit of any sort on the defendants, who are levels removed from the State’s reimbursement payment, is inconsistent with all but the most conclusory allegations of the Complaint.

Moreover, “increased sales and market share” are not the types of benefit that support a claim for unjust enrichment because they are too remote from the State’s payments. See, e.g., *San Francisco v. Phillip Morris, Inc.*, 957 F. Supp. 1130, 1144-45 (N.D. Ca. 1997). The State’s only response to this argument is the unsupported assertion that its unjust enrichment theory is not “intrinsically speculative.” But it is. The idea that the market share of a drug was driven by the reimbursement paid to Alaska Medicaid providers, and that any resultant increase in profits is an unjust benefit owed to the State is not supported by anything other than the State’s conclusory assertions. A cognizable claim for unjust enrichment requires far more.

Finally, the State concedes that it has not (and cannot) plead which defendants actually had their profits increased and for which specific drugs. Opp. 30. Indeed, the State actually alleges that some defendants created a spread only “to counter the same tactic used by a competitor.” Am. Compl. ¶ 41. It does not identify which defendants are which, and how all these competitors could be unjustly enriched at the same time by the allegedly increased sales and market share. Although the State argues that it should be allowed to conduct discovery before being required to make these “precise” allegations, the State must have some good faith, colorable basis for its claims before it should be permitted to conduct discovery of scores of defendants on all of their drugs. Without a single example in the Complaint of the widespread “market share increase” on which it is based, the State’s unjust enrichment claim fails.

## VI. THE STATUTE OF LIMITATIONS BARS THE STATE'S CLAIMS.

The statute of limitations bars both Count I (UTPA) and Count II (unjust enrichment) because they were first filed *more than six years after* September 8, 2000, the latest possible date the claims accrued. Government claims based on the UTPA and unjust enrichment must be asserted within six years of the date the government “discovers or reasonably should have discovered” facts that give rise to its claims. AS 09.10.120(a); AS 45.50.531(f) (emphasis added); *John's Heating Svc. v. Lamb*, 129 P.3d 919, 924-25 (Alaska 2006) (discovery rule applies if elements of claim not immediately apparent).

As set forth in defendants' opening brief, the State cannot deny that it has long known that AWP is not the same as providers' actual acquisition cost. For example, the State's own exhibit demonstrates that on May 1, 2000, and again on September 8, 2000, the federal Health Care Financing Administration (“HCFA”) contacted each state Medicaid agency with “more accurate” average wholesale market pricing “for about 400 national drug codes” compiled by the U.S. Department of Justice and the National Association for Medicaid Fraud Control Units (“NAMFCU”). See Am. Compl. Ex. B. The state Medicaid agencies, including Alaska's, were expressly informed that providers often acquired drugs at prices substantially lower than published AWPs. See *id.* Thus, the State was on notice of the facts that gave rise to its claims, at the very latest, on September 8, 2000. Since the State filed its initial Complaint more than six years later, on October 6, 2006, both counts are barred by the statute of limitations.

The State relies on AS 09.10.120(a) for the proposition that only actual knowledge triggers the limitations period. However, that standard applies only if the “action is for relief on the ground of fraud” (AS 09.10.120(a)), and the State itself insists that its “UTPA claim is not an averment of fraud.” Opp. 25. Accordingly, the limitations period for both Counts necessarily began when the State “discover[ed] or reasonably should have discovered” the facts giving rise to its claims. AS 09.10.120(a); AS 45.50.531(f). Based on the facts set forth in the Amended Complaint and defendants' moving papers, the State discovered or reasonably should have discovered the facts giving rise to its claims well before the statute of limitations expired.

The State also claims that the continuing violation doctrine tolled the statute of limitations until it filed its Complaint on October 6, 2006. The continuing violation doctrine has never been applied to UTPA claims, however, and should not be. While the Alaska Code expressly requires application of the doctrine to some provisions of the unfair competition chapter (see AS 45.50.588), the UTPA is not one of those provisions. Under the doctrine of *expressio unius est exclusio alterius*, the continuing violation doctrine does not apply to UTPA claims. See *Ranney v. Whitewater Eng'g*, 122 P.3d 214, 218-19 (Alaska 2005).<sup>10</sup>

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<sup>10</sup> Even if the continuing violation doctrine were applicable here, the statute of limitations absolutely bars the recovery of damages attributable to conduct that occurred prior to October 6, 2000 (i.e. six years before the Complaint was filed). *Alakayak v. B.C. Packers, Ltd.*, 48 P.3d 432, 461-62 (Alaska 2002).

**CONCLUSION**

The State's First Amended Complaint should be dismissed in its entirety.

Respectfully submitted:

DATED: March 2, 2007

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