Docket # X07 CV03 – 0083297 S (CLD)

STATE OF CONNECTICUT	:	SUPERIOR COURT
	:	
v.	:	COMPLEX LITIGATION DOCKET
	:	AT TOLLAND
	:	
PHARMACIA CORPORATION	:	JUNE 16, 2004

MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE[1]

I. INTRODUCTION

The State of Connecticut ("State") has brought four separate sovereign enforcement actions against several defendant pharmaceutical companies[2] pursuant to the State's police powers under Conn. Gen. Stat. §§ 42-110m and 42-110o of the Connecticut Unfair Trade 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.

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[1]The 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.

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

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]

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[3]These 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

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.

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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.

[4]One 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 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.

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 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, First Count ¶5. 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, First Count ¶14. 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, Fifth Count ¶12. 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, Fifth Count ¶16. 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, First Count ¶¶18-19; Revised Complaint, Fifth Count ¶¶17-18.

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, First Count ¶21; Revised Complaint, Fifth Count ¶20. 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, First Count ¶25; Revised Complaint, Fifth Count ¶24. 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, First Count ¶¶23-24; Revised Complaint, Fifth Count ¶¶22-23. 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, First Count ¶¶23-24; Revised Complaint, Fifth Count ¶¶22-23. 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, First Count ¶¶25, 33; Revised Complaint, Fifth Count ¶¶30, 32.

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 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.

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).

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 3rd, 4th, 7th and 8th Counts comprise the "unfairness" claims under CUTPA, and the 1st, 2nd, 5th and 6th Counts comprise the "deception" claims under CUTPA. All counts contain allegations of all elements necessary to state valid claims under CUTPA.

(A) THE REVISED COMPLAINTS IN ALL FOUR CASES MAKE SUFFICIENT ALLEGATIONS OF "UNFAIR TRADE PRACTICES" UNDER CUTPA.

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 has, in turn, applied the third or "substantial injury" prong of the cigarette rule by considering three sub-factors: (1) the injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and (3) it must not be an injury that consumers themselves could reasonably have avoided. *See Williams Ford, Inc. v. Hartford Courant Co.*, 232 Conn. 559, 591-92 (1995).

Moreover, "[w]hether a practice is unfair and thus violates CUTPA is an issue of fact." (Citations omitted.) *Willow Springs*, 245 Conn. at 43.

The Defendants argue that the State has failed to allege a legally sufficient unfairness cause of action because the State has purportedly failed to plead sufficient facts that would satisfy the third prong of the unfairness test noted above; namely, that the alleged harm could not have been reasonably avoided and that the purported injury is not outweighed by any countervailing benefits to consumers or competition that the practice produces (the so-called "substantial consumer injury" prong). The Defendants contend that the State did not allege

substantial consumer injury, that the State has not properly pleaded the requisite elements of an unfairness claim, and therefore move the Court to strike such claims from the State's Revised Complaints (Counts 3, 4, 7 and 8). The Defendants err as a matter of pleading and of law.

First and foremost, the State has sufficiently pleaded facts to support each of the three prongs of the unfairness test including substantial consumer injury. In so doing, it is not necessary that the State plead its cause of action with particularity or to use the exact language of each of the three prongs or sub prongs. *Macomber v. Travelers Property and Cas. Corp.*, 261 Conn. 620, 644 (2002). The Revised Complaints contain detailed allegations concerning unfairness with respect to drug pricing that affect the Connecticut Medical Assistance Program (3rd and 4th Counts) and consumers who are Medicare beneficiaries (7th and 8th Counts). These allegations clearly are tied into the three elements for a "unfairness" claim under CUTPA, as follows: (1) the Revised Complaints allege that the drug pricing practices offend public policy as embodied in Conn. Gen. Stat. §53a-161d; (2) the Revised Complaints allege that the defendants' practices were immoral, unethical, oppressive, or unscrupulous; and (3) the Revised Complaints allege substantial injury.

(1) Public policy.

The State alleges that the Defendants' conduct violates the public policy set forth in §53a-161d of the General Statutes. (Revised Complaint, Third Count ¶¶35; Revised Complaint, Seventh Count ¶¶34). This section establishes a class D felony for the payment of money or any benefit to a person in order to influence their purchase of goods for which reimbursement is claimed from a federal or state agency.

The State's Revised Complaints describes a scheme whereby health care providers are paid financial incentives over and above their purchase costs in order to try to influence them to purchase the Defendants' pharmaceutical products. The Defendants control the amount of these financial payments, referred to as the "spread" primarily through their manipulation of the average wholesale prices they report to a number of reporting services, knowing that state and federal agencies will use these reported average wholesale prices in calculating the amounts of the payments to be paid to health care providers. The health care providers actually receive these payments by submitting claims to the Connecticut Medical Assistance Program and for Medicare claims for which Connecticut Medicare beneficiaries are responsible for copays.

If the Defendants simply made direct cash payments to the health care providers in the amount of the spread, in order to influence them to purchase their respective products, it would constitute a kickback in violation of Conn. Gen. Stat. §53a-161d. The insidiousness of the Defendants' scheme, as clearly set forth in the Revised Complaints, is that the Defendants do not make these payments directly. Rather, they use taxpayer monies instead of their own funds. They can increase the amount of the financial incentive by falsely reporting a higher average wholesale price for a product while keeping the actual wholesale price at a constant level. This is done with full knowledge of the effect of the reporting of false average wholesale prices. In fact, the Defendants use the amount of the spread as a marketing tool to sell their products. Such conduct surely violates the public policy against kickbacks embodied in Conn. Gen. Stat. §53a-161d.

(2) Immoral, unethical, oppressive, or unscrupulous conduct.

The Revised Complaints allege that the Defendants engage in a practice which is fundamentally dishonest. The Defendants report false average wholesale prices for their products which bear no connection to the actual wholesale prices for such products. These misrepresentations are made with full knowledge that they will cause the Connecticut Medical Assistance Program, as well as elderly Connecticut consumers who are Medicare Part B participants, to pay higher prices for these prescription drugs. This conduct meets every part of the second prong of the unfairness test.

(3) Substantial injury.

There should be no doubt that the first factor in this prong of the unfairness test, that the injury must be substantial, is met in this case. As a direct result of the Defendants' average wholesale price manipulation the Connecticut Medical Assistance Program, as well as Connecticut Medicare beneficiaries all pay significantly higher prices for their prescription drugs. (See examples provided in the Table 2-1 and Table 4-1 attached to the Revised Complaints of the amount of the spread and the amount of the overcharges).

The Defendants have argued that the Revised Complaints do not satisfy the second factor in that they do not plead that the harm suffered is not outweighed by countervailing benefits to consumers or to competition. In this case, the "consumers" are those who pay for the Defendants' drugs: the Connecticut Medical Assistance Program, as well as Connecticut Medicare beneficiaries. The Revised Complaints clearly set forth how the Defendants' practice of artificially inflating the average wholesale prices they submit to the reporting services conveys

no benefit on these consumers. By causing the payments to health care providers to increase under the existing reimbursement formulas, this practice results only in significant harm to consumers.

The lack of any benefit to competition arising from this practice is also evident from the Revised Complaints. Open and honest competition ordinarily has the effect of keeping prices at a reasonable level. Yet, the Defendants' scheme of average wholesale price manipulation effectively turned the traditional concept of competition on its head. Instead of competing for market share by competitive pricing, the Defendants' scheme involves competition for who can create the most favorable financial incentives to influence health care providers to buy their products. Under this scheme, as the Defendants create greater financial incentives for health care providers, the price paid by the Connecticut Medical Assistance Program, as well as Connecticut Medicare beneficiaries, increases. The purpose of honest competition is effectively undermined in that the Defendants try to sell more products by increasing their incentives and thereby increasing, rather than lowering, their prices. Thus, the allegations in the Revised Complaints set forth a scheme which causes substantial injury to consumers and to competition without being outweighed by any countervailing benefits.

Moreover, the State's complaints more than amply plead sufficient facts to establish that consumer injury could not reasonably have been avoided. The rationale for the "unavoidability of injury" test is that the Defendants should not be held liable, after-the-fact, for erroneous market decisions made by fully-informed consumers. Where, however, the defendants interfere with the information available to consumers and, thus, upset the operation of the free market, consumers cannot be deemed solely responsible for their injury. The Defendants should properly

be held liable for the consumer injury resulting from purchasing decisions that are based on erroneous information supplied by the defendants. As the Federal Trade Commission has explained:

> We assume that consumers will survey the available alternatives, choose those that are the most desirable, and avoid those that are inadequate or unsatisfactory. However, it has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary. Most of the Commission's unfairness matters are brought, not to second guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes an advantage of an obstacle to the free exercise of consumer decision making. Sellers may adopt a number of practices that unjustifiably hinder such free market decisions. Some may withhold or fail to generate critical price or performance data, for example, leaving buyers with insufficient information for informed comparisons. ... Each of these practices undermines an essential precondition to a free and informed consumer transaction, and, in turn, to a well functioning market. Each of them is therefore properly banned as an unfair practice under the FTC Act.

Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), *reprinted in* Antitrust and Trade Regulation Reporter (CCH) ¶ 13,203 at 20,909.[5]

Federal courts reviewing claims of substantial consumer injury have regularly held that consumers could not reasonably have avoided injury when material information was withheld by the defendant. *Orkin Exterminating Co. v. FTC*, 849 F. 2d 1354, 1366 (11th Cir. 1988) (in action for breach of defendant's lifetime price guarantees, "it was proper for the Commission to decide summarily that" consumers could not reasonably have avoided injury where defendant withheld material information from its customers since "consumer information is central to this prong of

[5] The analysis set forth in this letter from the FTC formed the basis for the Connecticut Supreme Court's creation of a three-part test to measure whether the "substantial injury" prong of the cigarette rule has been met. *See McLaughlin Ford, Inc. v. Ford Motor Co.*, 192 Conn. 558, 569-70 (1984).

the unfairness issue"); *American Financial Services v. FTC*, 767 F.2d 957, 979-80 n. 27 (D.C. Cir. 1985) (noting that withholding material information is unfair because it causes consumer to bear a larger risk than an efficient market would require); *In re International Harvester*, 104 F.T.C. 949 (1984) (consumers could not have reasonably avoided injury where manufacturer failed to disclosed safely hazard known to manufacturer).

The Revised Complaints in these cases specifically allege facts that show the "unavoidability of injury" consistent with the interpretation of that requirement by the FTC and federal courts. The complaints describe how the Defendants submitted prices to reporting services which they called their average wholesale prices. The prices reported were false in that they did not reflect the actual average wholesale prices paid by healthcare providers for the Defendants' pharmaceutical products. The actual wholesale prices were substantially lower than the reported prices and were not publicly disclosed. The Defendants' combination of reporting false prices and witholding other truthful price information caused the Connecticut Medical Assistance Program and the federal Medicare program to establish exessively high payments to healthcare providers for the Defendants' products. Due to the deceptive nature of the Defendants' price manipulation, the state and federal programs could not formulate more accurate payments. Certainly the Medicare part B beneficiaries, who relied on the Medicare formulation to determine the amount of their copays could not, through any action on their part, have avoided the financial injury they suffered.

Connecticut Supreme Court decisions construing the "unfairness" test under CUTPA are absolutely explicit that it is not necessary to meet all three prongs of the test in order to establish a CUTPA violation. "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." *Fink v. Golenbeck*, 238 Conn. 183, 238 (1996) (quoting *Cheshire Mortgage Service, Inc. v. Montes*, 223 Conn. 80, 105-06 (1992).

Consistent with this well-established rule, the Connecticut Supreme Court regularly has found CUTPA violations where the plaintiff has proven only one or two of the three prongs of the standard, with and/or without demonstration of "substantial consumer injury." *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 507-08 (1995) (first and second prongs only); *Dow & Condon, Inc. v. Anderson*, 203 Conn. 475, 484 (1987) (second prong only); *Conaway v. Prestia*, 191 Conn. 484, 493 (1983) (first prong only); *Cheshire Mortgage Service, Inc. v. Montes*, 223 Conn. at 112-13 (first and third prongs only).

Indeed, the Appellate Court has expressly held that a CUTPA plaintiff may prevail on a CUTPA claim by establishing one prong of the cigarette rule even if he does not also prove that his injury could not reasonably have been avoided:

> The defendants next claim that the jury verdict on the CUTPA count is contrary to the evidence because the plaintiffs did not prove that their injury could not reasonably be avoided. The third criteria of the cigarette rule, the substantial injury factor, is satisfied only if an injury is substantial, is not outweighed by any countervailing benefits to consumers or competition that the practice produces, and could not reasonably be avoided … Because we have concluded that the plaintiffs needed to establish only one of the cigarette rule criteria, it was not necessary for the plaintiffs to prove a substantial injury.

Meyers v. Cornwell Quality Tools, Inc., 41 Conn. App. 19, 35 (1996).

There is plainly no requirement that the State plead facts to support the sub-prongs of the "substantial consumer injury" test as Connecticut law does not require the State to *prove* "substantial consumer injury" in order to establish a viable CUTPA action. Thus, Defendants'

Motion to Strike plaintiff's CUTPA counts based on the purported failure to plead facts to support those sub-prongs should be denied.[6]

Moreover, the Defendants argue that because the Federal Trace Commission and the federal courts have done away with the first and second prongs of the "cigarette rule," namely the public policy and unethical behavior prongs, respectively, and because the statutory language of CUTPA states that Connecticut courts shall be guided by interpretations of the FTC and the federal courts, that the State must therefore base its unfairness claims exclusively on the third prong (substantial injury). This argument is flawed because Connecticut courts have never held

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[6]The Defendants rely on *McLaughlin Ford, Inc. v. Ford Motor Co*., 192 Conn. 558, 473 A.2d 1185 (1984) and *Williams Ford, Inc. v. Hartford Courant Co*., 232 Conn. 559, 657 A.2d 212 (1995) for the proposition that any Complaint that asserts substantial injury must plead appropriate factual allegations in the Complaint lest it be deemed legally deficient. Defendants have overstated the holdings in these two cases. First, these cases did not concern pleading standards but the legal proof necessary for establishing a CUTPA violation. Second, in both cases, substantial consumer injury was a necessary factor to establish a CUTPA violation, due to the particular facts and claims in these two cases, and did not establish a generally applicable rule for all CUTPA unfairness cases. In *McLaughlin Ford*, the Plaintiff had failed to meet the first two prongs of the test, so the substantial injury inquiry was the only prong remaining to establish a CUTPA violation. In contrast to *McLaughlin Ford*, this case has alleged violations of all three prongs of the test. In *Williams Ford*, the court was simply applying the rule that a CUTPA cause of action cannot stand if the public policy prong is based in the negligence of the defendant and if the plaintiff was contributorily negligent. The courts have ruled that if the public policy prong is based in negligence, the plaintiff should establish that it could not have reasonably avoided the injury, thereby making the one element of the substantial injury test necessary. In contrast to *Williams Ford*, these cases do not base their public policy violation in negligence; rather, they are based *inter alia* in violations of the public policy against paying a financial benefit to individuals to influence them to purchase goods for which they will be reimbursed by a state agency, as set forth in Conn. Gen. Stat. §53a-165.

that they are bound by the decisions of the FTC and federal courts with respect to CUTPA.[7] In fact, the courts have reached the exact opposite conclusion.

> Although the guidance provided by federal law will often be enlightening, federal law is not a straightjacket. In *Caldor, Inc. v. Heslin*, 215 Conn. 590, 577 A.2d 1009 (1990), cert. denied, 498 U.S. 1088, 111 S.Ct. 966, 112 L.Ed.2d 1053 (1991), our Supreme Court held that that the judgments of our courts are not limited by §5 of the Federal Trade Commission Act. "As originally enacted, [CUTPA] provided that state unfair or deceptive acts or practices were to be those determined to be unfair or deceptive by the [Federal Trade Commission] or the federal courts. 1973 Pub. Acts 615, §2(a). However, the Act was amended in 1976 to provide only that courts in Connecticut [and the department of consumer protection] were to be 'guided by' federal interpretations of §5 of the [Federal Trade Commission Act]. The purpose of the change apparently was to permit ... practices which had not yet been specifically declared unlawful by federal authorities to be nevertheless unlawful under CUTPA.... *Bailey Employment System, Inc. v. Hahn*, 545 F.Supp. 62, 71 (D.Conn.1982) [aff'd, 723 F.2d 895 (2d Cir.1983)]." (Internal quotation marks omitted.) *Caldor, Inc. v. Heslin*, supra, at 598, 577 A.2d 1009. In other words, federal law sets a floor for Connecticut law, but not a ceiling.

Johnson Electric Co., Inc. v. Salce Contracting Associates, Inc., 72 Conn. App. 342, 352 (2002).

Therefore, the Defendants' argument that the first and second prongs of the legal test set forth in numerous Connecticut appellate decisions should not be considered by this Court, is unfounded.

(B) THE REVISED COMPLAINTS IN ALL FOUR CASES MAKE SUFFICIENT ALLEGATIONS OF "DECEPTIVE TRADE PRACTICES" UNDER CUTPA.

The provisions of CUTPA also may be used to attack deceptive conduct. Analysis for "deception" focuses solely upon the act or practice that is questioned. The Connecticut Supreme

[7] Indeed, the Defendants acknowledge that they do not have any Connecticut appellate level support for such a claim.

Court has looked to the approach taken by federal courts in considering "deception" claims in determining how such claims may be made under CUTPA:

> The federal courts have determined that an act or practice is *deceptive* if three requirements are met. *First*, there must be a representation, omission, or other practice likely to mislead consumers. *Second*, the consumers must interpret the message reasonably under the circumstances. *Third*, the misleading representation, omission, or practice must be material — that is, likely to affect consumer decisions or conduct." *Figgie International, Inc.*, 107 F.T.C. 313, 374 (1986). [Emphasis added].

Caldor v. Heslin, 215 Conn. 590, 597 (1990).

(1) The State Has Clearly Alleged All Three Elements Of A Deception Claim Under CUTPA.

The Revised Complaint contains allegations addressing each element of a deception claim under CUTPA. To sufficiently assert its deception claim under CUTPA, the State need only allege three things: (1) a representation, omission, or other practice likely to mislead consumers; (2) that consumers have interpreted the message reasonably under the circumstances; and (3) that the misleading representation, omission, or practice was material, i.e., "likely to affect consumer decisions or conduct." *Caldor, Inc. v. Heslin*, 215 Conn. 590, 597 (1990). Here, the State has alleged all of those elements in its Revised Complaint. It has thus asserted a legally sufficient deception claim under CUTPA. The Court should therefore deny the Defendants' Motion to Strike as to the State's deception claim.

With respect to the first element, the Revised Complaint describes precisely how the Defendants' misreporting of actual average wholesale prices of their own drugs resulted in the Connecticut Medical Assistance Program as well as Connecticut Medicare beneficiaries paying excessively high amounts for such drugs. Specifically, it details how the Defendants artificially

inflated average wholesale prices when representing to the reporting services the pricing information for the pharmaceutical products the Defendants manufacture, sell and distribute. *See* Pharmacia Revised Complaint, First Count, ¶2 and Table 2-1. It also explains how, pursuant to the regulatory mandates in Regulations of Connecticut State Agencies §§17-134d-81b(1), 17b-262-685(2) and 17b-262-685 (12), the Connecticut Medical Assistance Program, which is administered by DSS, must look to those official reporting services to determine the average wholesale prices of certain drugs manufactured, sold and distributed by the Defendants. Pharmacia Revised Complaint, First Count, ¶¶11-17. The Connecticut Medical Assistance Program then uses those average wholesale prices, as represented by the Defendants to those official reporting services, in calculating its reimbursements to physicians, pharmacies and other health care providers that dispense the drugs to the low income and/or disabled Connecticut consumers who represent the Program's recipients.

Additionally, the Revised Complaints explain that the federal Medicare program also relies on the reporting of average wholesale prices, pursuant to 42 CFR §405.517(c), "… in determining the amount that a provider will be paid for a drug." Revised Complaint, Fifth Count ¶¶11-16. According to the allegations, Connecticut Medicare beneficiaries contribute a portion of Medicare's reimbursements to health care providers who provide them with drugs.[8] Moreover, the Revised Complaints allege that the Defendants "… knew that the AWPs they reported to the price reporting services were the AWPs that would be reported to state and

[8]Where the Connecticut Medicare beneficiary is also a Connecticut Medical Assistance Program recipient, the Medicare co-pay is borne by the Connecticut Medical Assistance Program.

federal government health care programs, including [the Connecticut Medical Assistance Program]…." Revised Complaint, First Count ¶20.

The Revised Complaints also satisfy the second element necessary to sufficiently allege a deception claim under CUTPA in that it alleges facts that demonstrate that the State reasonably interpreted the Defendants' representations about the average wholesale prices of their drugs. *See Heslin*, 215 Conn. at 597. Specifically, they describe that the Defendants made or caused to be made representations to all the major reporting services that the prices submitted were the average wholesale prices of their products.[9] Revised Complaint, First Count ¶29; Revised Complaint, Fifth Count ¶19. When a manufacturer submits a price to the reporting services which it calls its "average wholesale price", it is entirely reasonable for the State to give the price the meaning it is represented to have. Although the State does not expressly use the words "reasonable interpretation" in its description of the Defendants' violations, there is no requirement that the exact language of every factor for each element of CUTPA be specifically pleaded. *Macomber v. Travelers Property and Cas. Corp.*, 261 Conn. 620, 644 (2002). The State's reasonable interpretation of the Defendant's representations is necessarily inferred or

[9]While the Defendants liken this price to the term "sticker price", the sticker price usually refers to the "manufacturer's *suggested* retail price". The term itself discloses that this price is only suggested and does not necessarily reflect an actual price. In this case, the Defendants represented their prices to be the "average wholesale prices" not the "suggested" retail prices. In addition the term "average" in its ordinary and common meaning indicates a mathematical computation based on a series or compilation of figures. Nothing about the term "average wholesale price" suggests that it is a single artificial and arbitrary figure created by the manufacturer. Defendants' arguments are also entirely inconsistent with the fact that "average wholesale price" is a defined term in Connecticut regulations. Regulations of Connecticut State Agencies §§17-134d-81b(1), 17b-262-685(2), 17b-262-685(12).

implied in the facts alleged. *Clohessy*, 237 Conn. at 33 n.4 ("what is necessarily implied need not be expressly alleged.").

Finally, the State has alleged that the misrepresentations regarding average wholesale prices were made expressly by Defendants. Specifically, the Revised Complaint asserts that the Defendants directly misreported the AWPs of their own drugs to the official reporting services. Revised Complaint, First Count, ¶29; Revised Complaint, Fifth Count, ¶19. This allegation alone satisfies the third element of a deception claim, the requirement that the Defendants' misrepresentations were material to the transaction, because the Court presumes materiality in all such express misrepresentations. *See In re Cliffdale Associates, Inc.*, 103 F.T.C. 110 (FTC 1984).

The State has thus plainly alleged all three elements of a valid deception claim under CUTPA. The Revised Complaint therefore asserts a legally sufficient cause of action under CUTPA and, accordingly, the Motion to Strike should be denied.

(2) The Defendants Seek To Have The Court Broaden Its Scope Of Review Well Beyond What Is Proper For A Motion To Strike.

The Defendants seek to convince this Court to strike the State's deception claim under CUTPA from the Revised Complaints on the grounds that the Defendants do not believe that the State can prove the deception.[10] For instance, they argue that the State had no valid reason to rely on their misrepresentations,[11] and that the State could have reasonably avoided the harm that

[10]Of course, for the reasons noted in Part II of the brief, *supra*, the well pleaded allegations of the complaint are deemed to be true for the purposes of the motion to strike. Accordingly, at this stage of the proceedings, the deception pled is deemed to be true.

[11] It also should be noted that the courts have specifically held that reliance is not a necessary element of a cause of action under CUTPA. *Associated Investment Co. Ltd. Partnership v.*

resulted from its reliance on their misrepresentations.[12] They also contend that that the State cannot establish that their misrepresentations adversely affected the Program's recipients. The Court should reject Defendants' invitation to stray into evidentiary matters, and limit its analysis strictly to the legal sufficiency of the claim in denying the Motion to Strike. *See Comm'r of Labor v. C.J.M. Servs.*, 268 Conn. 283, 292-93 (2004).

Under the prescribed standards, a court will only strike those claims that, even if proven, would not entitle the claimant to relief. *See O'Brien v. Stolt-Nielson Transp. Group*, 48 Conn. Supp. 200, 213 (Conn. Super. Ct., June 13, 2003) ("A motion to strike may only raise issues limited to the legal viability of allegations set forth in the pleading sought to be stricken. It bears repeating that a trial court should not make factual findings in determining a motion to strike."), *citing Vacco v. Microsoft Corp.*, 260 Conn. 59, 64-65 (2002). Here, the Court would need to make factual findings to determine whether the State had a reasonable basis for relying on the Defendants' misrepresentations, or whether the State could have reasonably avoided the harm that resulted from its reliance on the misrepresentations, or whether the State can establish that the misrepresentation adversely affected the Program's recipients. Because such an analysis is inapposite to the review of the legal sufficiency of the Revised Complaints, the court should reject the Defendants' arguments and deny their Motion to Strike.

Williams Associates IV, 230 Conn. 148, 158 (1994); *Hinchliffe v. American Motors Corp.*, 184 Conn. 607, 617 (1981).

[12] Whether the harm or injury could reasonably have been avoided is one of several factors that the Court may consider in determining the existence of a cause of action under the third prong of the *unfairness* standard, as discussed fully in the previous section. It is not a consideration for determining whether a cause of action under the *deception* standard has been sufficiently pleaded.

(C) THE STATE IS NOT REQUIRED TO ALLEGE THAT IT REASONABLY COULD NOT HAVE AVOIDED THE INJURIES SUFFERED TO PROPERLY STATE A DECEPTION CLAIM UNDER CUTPA.

The motions to strike suggest that the State failed to allege that the State could not have reasonably avoided the alleged injuries set forth in its deception counts. There is simply no requirement for a CUTPA cause of action under the deception test.

First, the Defendants have improperly cast the applicable legal standard to be different from what it actually is. Connecticut case law states the element at issue in the deception test as whether "the consumers … interpret the message reasonably under the circumstances.…" *Caldor v. Heslin*, 215 Conn. 590, 597 (1990). The Defendants have mischaracterized this element as requiring the State to plead and prove that the harm purportedly caused by Pharmacia's allegedly deceptive conduct could not have been reasonably avoided. This simply is not an accurate characterization of the applicable element and should therefore be summarily rejected. As noted above, this element focuses on the wrongdoer's deception and the reasonable interpretation of claims themselves, rather than the reasonableness of "a consumer's decision to accept or believe in a particular claim." *In re International Harvester*, 104 F.T.C. 949, 1056 n.21 (1984). In this respect the consumer's actions are irrelevant. Rather, the focus is on the alleged wrongdoer's deception.

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. This is really an estoppel argument in disguise.

Generally estoppel may not be invoked against the government. *Chotkowski v. State*, 240 Conn. 246, 268 (1997). Moreover, courts which have considered "government knowledge" arguments similar to those made by the Defendants here have squarely rejected them. *See e.g.*: *In re Lupron Marketing and Sales Practices Litigation*, 295 F. Supp. 2d 148, 168 n. 19 (D. Mass. 2003); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 58, 61-62, 104 S. Ct. 2218 (1984). Arguments concerning the inapplicability of estoppel and of the Defendants' "government knowledge" argument are set forth in greater depth in Part V of the briefs filed in opposition to the Warrick/Schering, GlaxoSmithKline and Aventis Motions to Strike in companion cases, which arguments are incorporated here by reference.

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 — 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 drugs[13]; (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.

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

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

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. 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).

A proper application of these rules should lead this Court to the conclusion that the Revised Complaints in these actions have been properly pleaded. Arguments concerning Connecticut rules of pleading are set forth in greater depth in Part VII of the briefs filed in opposition to the Warrick/Schering, GlaxoSmithKline and Aventis Motions to Strike in companion cases, which arguments are incorporated here by reference.

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 AWPs of the defendant and the impact of those AWPs on the 'spread.'" The revised version of ¶26 indicates that the tables "attached to this complaint illustrates the inflated AWPs of the defendant and the impact of those AWPs 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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