

Docket # X07 CV03 – 0083296 S (CLD)

STATE OF CONNECTICUT	:	SUPERIOR COURT
	:	
v.	:	COMPLEX LITIGATION DOCKET
	:	AT TOLLAND
	:	
DEY, INC.,	:	
DEY, L.P.,	:	
ROXANE LABORATORIES, INC.,	:	
WARRICK PHARMACEUTICALS CORP.	:	
SCHERING-PLOUGH CORPORATION,	:	
AND SCHERING CORPORATION,	:	JUNE 16, 2004

**MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE BY
WARRICK/SCHERING DEFENDANTS¹**

I. INTRODUCTION

The State of Connecticut (“State”) has brought four separate sovereign enforcement actions against several defendant pharmaceutical companies² pursuant to the State’s police powers under Conn. Gen. Stat. §§ 42-110m and 42-110o of the Connecticut Unfair Trade

¹The issues raised in all of the Motions to Strike in the related cases pending in this Court overlap significantly, and incorporate by reference arguments raised in motions to strike filed by other defendants. Accordingly, the State of Connecticut is filing briefs that relate to each other in the following four related cases: (1) *State of Connecticut v. Dey, Inc., et al*, # X07 CV03 – 0083296 S (CLD); (2) *State of Connecticut v. Pharmacia Corporation*, # X07 CV03 – 0083297 S (CLD); (3) *State of Connecticut v. GlaxoSmithKline PLC d/b/a GlaxoSmithKline, et al*, # X07 CV03 – 0083298 S (CLD); (4) *State of Connecticut v. Aventis Pharmaceuticals, Inc., et al*, # X07 CV03 – 0083299 S (CLD). In *State v. Dey, Inc.* there were two motions to strike (one by Dey & Roxane and the other by Warrick/Schering). Each motion is responded to separately.

²For the purposes of this memorandum, the defendant pharmaceutical companies in the four related cases are referred to collectively as the “Defendants.”

Practices Act (“CUTPA”). In so doing, the State is seeking to remedy a long standing course of deceptive, unfair and unlawful conduct by the Defendants, each of whom is a large pharmaceutical company. Relief, sought exclusively under Conn. Gen. Stat. §§42-110m, 42-110o, includes restitution, injunctive relief and civil penalties.

The Revised Complaints allege that the Defendants violated CUTPA by artificially inflating drug costs incurred both by the Connecticut Department of Social Services (“DSS”) through its administration of the Connecticut Medical Assistance Program, including Medicaid, and by Connecticut residents who are Medicare beneficiaries. The Revised Complaints allege that the Defendants reported false average wholesale prices, also known as “AWPs”, to national drug price reporting services that governmental agencies such as DSS utilize to determine reimbursement rates to healthcare providers (including pharmacists and physicians) for prescription drugs. These reported average wholesale prices, however, bore no relationship to the actual wholesale prices that pharmacists, physicians and other healthcare providers actually pay for drugs manufactured by the Defendants. The Revised Complaints allege that the Defendants marketed the “spread” (or price differential) between the artificially high average wholesale price reported by Defendants and the true average wholesale prices reflecting what healthcare providers actually paid for Defendants’ drugs.

Through this misleading sales and marketing scheme, the Defendants promoted certain prescription drugs and increased their market share for those drugs, all at the expense of the Connecticut Medical Assistance Program and Connecticut Medicare beneficiaries. In the words of a federal district judge presiding over similar average wholesale price litigation: “The defendants trumpeted a lie by publishing the inflated AWPs, knowing (and intending) them to be

used as instruments of fraud.” *In re Lupron Marketing and Sales Practices Litigation*, 295 F. Supp. 2d 148, 167 (D.C. Mass 2003).³

The Defendants now move to strike the Revised Complaints in each of the four related sovereign enforcement actions on grounds that the Revised Complaints fail to plead the elements of proper causes of action under CUTPA.⁴ Defendants also introduce prematurely the dubious defense that, because the “government” somehow “knew” about the Defendants’ unfair and deceptive marketing scheme, it was okay for the Defendants to continue to do so. In advancing these claims and defenses, the Defendants not only misapply the law concerning elements of causes of action under CUTPA, but also evince a flawed understanding of the scope of review on a motion to strike, which admits as true all well pleaded allegations of the complaint, and construes them in the light most favorable to the pleader.

Applying the proper standard of review in reviewing motions to strike, the Defendants claims, taken together and separately, utterly lack merit. For these reasons, which are explained more fully below, their motions to strike should be denied in their entirety.

³These cases were not prepared in a vacuum. Connecticut is one of at least 15 states that have sued pharmaceutical companies for substantially similar schemes. Similar cases have been initiated by the States of Arkansas, California, Connecticut, Florida, Kentucky, Massachusetts, Minnesota, Montana, Nevada, New York, Ohio, Pennsylvania, Texas, West Virginia and Wisconsin, as well as some county governments. These cases are specifically identified in Appendix A.

⁴One of the Defendants — Aventis Pharmaceuticals, Inc. — seeks to have its motion to strike granted “with prejudice”. Such action is improper and clearly inconsistent with well-settled Connecticut rules of practice. The Practice Book is very clear that if a motion to strike is granted the pleader may file a substitute pleading. Conn. Prac. Bk. §10-44. The pleader may elect to replead, or to allow judgment to enter in order to take an appeal, but may not do both. *Tuthill Finance v. Greenlaw*, 61 Conn. App. 1, 8 (2000). An order granting a motion to strike “with

II. STANDARD OF REVIEW.

In ruling on a motion to strike, the court is limited to the facts alleged in the plaintiff's complaint. *Rowe v. Godou*, 209 Conn. 273, 278 (1988); *Gordon v. Bridgeport Housing Authority*, 208 Conn. 161, 170 (1988); *King v. Board of Education*, 195 Conn. 90, 93 (1985); *Cavallo v. Derby Savings Bank*, 188 Conn. 281, 285-86 (1982). Moreover, "the purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted. In ruling on a motion to strike, the court is limited to the facts alleged in the complaint. The court must construe the facts in the complaint most favorably to the plaintiff.... If facts provable in the complaint would support a cause of action, the motion to strike must be denied." *Waters v. Autuori*, 236 Conn. 820, 825-26 (1996); *Gordon v. Housing Authority*, 208 Conn. at 170; *See also Amodio v. Cunningham*, 182 Conn. 80, 82-83 (1980).

In considering "a motion to strike, the facts giving rise to these claims must be taken from the complaint." *Kilbride v. Dushkin Publishing Group, Inc.*, 186 Conn. 718, 719 (1982); *State v. Bashura*, 37 Conn. Supp. 745, 748 (Super. Ct. 1981). A "speaking" motion to strike — a motion looking to facts outside of the pleading being attacked — should not be granted. *Connecticut State Oil Co. v. Carbone*, 36 Conn. Supp. 181, 182-83 (Super. Ct. 1979).

Thus, under the standard of review set forth above, the essential elements of the State's allegations in the Revised Complaints are deemed to be true for the purposes of the motion to

prejudice" would deprive the pleader with the right to replead that is clearly available under Connecticut law. Accordingly, it is simply not appropriate for a party to seek such an order.

strike. They also must be construed in the light most favorable to the State at this stage of the proceedings.

III. FACTUAL BACKGROUND.

As noted above, at the motion to strike stage the well-pleaded allegations of the complaint are deemed to be true and such allegations are to be construed in the light most favorable to the pleader. Accordingly, the facts which must be deemed as true at this point in these cases include the following:

The Connecticut Medical Assistance Program provides state medical benefits including prescription drugs for certain low income and disabled Connecticut residents. Revised Complaint, Seventeenth Count ¶8. Under Connecticut state laws and regulations, a manufacturer's "average wholesale price" or "AWP" is utilized as a benchmark or reference for calculating the amount to be paid for the reimbursement. Revised Complaint, Seventeenth Count, ¶17. The Connecticut Medical Assistance Program utilizes the average wholesale price reported to national drug price reporting services by the manufacturer. *Id.*

Medicare is a federal health benefit program for the elderly and disabled. Revised Complaint, Twenty-First Count ¶9. As with the State programs, Medicare also uses "average wholesale price" or "AWP" as a benchmark or reference for calculating the amount to be paid for the reimbursement. Revised Complaint, Twenty-First Count ¶13. Medicare pays 80% of the cost for a covered drug and the consumer who needs the drug pays the remaining 20%. *Id.* Where such consumer is a Connecticut Medicaid recipient, the 20% copay is actually paid by the State. *Id.*

The Defendants are well aware that the state and federal government rely upon the defendants' reported average wholesale price to set the amount of reimbursement. Revised Complaint, Seventeenth Count ¶¶21-22; Revised Complaint, Twenty-First Count ¶¶14-15.

The Defendants' *actual* average wholesale prices for the drugs addressed in this case were considerably lower than the average wholesale prices the Defendants *reported* to the price reporting services. Revised Complaint, Seventeenth Count ¶24; Revised Complaint, Twenty-First Count ¶17. In fact, the average wholesale prices reported by the Defendants bore no relation to any purchase price at which a provider could procure the drugs. Revised Complaint, Seventeenth Count ¶28; Revised Complaint, Twenty-First Count ¶21. The Defendants' reported average wholesale prices ranged up to hundreds of percent higher than their actual wholesale prices, as illustrated in the tables incorporated into the Revised Complaints.

The Defendants knowingly and intentionally created this "spread" between their actual prices and their reported prices to increase their market shares. Revised Complaint, Seventeenth Count ¶¶26-27; Revised Complaint, Twenth-First Count ¶¶19-20. Defendants increased their market shares, and thereby their profits, by inducing providers to purchase their drugs, using state government funding and Medicare co-payments to fuel their marketing efforts. Revised Complaint, Seventeenth Count ¶¶26-27; Revised Complaint, Twenty-First Count ¶¶19-20. Defendants knowingly inflated the prices they reported, knew that these inflated prices would result in excessive payments by the Connecticut Medical Assistance Program and Connecticut Medicare beneficiaries for such drugs, and the Connecticut Medical Assistance Program and Connecticut Medicare beneficiaries indeed paid excessive amounts for such drugs, due to the

defendants' deception and unfair trade practices. Revised Complaint, Seventeenth Count ¶¶28, 36; Revised Complaint, Twenty-First Count ¶¶27, 29.

Of course, the factual basis for the State's claims are pleaded in much greater detail in the Revised Complaints. The above recitation amply demonstrates, however, that the core factual claims clearly establish legally cognizable claims under the Connecticut Unfair Trade Practices Act.

IV. THE REVISED COMPLAINTS IN ALL FOUR CASES FULLY AND ADEQUATELY PLEAD ALLEGATIONS WITH RESPECT TO ALL ELEMENTS OF CAUSES OF ACTION UNDER CUTPA.

The provisions of CUTPA permit claims for “unfairness,” as well as for claims for “deception”. The Connecticut Supreme Court has observed the distinction between the two types of CUTPA claims: “[A] violation of CUTPA may be established by showing either an actual deceptive practice; or a practice amounting to a violation of public policy.” (Citations omitted.) *Dadonna v. Liberty Mobile Home Sales*, 209 Conn. 243, 254 (1988); *See also Normand Josef Enter., Inc. v. Connecticut Nat'l Bank*, 230 Conn. 486, 522-23 (1994).

The elements for a claim under CUTPA alleging an “unfairness” claim, are different from the elements of a “deceptive practices” claim. In the cases before this Court, the 19th, 20th, 23rd and 24th Counts comprise the “unfairness” claims under CUTPA, and the 17th, 18th, 21st and 22nd Counts comprise the “deception” claims under CUTPA. All counts contain allegations of all elements necessary to state valid claims under CUTPA.

The State's allegations, as set forth in the Revised Complaints, assert ample facts to support the State's deception claim under CUTPA. “If facts provable in the [Revised

Complaints] would support a cause of action, the motion to strike must be denied.” *Comm’r of Labor v. C.J.M. Servs.*, 268 Conn. 283, 292-293 (2004); *quoting Waters v. Autuori*, 236 Conn. 820, 826 (1996). Furthermore, “where the legal grounds for such a motion [to strike] are dependent upon underlying facts not alleged in the plaintiff’s pleadings, the defendant must await the evidence which may be adduced at trial, and the motion should be denied.” *Liljedahl Bros., Inc. v. Grigsby*, 215 Conn. 345, 348 (1990) (analyzing sufficiency of CUTPA claim); *quoting Fraser v. Henninger*, 173 Conn. 52, 60 (1977); *see also C.J.M. Servs.*, 268 Conn. at 292-293.

Connecticut courts have applied a consistent legal standard for determining the legal sufficiency of an “unfairness” claim under CUTPA:

It is well settled that in determining whether a practice violates CUTPA [Connecticut courts] have adopted the criteria set out in the “cigarette rule” by the federal trade commission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise — in other words, it is within 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, [competitors or other businesspersons] All three criteria do not need to be satisfied to support a finding of unfairness. 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. (Citations omitted; internal quotation marks omitted.) *Cheshire Mortgage Services, Inc. v. Montes*, 223 Conn. 80, 105-106, 612 A.2d 1130 (1992). CUTPA reflects a public policy that favors remedying wrongs that may not be actionable under other bodies of law. *Associated Investment Co., Ltd. Partnership v. Williams Associates IV*, 230 Conn. 148, 159, 645 A.2d 505 (1994)....

Willow Springs Condominium Ass’n, Inc. v. Seventh BRT Development Corp., 245 Conn. 1, 43 (1998); *see also Macomber v. Travelers Property and Cas. Corp.*, 261 Conn. 620, 644 (2002);

Fink v. Golenbock, 238 Conn. 183, 215 (1996); *Normand Josef Enterprises, Inc. v. Connecticut Nat. Bank*, 230 Conn. 486, 522 (1994).

The Connecticut Supreme Court consistently construes CUTPA claims in the manner most favorable to sustaining their legal sufficiency. *Bohan v. Last*, 236 Conn. 670, 674 (1996); *see also Mingachos v. CBS, Inc.*, 196 Conn. 91, 108-109 (1985). Courts have construed such allegations “broadly and realistically, rather than narrowly and technically.” *Gazo v. Stamford*, 255 Conn. 245, 260-61 (2001); *see also Doe v. Yale University*, 252 Conn. 641, 667 (2000); *Edwards v. Tardif*, 240 Conn. 610, 620 (1997). Thus, “what is necessarily implied need not be expressly alleged.” *Clohessy v. Bachelor*, 237 Conn. 31, 33 n. 4 (1996).

These standards have clearly been met in this case. Arguments concerning the application of the law concerning CUTPA are set forth in greater depth in Part IV of the briefs filed in opposition to the Dey/Roxane and Pharmacia Motions to Strike in this case and a companion case, which arguments are incorporated here by reference.

V. “GOVERNMENT KNOWLEDGE” IS NOT A COGNIZABLE DEFENSE TO THESE ACTIONS.

Even though the Defendants assert that the State’s Revised Complaints fail to state any claims against them, they spend many pages of their respective briefs pleading defenses to the very claims they challenge as legally insufficient. The Defendants try to defend their deceptive and unfair marketing practices by arguing that somehow “government knowledge” of the

Defendants' wrongdoing defeats the causes of action that have been pleaded in the Revised Complaints.⁵

As a preliminary matter, raising this purported "government knowledge" defense at this early stage in the pleadings is entirely inappropriate. As noted above, it is well settled that "in determining whether a motion to strike should be granted, the sole question is whether, if the facts alleged are taken to be true, the allegations provide a cause of action or a defense." *County Federal Sav. And Loan Ass'n v. Eastern Associates*, 3 Conn. App. 582, 585 (1985). Thus, it is of absolutely no relevance at this early stage in pleadings whether the Defendants could plead defenses or prove facts which might bar the State's claims as pleaded in the Revised Complaints. Simply put, these defenses belong in the Defendants' answers, not in their motions to strike.

Further, even if it were proper for the Defendants to raise this "government knowledge" claim at this time, such a defense necessarily fails as a matter of law. First, the Defendants' claim of "government knowledge" really is a government estoppel argument in disguise, and the Defendants simply have not, and cannot, establish any of the necessary elements of conduct giving rise to government estoppel on this record. Second, those courts that have considered the theory advanced by the Defendants here — namely, that the government's knowledge of the

⁵*See, e.g.*, Brief of the Defendant Aventis Pharmaceuticals Inc. ("There is a simple reason why the State failed to allege the necessary elements of its deceptive practices claim: the State has known for decades that published AWP's are not 'true average wholesale prices' and in fact, represent prices that are higher than a provider's actual costs." Aventis Brief, p. 12); Brief of Defendant Dey, Inc. and Defendant Roxane Laboratories, Inc. (Arguing that the State's Revised Complaints are "legally infirm" because the State used pharmaceutical pricing information "with the full recognition and knowledge that the relevant pharmaceutical industry terms of art, customs and usages did not treat this published information as reflective of an actual average wholesale price charged by pharmaceutical manufacturers such as Defendants." Dey/Roxane Brief, pp. 1-2).

Defendants' wrongdoing is tantamount to government acquiescence with, and condonation of, such unlawful conduct — have squarely and resoundingly rejected it.

The Defendants attach a selected collection of several audits, reports and surveys to their briefs in support of their motions to strike. It is entirely improper to append these documents to a memorandum in support of a motion to strike. “[A] motion to strike is *not* tested by new facts alleged by the movant which are extraneous to the pleading attacked. *Blanchard v. Nichols*, 135 Conn. 391, 392, 64 A.2d 878.” (Emphasis added.) *Doyle v. A & P Realty Corp.*, 36 Conn. Supp. 126, 127 (Conn. Super. 1980). It is not at all clear exactly what putative facts the Defendants seek to have the Court infer from the documents improperly attached to the motions to strike, let alone whether these documents actually support the Defendants’ claim of “government knowledge.” The Defendants are actually offering selected documents in an area that is highly disputed in this litigation. It is simply not appropriate to open up a factual quagmire on a motion to strike.

For these reasons, explained more fully below, these “government knowledge” arguments of the Defendants should fail.

(A) THE DEFENDANTS HAVE NOT, AND CANNOT, ESTABLISH ESTOPPEL AGAINST THE GOVERNMENT ON THIS RECORD.

To evaluate the Defendants’ claims that “government knowledge” of the Defendants’ misconduct somehow defeats the causes of action pleaded by the State in the Revised Complaints, it is essential to analyze the applicable legal standard for determining whether the State has conducted itself so as to be subject to estoppel. Not surprisingly, this analysis is entirely absent from all of the Defendants’ briefs submitted in support of their motions to strike. The

Defendants have not, and cannot, establish any of the elements giving rise to a defense of government estoppel on this record. Accordingly, their arguments should be rejected.

The Connecticut Supreme Court has clearly and unequivocally determined: “Under our well-established law, any claim of estoppel is predicated on proof of *two essential elements*: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury...” (Emphasis added). *Chotkowski v. State*, 240 Conn. 246, 268 (1997); *See also Connecticut National Bank v. Voog*, 233 Conn. 352, 366 (1995).

It is also well-established that a party seeking estoppel against the state or federal Government carries a heavy burden. “[A]s a general rule estoppel may not be invoked against a public agency in the exercise of its governmental functions.” *Kimberly-Clark Corporation v. Dubno*, 204 Conn. 137, 146-47 (1987); *See also Zoning Commission v. Lescynski*, 188 Conn. 724, 731 (1982). Although “[n]o blanket bar against estoppel exists ... it is infrequently a valid defense against the government absent proof of affirmative misconduct by a government agent.” *United States v. Lancaster*, 898 F. Supp. 320, 322 (E.D. N.C. 1995). In Connecticut, “estoppel against a public agency is limited and may be invoked: (1) only with great caution; (2) only when the action in question has been induced by an agent having authority in such matters; and (3) only when special circumstances make it highly inequitable or oppressive not to estop the agency.” *Chotkowski*, 240 Conn. at 268-69; *See also Kimberly-Clark Corporation v. Dubno*, 204 Conn. at 148.

In *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 104 S.Ct. 2218 (1984), the United States Supreme Court articulated the important public policy reasons for applying estoppel against the government on only on the rarest of occasions:

When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that the Government may not be estopped on the same terms as any other litigant.... But however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present.

Heckler, 467 U.S. at 60-61.

As noted above, the well-pleaded allegations of the Revised Complaints are deemed to be true for the purposes of the motions to strike. Applying the requisite elements of government estoppel to the record before the Court — that is, the well-pleaded allegations of the State’s Revised Complaints — it is clear that Defendants simply cannot establish conduct by the State that would render the State subject to a claim of estoppel. What the Revised Complaints do clearly establish are that the Defendants misrepresented the actual average wholesale price for their drugs, and those misrepresentations resulted in substantial harm to the Connecticut Medical Assistance Program, and to Connecticut Medicare beneficiary consumers. Pharmacia, Revised Complaint, First Count, ¶33; Pharmacia, Revised Complaint, Fifth Count, ¶32. What is entirely absent from the record before the Court, however, is any basis for the Court to conclude that any duly authorized⁶ official of the State *said or did anything whatsoever to induce any of the*

⁶It is important to note that to properly invoke estoppel, a party must show that the State officials had the legal authority to perform the act that was relied upon. Where State officials acted outside of their authority in purporting to bind the State, such actions cannot form the basis for an estoppel argument. *McGowan v. Administrator*, 153 Conn. 691, 694 (1966); *State v.*

Defendants to rely to their detriment on the action of said State official in continuing to misrepresent the actual average wholesale price of their drugs.

Any allegations by the Defendants’ of governmental neglect, governmental omissions, and tacit acquiescence (all of which are strenuously contested by the State) are not sufficient to invoke estoppel. Error, lack of diligence in enforcing the law and inefficiency simply do not entail the “affirmative misconduct” that creates an estoppel defense. In *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 104, S. Ct. 2218 (1984), the Secretary of Health and Human Services sued a private provider of home health care services to recover an overpayment of Medicare reimbursements. Like the Defendants here, the provider claimed that the Secretary was estopped from pursuing the overpayment due to its knowledge of, and acquiescence to the overpayment. *Heckler*, 467 U.S. at 58. The Supreme Court was unpersuaded by the provider’s claim that the HHS Secretary’s omission satisfied the requisite element of affirmative misconduct upon which the provider was induced to detrimentally rely. *Heckler*, 467 U.S. at 61. The Supreme Court also held that there is no basis for an estoppel when the only “detriment” to the party seeking it was its “inability to retain money that it should never have received in the first place.” *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. at 61-62.

Finally, “[i]t is fundamental that a person who claims an estoppel must show that he has exercised due diligence to know the truth, and that he not only did not know the true state of

Metrusky, 140 Conn. 26, 30 (1953). Accordingly, even if actions by State officials happened and were referred to in the Revised Complaints — which clearly is not the case here — the Defendants would also have to show that the actions they purported to detrimentally rely upon were within the authority of such officials.

things but also lacked any reasonably available means of acquiring knowledge. [Citations omitted].” *Chotkowski*, 240 Conn. at 268; *see also Connecticut National Bank v. Voog*, 233 Conn. at 366. The Defendants simply cannot meet this requirement.

As with the other elements of government estoppel, there is nothing in the record before the Court reviewing these motions to strike that shows that the Defendants detrimentally relied upon non-existent representations by duly authorized state officials in order to condone the blatant misreporting of the Defendants’ own average wholesale prices. By the same token, there is nothing in the record demonstrating that the Defendants lacked any reasonably available means of acquiring knowledge concerning their own misreporting of actual average wholesale prices of their own products.⁷

(B) THE PUTATIVE “GOVERNMENT KNOWLEDGE” DEFENSE HAS BEEN REJECTED BY COURTS WHICH HAVE CONSIDERED THE ARGUMENT.

Unable to establish the elements of government estoppel on this record, the Defendants seek to advance a vague and generalized “government knowledge” defense to stop the State from going forward with these sovereign enforcement actions. Of course, the State vigorously denies that it knew of the Defendants’ unfair and deceptive drug pricing schemes. The Defendants’ efforts to bar the State from bringing these actions based on an imputed knowledge theory are nonetheless unavailing. To the extent that courts that have considered the proposition that

⁷It is also difficult to imagine how the Defendants could ever meet the demands of this inquiry under any circumstances. Surely defendants “know” the truth concerning pricing for their own products regardless of what actions any government officials did or did not take. Moreover, since the Defendants have greater means than anyone to acquire knowledge about the truth of the pricing of their own products, and their own marketing practices for their own drugs, they would

“government knowledge” wrongdoing somehow immunizes the perpetrator from liability, they have uniformly rejected it.

In federal class-action litigation brought by cancer patients and health care plans against pharmaceutical for conspiring to inflate the price of the drug *Lupron*, the defendant pharmaceutical companies argued that: (1) through the publication of various reports and audits, the government “knew” that the drug’s average wholesale price was not reflected in the price reported by the defendant pharmaceutical, and therefore (2) the government condoned the fraudulent pricing scheme. The U.S. District Court squarely rejected the defendant pharmaceutical companies’ claim of imputed government knowledge:

In support of this argument, Defendants cite a number of government reports acknowledging that the published AWP for prescription drugs often exceed their acquisition costs. The argument is ultimately unpersuasive. There is a difference between sticker price and sucker price. If one were confronting a modest markup of the actual AWP for *Lupron* (which 300% is not), intended to make sales of the drug for the treatment of Medicare patients commercially viable (given the 95% of AWP reimbursement rate), it is unlikely that there would have been a government investigation of TAP’s marketing practices ... *Finally, the recognition of the part of government regulators of inefficiencies in the administration of Medicare does not, as defendants contend, amount to condonation of fraudulent conduct.* [Emphasis added].

In re Lupron Marketing and Sales Practices Litigation, 295 F. Supp. 2d 148, 168 n. 19 (D. Mass 2003).

In other words, the *Lupron* court held that the mere existence of government studies on average wholesale price was wholly insufficient to establish that the government actively misled the Defendants into believing that the federal government had approved of the defendant

never be able to establish that they lacked any reasonably available means to know the impact of misreporting the prices of their own products.

pharmaceutical companies' misleading statements and deceptive practices. The federal judge overseeing the multi-district litigation matter encompassing numerous cases raising average wholesale price issues has also denied motions to dismiss that have included extensive arguments about the putative government knowledge defense. *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 307 F. Supp. 2d 196 (D. Mass. 2004); *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 263 F. Supp. 2d 172 (D. Mass. 2003).

Similarly, in other related contexts, courts consistently have dismissed the theory that government knowledge of wrongdoing itself vitiates liability of those who perpetrate the wrongful, fraudulent practice. Indeed, the government's knowledge of a fraud does not absolve a defendant from liability under the federal False Claims Act. *See United States of America ex rel. Kriendler & Kreindler v. United Technologies Corporation*, 985 F.2d 1146, 1148 (2d Cir. 1993) (Expressly rejecting the contention that government knowledge of the falsity of a claim automatically bars an action False Claims Act action); *U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F. 2d 1416, 1421 (9th Cir. 1991). Government knowledge of wrongdoing does not immunize a defendant from liability under federal False Claims Act, where pleading and proof of scienter by the federal government is a requisite element of the cause of action. It logically follows that in an action brought by a party under CUTPA, which does not have the rigorous pleading requirements of a federal False Claims Act case, far more than mere knowledge on the part of the government is required.

- (C) IT IS NOT CLEAR WHAT PUTATIVE FACTS THE DEFENDANTS SEEK TO HAVE THE COURT INFER FROM THE DOCUMENTS IMPROPERLY ATTACHED TO THE MOTIONS TO STRIKE, LET ALONE WHETHER

THE DOCUMENTS ACTUALLY SUPPORT THE DEFENDANTS'
ARGUMENTS.

The Defendants introduce a variety of audits, reports and surveys regarding drug pricing and average wholesale prices as attachments to their motions to strike, presumably in support of their dubious claim that the State had knowledge of their illicit activity.⁸ It is entirely improper to attach these documents for the Court to consider in the context of a motion to strike. Moreover, even if it were proper for the Defendants to append these audits and surveys to their motions to strike, these audits do not support the either government estoppel defense argument or the more amorphous — and hithertofore unrecognized — “government knowledge” defense.

As emphasized throughout this memorandum, in a motion to strike, the allegations of the complaint must be considered to be true. At this stage of the litigation, the only “knowledge” which can be imputed to the State is the knowledge attributed to the State in the Revised Complaints. Judicial notice that the State had “knowledge” of the reports and audits appended to the Defendants’ motions is entirely inappropriate. “Judicial notice is directed to facts to which the offer of evidence would normally be directed.” *State v. Tomanelli*, 153 Conn. 365, 368, 216 A.2d 625 (1966). “A court may take judicial notice of all matters that are (1) within the knowledge of people generally in the ordinary course of human experience; *Nichols v. Nichols*, 126 Conn. 614, 620, 13 A.2d 591 (1940); or, (2) generally accepted as true and capable of ready and unquestionable demonstration. *State v. Tomanelli* [153 Conn. at 369, 216 A.2d 625]” C. Tait & J. LaPlante, *CONNECTICUT EVIDENCE* (2d Ed. 1988) § 6.2.1, p. 120.” *Parsons v. United Techs.*

⁸ Such documents are necessarily incomplete. They surely do not constitute the entire universe of available information concerning government reimbursements for prescription drugs.

Corp., 243 Conn. 66, 84 & n. 18 (1997)⁹. Although a court may acknowledge the existence of a report or audit, it is not appropriate for a court to take judicial notice of its contents. *See Heritage Village Master Ass’n, Inc. v. Heritage Village Water, Co.*, 30 Conn. App. 693, 701 (1993) (“Although a court may take judicial notice of a file of another action ... information contained in a court file may be used only to prove that such information or documentation exists, not to prove the truth of facts recited or found therein.”) In other words, what *cannot* be presumed as a matter of law from the improperly attached audits and surveys, was that the State had knowledge of all the reports and audits upon which the Defendants rely.

It is entirely unclear, furthermore, what specifically the Defendants seek to have the Court infer from the documents improperly attached to the motions to strike. The attached documents raise many questions regarding the extent of government knowledge of the Defendants’ exhibits, if any. For example, *who* in government purportedly had the knowledge that the Defendants allege? Did only the federal government have the knowledge that Defendants claim, or was it also possessed by the State? Did all of the State’s agencies and departments that work with Medicaid and/or Medicare have the knowledge that the Defendants allege, or just some of them? For example, at the federal level, the HHS Office of the Inspector General is not

⁹ The *Parsons* case is relied upon by the Defendants as legal authority for taking judicial notice of the documents improperly attached to their briefs. All *Parsons* did was acknowledge certain undisputed events to place a complaint in its proper context, to support a holding which reversed the granting of a motion to strike, thereby permitting the case to go forward. *Parsons*, 243 Conn. at 84 & n. 18. A concurring opinion suggested that this “stretched beyond the breaking point the principle that pleadings are to be read broadly and realistically, rather than narrowly and technically”. *Parsons*, 243 Conn. at 90 (Borden, J., concurring). Clearly nothing in *Parsons* permits a party to look beyond the four corners of the complaint to introduce putative facts outside of the record in an effort to strike a complaint.

synonymous with the Department of Justice. At the state level, the General Assembly and executive branch departments are all separate entities. The knowledge that may have been possessed by any one of these federal and/or state entities cannot, as a matter of law, be imputed to others.

Not only do these reports fail to specify or confirm who in the State had knowledge, it is not clear from the attached documents *what* the State is imputed to have known *vis a vis* these questionable price reporting practices. There is a big difference, after all, between knowing that average wholesale prices were generally inflated, and between knowing that the Defendants have so grossly inflated average wholesale prices as part of an underlying deceptive, wrongful and unfair marketing scheme. Sporadic knowledge that reported drug prices were inflated following publication of government studies on average wholesale price reporting does not rise to the level of government acquiescence, which is not even an adequate defense to the State's sovereign enforcement actions under CUTPA.

In the *Lupron* litigation, the defendant pharmaceutical companies appended much of the same documentation to their motions to dismiss the class action cases. Denying those motion to dismiss, the U.S. District Court rejected the invitation by the defendant pharmaceutical companies to infer that Congress, by setting the reimbursement rate at 95% of the published wholesale price following the publication of various government audits and surveys, had approved of the defendants fraudulent pricing scheme:

As defendants portray the Congressional purpose in setting the [Medicare] reimbursement at 95% of AWP, Congress meant to turn a blind eye to the inflated AWP as a means of enticing physicians to treat Medicare patients. In other words, Congress deliberately invited the very fraud of which defendants are accused....*The suggestion that Congress would deliberately condone a bribery*

scheme using public funds to enrich drug manufacturers and physicians is, to say the least, unusual. It is far more likely that by setting the Medicare reimbursement rate below the AWP, Congress took a tentative step towards using the 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 prices will be lower than the median. Congress might reasonably have wished to put Medicare on the lower end of the equation.

In re Lupron Marketing and Sales Practices Litigation, 295 F. Supp. 2d 148, 163 (D. Mass 2003) (emphasis added).

The Defendants have utterly failed to meet the standard for pleading the elements of government estoppel defense. Even if this were not the case, all of the surveys, reports and audits improperly attached to the Defendants' motions simply do not demonstrate that the State "knew" of the deceptive, unfair and wrongful misconduct of the Defendants, who grossly inflated average wholesale prices in an effort to promote their market share for certain drugs resulting in significant harm to the Connecticut Medical Assistance Program and Connecticut Medicare beneficiaries. The Defendants' claims to the contrary do not relieve them from liability under CUTPA.

VI. THE REVISED COMPLAINT PROPERLY ALLEGES THAT CONNECTICUT CONSUMERS WERE DIRECTLY INJURED BY THE DEFENDANTS' CONDUCT.

Some Defendants claim in their motion to strike that the Fifth through Eighth Counts (corresponding to the Twenty-First through Twenty-Fourth Counts for the Warrick/Schering Defendants) — those counts addressing direct harm to Connecticut Medicare beneficiaries — should be stricken since the harm alleged is too remote to be actionable under CUTPA. This argument should be squarely rejected since the Revised Complaints properly alleges direct harm to such consumers.

Defendant's argument relies primarily upon two cases in which the injury was found to be too remote for the plaintiffs to have standing to bring a CUTPA action. *Ganim v. Smith and Wesson Corp.*, 258 Conn. 313, 780 A.2d 98 (2001); *Vacco v. Microsoft Corp.*, 260 Conn. 59, 793 A.2d 1048 (2002). These cases identified three policy factors by which the courts should be guided in determining the issue of the remoteness of the plaintiff's injury.

First, the more indirect an injury is, the more difficult it becomes to determine the amount of plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors. Second, recognizing claims by the indirectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries. Third, struggling with the first two problems is unnecessary where there are directly injured parties who can remedy the harm without these attendant problems.

Ganim v. Smith and Wesson Corp., 258 Conn. at 353; *Vacco v. Microsoft Corp.*, 260 Conn. at 89-90.

Applying these factors to the present case demonstrates that the injury suffered by the Connecticut Medicare beneficiaries is not too remote to be actionable under CUTPA. First, the State has clearly pleaded facts sufficient to show direct injury to consumers which is caused solely by the Defendants' wrongful conduct. The Fifth through Eighth Counts of the Revised Complaints clearly allege that: (1) Medicare uses average wholesale price to determine the amount that a provider will be paid for a drug; (2) that Medicare beneficiaries are responsible for paying 20% of the cost of the drugs¹⁰; (3) Defendants misrepresented the actual average wholesale prices in reporting prices to price reporting services that served as the basis for paying particular claims with knowledge of the reimbursement methodology used by Medicare and with

knowledge that these misrepresentations would actually be used for this purpose; (4) Defendants in fact manipulated the “spread” between the prices they reported and the prices providers actually charged for Defendants’ own drugs and marketed the “spread”; and (5) that as a direct result of this scheme Connecticut Medicare beneficiaries were directly harmed by having to pay such excessive prices out of their own resources.

These clearly are allegations that Connecticut Medicare beneficiaries have been directly harmed by the Defendants’ illicit conduct. In fact, the injury to the Connecticut Medicare beneficiaries is no more remote than the injury to the Connecticut Medical Assistance Program as set forth in the first four counts of the Revised Complaints. Both the State and the Connecticut Medicare beneficiaries actually pay the excessive prices for the Defendants’ drugs as a result of the Defendants’ average wholesale price manipulation. The scheme described in the Revised Complaints does not indicate any other factors which contributed to these injuries other than the Defendants’ wrongdoing.

Applying the second factor, this case does not require the courts to adopt complicated rules to apportion damages among different levels of injured victims. All of the injuries occurred at the same level, to those entities or individuals who made payments to health care providers which included the “spread” resulting from the AWP based formulas used by the Medicaid and Medicare programs. No apportionment of damages is necessary or even possible under the facts as alleged in the complaints.

¹⁰ If the Connecticut Medicare beneficiary is also a participant in the Connecticut Medical Assistance program the State pays this 20%.

Consideration of the third factor is even more compelling. There are no other victims of the Defendants' price manipulation scheme other than those described in the Complaints. The Connecticut Medical Assistance Program, the Medicare program and the Connecticut Medicare beneficiaries are the only ones to make payments directly to the healthcare providers which included the financial incentives resulting from the Defendants' manipulation of the "spread". There are no other injured parties, more directly harmed or otherwise, that can take action to remedy the harms alleged in the complaint. Applying the three factors set forth in *Ganim* and *Vacco* clearly demonstrates that the injuries suffered by the Connecticut Medicare beneficiaries, like those suffered by the State, are sufficiently directly caused by the actions of the Defendants so as to be actionable under CUTPA.

The decisions in *Ganim* and *Vacco* rely heavily on proximate causation principles. *Ganim*, for example, notes that proximate cause and standing are part of the same inquiry. 258 Conn. at 349-50. There is no doubt that the State has standing to bring this action under Conn. Gen. Stat. §§42-110m, 42-110o. There should also be no doubt, as noted above, that the injury alleged in this case is direct injury. Significantly, the only courts to have considered a proximate cause argument in the context of litigation raising average wholesale price issues have squarely rejected such arguments.

The Defendants' arguments are not persuasive. In the private, end-payor context, the harm alleged by Defendants' alleged actions is visited upon the end-payor Plaintiffs, as they have paid directly for the named drugs based on the AWP's. Similar arguments about intervening causes between the setting of an AWP by a defendant and injuries to plans and individual co-payors were recently rejected as "bordering on the frivolous," *In re Lupon Marketing and Sales Practices Litig.*, 295 F. Supp. 2d, 148, 175 (D. Mass. 2003) (Stearns, J.), for "the argument ignores ... the corollary requirement that the intervening act be unforeseeable and

completely independent of any act undertaken by the original actor,” *id.*, a requirement not met in this case.

In re Pharmaceutical Industry Average Wholesale Price Litigation, 307 F. Supp. 2d 196, 207-208 (D. Mass. 2004).

For all of the above reasons it should be clear that this argument should also be rejected.

VII. THE ALLEGATIONS OF THE REVISED COMPLAINTS HAVE BEEN PROPERLY PLEADED.

There are repeated claims throughout Defendants’ briefs that several of the State’s allegations are deficient in one way or another, or are missing sufficient allegations to properly state causes of action. In making such arguments Defendants have failed to properly apply Connecticut rules of pleading.

(A) THE REVISED COMPLAINTS FAIRLY APPRISE DEFENDANTS OF THE CAUSES OF ACTION THEY MUST DEFEND.

The provisions of Conn. Prac. Bk. §10-1 state that “[e]ach pleading shall contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved.” In addition, Conn. Prac. Bk. §10-2 requires that pleadings be such “as fairly to apprise the adverse party of the state of the state of facts of which it is intended to prove.” These Rules of Practice must be read and applied in a manner consistent with the “modern trend, which is followed in Connecticut, ... to construe pleadings *broadly and realistically, rather than narrowly and technically.*” (Emphasis added.) *Dornfried v. October Twenty-Four, Inc.*, 230 Conn. 622, 629, 646 A.2d 772 (1994); *see also Normand Josef Enterprises, Inc. v. Connecticut National Bank*, 230 Conn. 486, 496 (1994). As the Connecticut Supreme Court explicitly recognized in *Dornfried*:

The complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties *As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party*, [this Court] will not conclude that the complaint is insufficient to allow recovery.... (Emphasis added.) (Citations omitted; internal quotation marks omitted.)

Dornfried v. October Twenty-Four, Inc., 230 Conn. at 629.

The fundamental purpose of fact pleading requirements thus “is to prevent surprise to the defendant.” *Todd v. Glines* 217 Conn. 1, 10, 583 A. 2d 1287 (1991). “The test is not whether the pleading discloses all that the adversary desires to know in aid of his own cause, but whether it discloses the material facts which constitute the cause of action or ground of defense.” *Killeen v. General Motors Corp.*, 36 Conn. Supp. 347, 421 A. 2d 874 (1980).

A review of the Revised Complaints at issue here unambiguously shows that the allegations provide more than ample notice of the issues to be determined at trial. Indeed, the Defendants are hard pressed to claim any surprise or prejudice by the specific allegations of the Revised Complaints against them. The allegations of the Revised Complaints put the Defendants on fair notice that they have engaged in violations of CUTPA by artificially inflating drug costs incurred by the State through the administration of its Medical Assistance Program, including Medicaid. The Revised Complaints further allege that these practices severely harmed Connecticut consumers who are Medicare beneficiaries. The allegations make clear that the defendants knowingly have artificially inflated the AWP and other pricing information related to drugs that they manufactured, thereby harming the State and Connecticut Medicare beneficiaries.

The State at all times possesses the right to plead its case as it chooses, rather than as the defendants would prefer. *See Burgess v. Vanguard Ins. Co.*, 192 Conn. 124, 127 (1984) (“[u]nder

our adversary system, a party may not be compelled to become his opponent's amanuensis."); *Freeman's Appeal*, 71 Conn. 708, 714 (1899) ("[a] party [is] permitted to put his case before the court in his own way, rather than that which his antagonist might prefer.") The requirements that fact pleading imposes must be applied in harmony with the principle that the State, as plaintiff, is the master of its claims, and in light of the modern trend followed by Connecticut courts to construe all pleadings broadly and realistically, rather than narrowly and technically. The Revised Complaints at issue here meet the fact pleading requirements. The defendants' attempt to strike these claims should be rejected.

(B) ALLEGATIONS UNDER CUTPA DO NOT NEED TO BE PLED WITH PARTICULARITY.

The Connecticut Supreme Court recently has considered and rejected the proposition that a case under CUTPA needs to be pleaded "with particularity". In *Macomber v. Travelers Property and Cas. Corp.*, 261 Conn. 620 (2002), the Defendants argued that a CUTPA claim was not pleaded with sufficient particularity.¹¹ Rejecting the Defendants' contention in this regard, the Court explicitly held that it was "unpersuaded that there is any special requirement of pleading particularity connected with a CUTPA claim, over and above any other claim." *Macomber*, 261 Conn. at 644.

Applying the *Macomber* holding to these cases should lead this Court to the ineluctable conclusion that there is no special rule of "pleading with particularity" that is applicable to these

¹¹Specifically, the defendants argued that the "plaintiffs' allegation that the '[d]efendants used and employed unfair and deceptive acts and practices in connection with the solicitation and entering into of structured settlements in connection with the sale of annuities' was insufficient for [the] court to evaluate the claim." *Macomber*, 261 Conn. at 643-44.

cases brought under CUTPA. The Defendants have not, and cannot, point to any exception to the *Macomber* rule that would warrant the deviation they request. Rather, the Revised Complaints properly plead all of the elements of CUTPA, as discussed in Part IV of this brief.

(C) ALLEGATIONS UNDER CUTPA ARE NOT ALLEGATIONS OF FRAUD.

The Defendants' assertion that "pleading with particularity" applies to these cases is based on the faulty premise that the Revised Complaints allege "fraud." Connecticut case law is very clear that allegations of unfair and/or deceptive trade practices under CUTPA are very different from allegations of fraud.

The provisions of CUTPA have been described variously by the Connecticut Supreme Court as "expansive" and "as establishing 'an action more flexible and a remedy more complete than did the common law.'" *Associated Inv. Co. Ltd. Partnership v. Williams Associates IV*, 230 Conn. 148, 156 (1994); *Hinchliffe v. American Motors Corp.*, 184 Conn. 607, 617 (1981). CUTPA is a remedial measure to be construed liberally in order to effectuate its public policy goals. *Sportsmen's Boating Corp. v. Hensly*, 192 Conn. 747, 756 (1984); *Willow Springs Condominium Ass'n, Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 40 (1998). "[T]he expansive language of CUTPA prohibits unfair or deceptive trade practices without requiring proof of intent to deceive, to defraud or to mislead." (Citations omitted) *Associated Inv. Co. Ltd. Partnership v. Williams Associates IV*, 230 Conn. 148, 158 (1994).

Federal courts applying CUTPA also have recognized that "[f]raud ... is not a necessary element for a claim under the CUTPA, which is broader in scope than traditional common law remedies for fraud." *Federal Paper Bd. Co., Inc. v. Amata*, 693 F. Supp. 1376, 1390 (D. Conn.

1988). In *Omega Engineering, Inc. v. Eastman Kodak Co.*, 908 F. Supp. 1084, (D. Conn. 1995), a Connecticut federal District Court noted:

Unlike fraud, [citation omitted] CUTPA does not require proof that the defendant knew of a representation's falsity, *Web Press Servs. Corp. v. New London Motors, Inc.*, 203 Conn. 342, 362-63, 525 A.2d 57, 67-68 (1987), or intended to deceive the plaintiff, *Cheshire Mortgage Serv., Inc.*, 223 Conn. at 106, 612 A.2d at 1144....

Omega Engineering, Inc. v. Eastman Kodak Co., 908 F. Supp. 1084, 1099 – 1100 (D. Conn. 1995).

Thus, it is clear from the case law that CUTPA cases are not “fraud” cases. As such, the defendants’ claim that “pleading with particularity” applies to these actions brought under CUTPA, necessarily should fail.

VIII. THIS ACTION IS NEITHER BARRED NOR LIMITED IN ANY FASHION BY A STATUTE OF LIMITATIONS.

The Dey/Roxane joint Motion to Strike claims that Conn. Gen. Stat. § 42-110g(f) is a statute of limitations which bars and/or limits this action. For the reasons set forth in greater depth in Part VIII of the brief concerning the Dey/Roxane Motion to Strike, which arguments are incorporated here, the statute of limitations argument is plainly wrong for the following reasons: (1) the specific statute referred to by Defendants simply has no bearing on the causes of action pleaded by the State; (2) there is no statute of limitations applicable to a CUTPA action brought by the State; and, (3) it is generally inappropriate to raise statute of limitations issues in a motion to strike.

IX. THE REVISED COMPLAINTS PROPERLY ALLEGE THE IMPACT OF THE DEFENDANTS' MANIPULATION OF THE "SPREAD" BETWEEN THE REPORTED AVERAGE WHOLESALE PRICE AND THE ACTUAL AVERAGE COST OF DRUGS.

Significant portions of the Revised Complaints contain allegations concerning the impact of the Defendants' manipulation of the "spread" between the reporter average wholesale price and the actual average cost of Defendants' drugs. This is discussed in depth in *all* of the allegations of §II(B) of the First Count and §II(B) of the Fifth Count of all of the Complaints. Notwithstanding these allegations, and the fact that they clearly put the Defendants on notice of the materials facts of the causes of action, Defendant Aventis Pharmaceuticals, Inc., claims that ¶26 of the First Count and ¶26 of the Fifth Count of the Aventis Revised Complaint, with corresponding Table 2-1 & Table 4-1, looked at in isolation, are insufficient to allege the impact of the spread.

While Aventis describes the revisions to ¶26 of the Aventis Complaint as "minor" there was actually a significant revision. The original version of ¶26 indicated that the tables "attached to this complaint provides illustrative examples of the inflated AWP's of the defendant and the impact of those AWP's on the 'spread.'" The revised version of ¶26 indicates that the tables "attached to this complaint illustrates the inflated AWP's of the defendant and the impact of those AWP's on the 'spread' *for the drugs identified in said table.*" (Emphasis added). This revision was consistent with revisions made elsewhere in the Aventis Revised Complaint to describe the State's claims only in the context of those drugs specifically identified in the Aventis Revised Complaint — the primary revision required by the court's orders on the requests to revise.

More importantly, the "spread" allegations of the Complaints squarely fall within the pleading rules more fully described in Part VII of this brief. "As long as the pleadings provide

sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, [this Court] will not conclude that the complaint is insufficient to allow recovery....” *Dornfried v. October Twenty-Four, Inc.*, 230 Conn. 622, 629 (1994). Pleadings are not supposed to contain the evidence by which they are to be proved. Conn. Prac. Bk. §10-1.

The Complaints clearly provide sufficient notice of the State’s claims that Defendants’ manipulation of the “spread” between the reported average wholesale price and the actual average wholesale price caused significant harm for the Defendants’ to defend, without improperly pleading the specific evidence of each and every spread during each and every time period. Accordingly, this is simply not a proper ground for granting a motion to strike.

X. CONCLUSION

For all of the foregoing reasons, this Court should conclude that the Defendants’ motions to strike each of these related cases lack merit. Accordingly, the motions to strike should be DENIED in their entirety.

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CERTIFICATION

I hereby certify that a copy of the foregoing MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE was mailed or electronically delivered in accordance with Conn. Prac. Bk. §10-12 on this 16th day of June, 2004, to all counsel of record in this and related cases, as follows:

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