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ATTORNEYS FOR THE STATE OF IDAHO

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO,

Plaintiff,

vs.

ABBOTT LABORATORIES,

Defendant.

)
) Case No. **CV OC 0701846**
)

) **COMPLAINT AND DEMAND**
) **FOR JURY TRIAL**
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COPY

The plaintiff, State of Idaho, by Lawrence G. Wasden the Attorney General for the State of Idaho, brings this action on behalf of the State and taxpayers complaining of the above-captioned pharmaceutical manufacturer defendant as follows for its illegal conduct which has resulted in windfall profits at the expense of the State and its taxpayers:

NATURE OF THE ACTION

1. This action is brought on behalf of the State of Idaho, by Lawrence G. Wasden, Idaho Attorney General, pursuant to the Idaho Consumer Protection Act (ICPA), Idaho Code § 48-601 *et seq.* and rules promulgated thereunder.

2. Idaho brings this lawsuit to recover damages and obtain injunctive relief from defendant, who is a manufacturer of prescription drugs. As described in this complaint, defendant has taken advantage of the enormously complicated and non-transparent market for prescription drugs to engage in an unlawful scheme to cause the State of Idaho to pay inflated prices for prescription drugs in connection with its Medicaid Program. The scheme involves the publication by defendant of phony "average wholesale prices" ("AWPs"), which then become the basis for calculating the cost at which "providers" – the physicians and pharmacies who provide these prescription drugs to patients – are reimbursed by the State of Idaho. Defendant reinforces this basic tactic with other deceptive practices described in this complaint, including the use of secret discounts and rebates to providers and the use of various devices to keep secret the prices of its drugs currently available in the marketplace to other purchasers. By engaging in this unlawful scheme, defendant has succeeded in having Idaho's taxpayers finance windfall profits to these providers. Defendant attempts to profit from its scheme by using the lure of these windfall profits competitively to encourage providers to buy more of its drugs instead of

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

AUTHORITY

3. The Attorney General of Idaho is authorized and empowered to enforce the ICPA by Idaho Code § 48-606.

PARTIES AND JURISDICTION

4. The Attorney General for the State of Idaho brings this action on behalf of the State of Idaho and its citizens. As described in this complaint, defendant's unlawful scheme has resulted in higher prices for prescription drugs being paid by Idaho under the Medicaid program. The Attorney General has reason to believe that defendant has used and continues to use the methods, acts, and practices set forth in this complaint and which, among other violations, are illegal under the ICPA, and that these proceedings are in the public interest.

5. Defendant is a pharmaceutical company whose fraudulent schemes, including the publication of excessive and inflated prices for prescription drugs as described in this complaint, have caused to be presented to officers and/or employees of the State of Idaho false or fraudulent claims for payment or approval of certain drugs to get these false or fraudulent claims paid or approved by the State of Idaho Medicaid program, and have resulted in Idaho's taxpayers paying for drugs at inflated prices, as detailed below.

6. At all times material to this civil action, the defendant has transacted business in the State of Idaho by, including but not limited to, selling directly or through wholesalers its drugs, including those identified in this complaint, to purchasers within the State of Idaho.

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

8. This Court has jurisdiction over plaintiff's claims as they involve claims arising exclusively under Idaho statutes and authority of the Attorney General to act on behalf of the State of Idaho. The Attorney General has previously given notice in writing to the defendant that these proceedings were contemplated and the defendant had the opportunity to appear before the Attorney General and enter into an assurance of voluntary compliance or consent judgment. The defendant has declined to enter into such an agreement.

9. Venue is proper in the district court of Ada County, Idaho pursuant to Idaho Code § 48-606(2).

FACTUAL BACKGROUND

A. The market for prescription drugs.

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

entities, and government entities are commonly known as "payers." More often than not, the payer makes the reimbursement payment directly to the provider, not to the patient.

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

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

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

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

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

15. The purpose of the Idaho Medicaid program is to provide medical assistance to the state's neediest citizens.

16. Idaho, through its Medicaid program, is an enormous purchaser of drugs, purchasing over \$166 million in fiscal year 2005. Although defendant's participation in the Idaho Medicaid program is purely voluntary, the defendant has chosen to participate and sell drugs to Idaho Medicaid participants because of the size of the Idaho Medicaid program. Thus, Idaho may at any given time have to reimburse a provider for any of the drugs of the defendant.

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

42 C.F.R. § 447.301. Thus, pursuant to federal law, the highest price Idaho can pay for a drug is the provider's cost to acquire that drug.

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

19. Idaho, like most other states, has chosen First DataBank as its primary cost source because it supplies up-to-date pricing information in electronic form which can be integrated into Idaho's payment structure. First DataBank purports to supply the states with accurate information about the AWP of all drugs, information it receives from the drug manufacturers themselves. As First DataBank explained AWP to its customers in September, 1991:

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

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

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

20. For virtually the entire time period relevant hereto, First DataBank has represented that its published AWP's reflect actual average wholesale prices consistent with the definition of AWP.

21. Because Idaho, like most states, has no in-house source of comprehensive information about providers' acquisition cost for defendant's drugs, Idaho has relied on the prices the defendant reported to First DataBank. Consistent with First DataBank's suggestion that some providers were paying less than AWP, Idaho agreed to pay providers an amount consisting of AWP minus a certain percentage (currently AWP minus 12%). Idaho has also continued to pay a separate dispensing fee to providers to reimburse them for the service provided in dispensing drugs to customers.

22. As a practical matter, Idaho, like with most other states, is dependent on the First DataBank pricing reports for the maintenance of its Medicaid claims processing system. When a pharmacy fills a prescription and dispenses a drug to a Medicaid patient, information on the reimbursement price for that prescription is communicated electronically between Idaho's electronic claim processor, EDS, to the pharmacy provider at the point of sale. The information EDS uses to determine that reimbursement originates from First DataBank, and is downloaded into EDS' database. On a weekly basis, First DataBank electronically sends its updated AWP's for the thousands of NDC-numbered drugs listed in its database to EDS. These prices become the basis for Idaho' reimbursements to providers. There is no other electronic source for this information, besides Medispan which publishes the same prices. Accordingly, Idaho is functionally dependent on the accuracy of the data the defendant supplies to First DataBank in

meeting its obligation to pay providers no more than their actual acquisition cost of defendant's drugs.

C. Defendant's corruption of the government Medicaid assistance programs.

23. Defendant has defeated the intent of the Medicaid program to pay providers no more than their acquisition cost by reporting false and inflated AWP's to First DataBank and/or by reporting prices that it knew, because of the manner of First DataBank's operations, would misrepresent defendant's true wholesale prices. One purpose of this scheme was and is to create the spread between a drug's true wholesale price and the false and inflated AWP published by First DataBank and thereby increase the incentive for providers to choose the drug for their patients, or, at a minimum, to counteract the same tactic used by a competitor.

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

25. The defendant has inflated its drugs' reported AWP's to levels far beyond any real average wholesale price for its drugs. One high-ranking industry executive has described it as the industry practice to do so.

26. In 2004, high-ranking executives of certain pharmaceutical manufacturers testified before Congress that their AWP's do not reflect the actual selling prices of their drugs. At the same meeting when asked why his generic drug manufacturer doesn't lower its AWP on generic drugs, a chief financial officer of one of the manufacturers testified: "The simple answer is that given the system that now exists our customers won't buy from us if we lower our AWP."

27. Attached as Exh. A to this complaint is a list of drugs manufactured by certain pharmaceutical companies including the defendant and/or its subsidiaries that the U.S.

Department of Justice, after an extensive investigation, found to have inflated AWP. The U.S. Department of Health and Human Services concluded, with respect to all drugs utilized in the Medicare program that "[a] general conclusion reached in reviewing the GAO [General Accounting Office] and OIG [Office of Inspector General] data is that there is a level of overstatement in the listed AWP for *all* drugs..." Payment Reform for Part B Drugs, 68 Fed. Reg. 50,431 (August 20, 2003) (emphasis added).

28. Plaintiff has obtained the false prices defendant caused to be published by FirstData Bank. Plaintiff has also obtained data showing the true AWP of defendant's drugs from two of the largest national drug wholesalers: Cardinal and AmerisourceBergen. Attached as Exh. B to this complaint is a chart containing additional examples of defendant's drugs that have false and inflated AWP. Exh. B identifies (a) the NDC; (b) the name of the drug; (c) the false AWP published by First DataBank as of the end of each year from 2001 to 2003; (d) the average AWP published by First DataBank for each year from 2001 to 2003; (e) a market price for the NDC for each year from 2001 to 2003; and (f) the spread between the market price and the AWP. The AWP and market prices are unit prices. The source of the market prices is AmerisourceBergen, one of the three largest wholesalers. The market price is the average price at which AmerisourceBergen sold the NDC numbered drug to the classes of trade that are reimbursed by the Idaho Medicaid program, *i.e.*, retail pharmacies, chain pharmacies, and long-term care facilities. The spread, expressed as a percentage, is calculated as average AWP minus market price. The NDC numbered drugs on Exh. B are those for which the Idaho Medicaid program paid more than \$10,000.00 between 2001 and 2003. Plaintiff has similar data for years prior to 2001 and after 2003, which data will be produced to defendant upon request during discovery. The NDC numbered drugs identified in Exh. B constitute most, but not necessarily

all, of the NDC numbered drugs upon which the state is seeking damages. The following provides an example of Exh. B:

Drug NDC	Year-end Reported FDB AWP 2001	Avg Reported FDB AWP 2001	Avg Market Price 2001	AWP Mkt Price Spread 2001	Year-end Reported FDB AWP 2002	Avg Reported FDB AWP 2002	Avg Market Price 2002	AWP Mkt Price Spread 2002	Year-end Reported FDB AWP 2003	Avg Reported FDB AWP 2003	Avg Market Price 2003	AWP Mkt Price Spread 2003
BIAXIN 74316313	0.362	0.361	0.289	25%	0.383	0.377	0.301	25%	0.398	0.395	0.313	26%

29. As it has done with its AWP's, defendant has illegally and deceptively misrepresented and inflated the wholesale acquisition cost ("WAC") of its drugs. WAC is the price at which defendant sells its drugs to wholesalers. Defendant has made it appear that any reduction in the purchase price below the listed WAC would result in a loss to the wholesaler and was, hence, unachievable, when in fact defendant secretly discounted the WAC to purchasers other than the Medicaid program.

DEFENDANT'S EXACERBATION OF THE COMPLEXITIES OF THE MARKET AND AFFIRMATIVE CONCEALMENT OF ITS WRONGDOING

30. Defendant has been able to succeed in its drug pricing scheme for more than a decade by exacerbating the complexities of the huge and complex drug market, and by purposely concealing its pricing scheme from Idaho and other payers, as set forth below.

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

32. Defendant has further exacerbated the inherent complexities of the drug market by utilizing marketing schemes that conceal the true price of its drugs in the following different ways.

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

34. Second, defendant further inhibits the ability of Idaho and other payers and ultimate purchasers to learn the true cost of its drugs by wrapping the sales agreements it negotiates with providers in absolute secrecy, terming them trade secrets and proprietary, to preclude providers from telling others the actual price they paid.

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

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

37. Defendant has continuously concealed the true price of its drugs and has continued to report and cause to be published false and inflated AWP's and WAC's as if they were real, representative prices. Indeed, in the 2000 edition of pharmaceutical manufacturer Novartis' Pharmacy Benefit Report, an industry trade publication, the glossary defines AWP as follows:

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

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

38. Defendant's unlawful scheme has completely corrupted the market for prescription drugs. Instead of competing on price and medicinal value alone, defendant has deliberately sought to create a powerful financial incentive for providers to prescribe drugs based primarily on the spread between the true price of a drug and its published AWP or WAC. Creating incentives for providers to prescribe drugs based on such a spread is inconsistent with Idaho law and public policy. Large price spreads on higher priced drugs encourage providers to

prescribe more expensive drugs instead of their lower priced substitutes, thereby increasing the cost of healthcare. Competition on the basis of such spreads also has the potential to influence providers (consciously or unconsciously) to prescribe less efficacious drugs over ones with greater medicinal value. Because of defendant's concealment of its scheme, Idaho has unknowingly underwritten this perversion of competition in the drug market. In sum, defendant has been, and continues to be, engaged in an insidious, deceptive scheme that is causing Idaho to pay millions of dollars a year more than it should for its prescription drugs, and may well be inducing some providers to prescribe less efficacious drugs.

THE GOVERNMENTAL INVESTIGATIONS OF DEFENDANT'S CONDUCT

39. In 2000, Congress began its investigation of the pricing practices of certain pharmaceutical manufacturers in connection with the Medicare program based on documents Congress had subpoenaed from those manufacturers in connection with a confidential *qui tam* filing. On September 28, 2000, as part of this investigation, U.S. representative Pete Stark wrote to the president of the Pharmaceutical Research and Manufacturers of America (the main pharmaceutical trade association of which most pharmaceutical manufacturers are members) as follows:

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

The evidence I have obtained indicates that at least some of your members have knowingly and deliberately falsely inflated their representations of the average wholesale price ("AWP"), wholesaler acquisition cost ("WAC") and direct price ("DP") which are utilized by the Medicare and Medicaid programs in establishing drug reimbursements to providers. The evidence clearly establishes and exposes the drug manufacturers themselves that were the direct and sometimes indirect sources of the fraudulent misrepresentation of prices. Moreover, this

unscrupulous "cartel" of companies has gone to extreme lengths to "mask" their drugs' true prices and their fraudulent conduct from federal and state authorities. I have learned that the difference between the falsely inflated representations of AWP and WAC versus the true prices providers are paying is regularly referred to in your industry as "the spread"...

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

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

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

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

The Committee on Energy and Commerce is conducting an investigation into pharmaceutical reimbursements and rebates under Medicaid. This inquiry builds upon the earlier work by this Committee on the relationship between the drug pricing practices of certain pharmaceutical companies and reimbursements rates under the Medicare program. In that investigation, the Committee uncovered significant discrepancies between what some pharmaceutical companies charged providers for certain drugs and what Medicare then reimbursed those providers for dispensing those drugs. This price difference resulted in profit incentives for providers to use the drugs of specific companies as well as higher costs to the Medicare system and the patients it serves. For example, we learned that one manufacturer sold a chemotherapy drug to a health care provider for \$7.50, when the reported price for Medicare was \$740. The taxpayer therefore reimbursed the doctor almost \$600 for dispensing the drug and the cancer patient had a \$148 co-payment. Such practices are unacceptable in the view of the Committee, which is why we are in the process of moving legislation to address these abuses.

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

House Committee on Energy and Commerce Press Release, Tauzin, Greenwood Expand Medicaid Fraud Investigation (June 26, 2003), available at http://energycommerce.house.gov/108/News/06262003_1002.htm.

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

Data obtained by the Committee from five of the largest retail pharmacy chains reveals that during the period July 1, 2002 to June 20, 2003, the average acquisition costs for seven widely prescribed generic drugs was \$0.22, while the average Medicaid reimbursement, just for those drugs alone, was \$0.56-more than double the cost...

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

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

the drug industry was powerful, and they succeeded in securing a provision in the basic legislation that kept the best price and the AMP information a secret.

Can you imagine that? The Federal Government knew this information, but we kept it a secret from the States. This has proved to be a costly error. Without this

crucial piece of information, States who are, after all, responsible for establishing the reimbursement rates for prescription drugs could not set their reimbursement rates appropriately.

As a result, [the states] continued to rely on the average wholesale price minus some arbitrary amount simply because they did not have the information they needed to set a more appropriate reimbursement rate.

Id., at 74.

44. As a result of all these investigations, many states began to investigate defendant's and other pharmaceutical manufacturers' drug pricing practices on their own, leading to lawsuits by more than 20 separate states, including Idaho. Notwithstanding these investigations and lawsuits, defendant continues to publish, or participate in the publication of, inflated wholesale prices, and continues to hide the true prices of its drugs.

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

45. Medicaid is a joint federal and state health-care entitlement program authorized by federal law, with mandatory and optional provisions for eligibility and benefits covered, including pharmacy. Idaho' Medicaid program is administered by the Idaho Department of Health and Welfare.

46. Idaho Medicaid drug expenditures have increased dramatically. In fiscal year 1999 (covering the period July 1, 1998 to June 30, 1999), Idaho Medicaid drug expenditures totaled over \$64 million. In fiscal year 2005 (covering the period July 1, 2004 to June 30, 2005), Idaho Medicaid drug expenditures totaled over \$166 million, which constitutes approximately 15.5% of the overall Medicaid budget. As of December, 2004, the number of Idaho citizens enrolled in Medicaid is approximately 171,000, which represents approximately 12.5% of the state population.

47. During the relevant time period, with some exceptions, reimbursement to pharmacies, physicians, and hospitals for drugs covered by the Idaho Medicaid program has been made at defendant's published AWP minus a percentage (currently 12%), plus a dispensing fee.

48. For a minority of the drugs purchased by Idaho, the state sets its reimbursement rate at the lesser of the published AWP minus a percentage (currently 12%), the federal upper limit ("FUL"), or at a rate established by the state maximum allowable cost ("MAC") program. For multi-source drugs that have at least three suppliers, the Center for Medicaid Services ("CMS") generally establishes FULs, defined as 150% of the least costly therapeutic equivalent (using all national compendia) that can be purchased by pharmacies in quantities of 100 tablets or capsule or, in the case of liquids, the commonly listed size. 42 C.F.R. § 447.332. As a practical matter, CMS has relied on the defendant's inflated prices to set most of its FULs. The states also may set reimbursement rates for these drugs at rates lower than the FUL pursuant to the state MAC program and Idaho has done so in a number of instances. Had defendant reported truthful prices, the FULs and state MACs would have been lower.

49. At all relevant times, defendant was aware of the reimbursement formula used in the Idaho Medicaid program and the dependence of the Medicaid program on defendant's reported AWP.

50. By reporting false and inflated wholesale prices, and by keeping its true wholesale prices secret, defendant has knowingly created a situation that enabled providers of drugs to Medicaid recipients to receive reimbursements from Idaho that are higher than they would be if the true wholesale prices were reported, and interfered with Idaho's ability to set reasonable reimbursement rates for these drugs.

51. As a consequence, the Idaho Medicaid program has paid more for prescription drugs than it would have if defendant had reported its true wholesale prices.

**DEFENDANT'S CONDUCT WAS INTENTIONALLY
IN DISREGARD OF ESTABLISHED LAW**

52. Defendant had a duty to deal truthfully and honestly with the State of Idaho and it so knew.

53. Moreover, it has uniformly been the law for over 60 years that it is unlawful for a seller to cause to be circulated a price at which no, or few, sales are actually expected, whether it is called a list price, suggested price, or benchmark price. *E.g., F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965). Defendant either knew of this law or acted in reckless and willful disregard of it.

54. Defendant purposefully took advantage of a system designed to assist Idaho's neediest citizens with medical care and established a system designed to plunder it.

55. Defendant has willfully ignored, and continues to ignore: (a) its duty to Idaho to behave with scrupulous honesty; (b) case law uniformly holding that its pricing practices are unlawful; and (c) the reprimands of Congress.

56. As a result, civil penalties, consistent with Idaho's statutory scheme, are mandated in this case.

HARM TO IDAHO

57. Defendant's unlawful activities have significantly and adversely impacted Idaho. Idaho has paid more for the drugs it purchases through its Medicaid program than it would have if defendant had reported the true wholesale prices of its drugs.

58. Defendant's conduct materially affected the ability of Idaho to provide medical care to its neediest citizens by forcing Idaho to pay higher costs thereby reducing the availability of medical assistance to Idaho's neediest citizens.

COUNT I

Violations of the Idaho Consumer Protection Act

59. Plaintiff hereby realleges all previous paragraphs.

60. Idaho Code § 48-603(17) declares that it is unlawful to engage "in any act or practice which is otherwise misleading, false, or deceptive to the consumer."

61. Moreover, the Idaho Administrative Code, IDAPA 04.02.01.066.04 states that it is an unfair and deceptive act or practice for a seller to "state or imply that any goods or services are being offered at 'wholesale' prices or to use a term of similar meaning unless the prices are in fact at or below the current prices which most retailers in the trade area usually and customarily pay when they buy such goods or services for resale."

62. Finally, IDAPA 04.02.01.031 places the burden on the defendant "to substantiate all claims or offers made before such claims or offers are advertised. Sellers must maintain sufficient records to substantiate all representations made in their advertisements."

63. By committing the acts alleged above, defendant has violated the above statute and administrative rules.

64. Idaho has been harmed by defendant's unfair and deceptive conduct in that it has paid far more for defendant's drugs than it would have paid had defendant truthfully reported the AWP's of its drugs.

COUNT II

Unjust Enrichment

65. Plaintiff hereby realleges all previous paragraphs.

66. As a result of defendant's misleading pricing information, Idaho purchased drugs at prices greater than they would have had defendant not engaged in unlawful conduct.

67. The defendant knew that Idaho was being overcharged by pharmacy providers and physicians as a direct result of defendant's misleading pricing information.

68. As a result of defendant's unlawful conduct, defendant obtained increased sales, market share and profits at the expense of Idaho.

69. The defendant knew that it was not entitled to the profits it realized from the increased sales and market share that resulted from the excessive payments made by Idaho.

WHEREFORE, plaintiff prays that this Court:

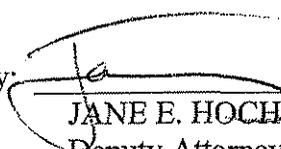
- A. *declare that defendant's conduct as described above constitutes unfair and/or deceptive acts or practices within the meaning of Idaho Code § 48-603 and the Idaho Administrative Code;*
- B. *grant judgment for plaintiff;*
- C. *permanently enjoin defendant and its employees, officers, directors, agents, successors, assigns, affiliates, merged or acquired predecessors, parent or controlling entities, subsidiaries, and any and all persons acting in concert or participation with defendant, from continuing the unlawful conduct, acts, and practices described above;*
- D. *award plaintiff State of Idaho actual damages for all excessive prescription-drug payments paid as a result of defendant's unlawful conduct;*
- E. *award penalties for each violation found by the Court to have been committed by the defendant in the amount of \$5,000.00 pursuant to Idaho Code § 48-606(1)(e);*
- F. *require the defendant to disgorge all profits it realized as a result of its unlawful conduct;*
- G. *award plaintiff its costs and attorneys' fees; and*

H. award any other relief to which plaintiff is entitled or the Court deems appropriate and just.

PLAINTIFF DEMANDS TRIAL BY JURY OF 12.

Dated this 26th day of January, 2007.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

By: 

JANE E. HOCHBERG
Deputy Attorney General

Michael Winget-Hernandez (pro hac vice application pending)
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