

COPY

STATE OF WISCONSIN

CIRCUIT COURT  
Branch 7

DANE COUNTY

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 STATE OF WISCONSIN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 AMGEN, INC., et. al., )  
 )  
 Defendants. )  
 \_\_\_\_\_)

Case No.: 04 CV 1709

CIRCUIT COURT  
 DANE COUNTY, WI  
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**BAXTER HEALTHCARE CORPORATION'S ANSWER AND AFFIRMATIVE  
 DEFENSES TO PLAINTIFF'S SECOND AMENDED COMPLAINT**

Defendant Baxter Healthcare Corporation ("Baxter"), by and through its attorneys, hereby responds to the State of Wisconsin's ("Plaintiff" or the "State") Second Amended Complaint ("Complaint") in corresponding numbered paragraphs as follows:

**PREFACE**

Plaintiff's Complaint contains allegations that are vague, ambiguous, inflammatory or otherwise improper. The Complaint improperly refers to Baxter and certain other defendants and third parties on a collective basis, failing to plead with requisite particularity allegations against Baxter or other defendants or third parties. The Complaint's intentionally ambiguous pleading is improper and insufficient to apprise Baxter in any meaningful sense of the allegations asserted against it. Baxter nevertheless attempts to respond to Plaintiff's allegations to the extent possible under the circumstances.

In this Answer, Baxter responds only for itself, even where Plaintiff's allegations refer to alleged conduct by Baxter and other persons or entities. To the extent the allegations of the Complaint refer to the knowledge, conduct or actions of persons, entities or defendants other

than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies those allegations.

The Complaint improperly mixes factual allegations with inflammatory rhetoric so as to make it virtually impossible for Baxter to respond meaningfully. Many of the allegations of the Complaint are vague or conclusory. The Complaint also includes terms that are undefined and that are capable of different meanings. Baxter responds only to the extent that the Complaint necessitates a response and to the extent that Baxter has information sufficient to form a belief as to the allegations. Baxter denies all allegations that contain legal arguments and conclusions of law.

Baxter explicitly denies the existence of, and its participation in, any fraud, fraudulent scheme, conspiracy or enterprise. Baxter further denies each and every allegation of the Complaint except as specifically admitted herein. Any factual averment admitted herein is admitted only as to the specific facts, not as to any conclusion, characterization, implication, innuendo or speculation that is contained in any averment or in the Complaint as a whole. Moreover, Baxter specifically denies any allegations contained in headings, footnotes, or unnumbered paragraphs in the Complaint.

These comments and objections are incorporated, to the extent appropriate, into each numbered paragraph of the Answer.

## **I. NATURE OF THE ACTION.<sup>1</sup>**

1. Admitted in part; denied in part. Baxter admits only that Plaintiff has brought this action against Baxter. Baxter denies the remaining averments of this paragraph. Specifically, Baxter denies that it engaged in “an unlawful scheme” that caused the State and its citizens to

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<sup>1</sup> For ease of reference, Baxter has included in this Answer the captions used in the Complaint, but does not thereby admit any inference that could be drawn from those captions.

pay “inflated prices for prescription drugs.” Baxter further denies that the State is entitled to any damages or other form of relief from Baxter.

## **II. PARTIES AND JURISDICTION.**

2. Admitted in part; denied in part. Baxter admits only that Plaintiff has brought this action against Baxter, but denies that there is any basis on which to do so. The remaining averments of this paragraph contain conclusions of law to which no response is required. To the extent that a response is required, the remaining averments of this paragraph are denied.

3. Admitted in part; denied in part. Baxter admits only that it is a pharmaceutical company. The remaining averments of this paragraph contain legal arguments or conclusions of law to which no response is required. To the extent that a response is required, the remaining averments of this paragraph are denied.

Paragraphs 4 through 7. Denied. These paragraphs are directed at parties other than Baxter, and therefore Baxter need not respond to these paragraphs. To the extent that a response is required of Baxter, the allegations in these paragraphs are denied.

8. Admitted.

Paragraphs 9 through 23. Denied. These paragraphs are directed at parties other than Baxter, and therefore Baxter need not respond to these paragraphs. To the extent that a response is required of Baxter, the allegations in these paragraphs are denied.

24. Denied. To the extent that the averments in this paragraph refer to statutes and regulations, those sources speak for themselves, and Baxter denies any characterizations thereof. To the extent the allegations set forth in this paragraph are legal arguments or conclusions of law, no further response is required. To the extent that a response is required, the allegations in this paragraph are denied.

25. Denied. To the extent the allegations set forth in this paragraph are legal arguments or conclusions of law, no further response is required. To the extent that a response is required of Baxter, the allegations in this paragraph are denied.

### **III. FACTUAL BACKGROUND**

#### **A. Market For Prescription Drugs.**

26. Admitted in part; denied in part. To the extent that the averments in this paragraph are directed at Baxter, Baxter admits only that the market for prescription drugs “is composed of over 65,000 separate National Drug Codes (‘NDCs’).” After reasonable investigation, Baxter is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in this paragraph. Therefore, they are denied.

Paragraphs 27-29. Denied. After reasonable investigation, Baxter is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraphs 27-29. Therefore, these averments are denied.

30. Denied. Baxter denies the averments in this paragraph to the extent they are directed at Baxter. Baxter specifically denies the existence of an “unlawful scheme.”

#### **B. The Purpose of the Medicaid Program and How it Responds to the Complexity of the Drug Market.**

Paragraphs 31-33. Denied. To the extent that the averments in Paragraphs 31 through 33 refer to statutes and regulations, those sources speak for themselves, and Baxter denies any characterizations thereof. To the extent the allegations set forth in Paragraph 31 through 33 are legal arguments or conclusions of law, no further response is required. To the extent a response is required, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations.

34. Denied. To the extent the allegations set forth in this paragraph are directed at parties other than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations set forth in this paragraph are directed at Baxter, Baxter admits that pharmaceutical industry compendia, including Red Book and First DataBank, periodically publish AWP and WACs for certain prescription medicines sold in this country. Baxter denies the remaining allegations in this paragraph.

35. Denied. To the extent the allegations set forth in this paragraph are directed at parties other than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations set forth in this are directed at Baxter, Baxter denies the allegations.

Paragraphs 36-38. Denied. After reasonable investigation, Baxter is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraphs 36-38. Therefore, these averments are denied.

39. Denied. After reasonable investigation, Baxter is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 39. Therefore, these averments are denied.

**C. Defendants' Corruption of the Government Medicaid Assistance Programs.**

40. Denied. To the extent the allegations set forth in this paragraph are directed at defendants other than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations set forth in this paragraph are directed at Baxter, Baxter denies the allegations. Baxter specifically denies any existence of or involvement in any "scheme."

Paragraph 41 – 45. Denied. Baxter denies the averments in Paragraphs 41-45 to the extent that they are directed at Baxter.

46. Admitted in part; denied in part. Baxter admits that the Department of Health and Human Services (“DHHS”) memorandum cited in Paragraph 46 of the Complaint exists. Baxter denies that Plaintiff has accurately characterized the findings, opinions, statements or conclusions of the DHHS memorandum, or that such are applicable to Baxter. Baxter denies the remaining averments in Paragraph 46.

47. Denied. Baxter denies the averments in this paragraph to the extent they are directed at Baxter.

Paragraphs 48 – 49. Denied. To the extent the allegations in Paragraphs 48 and 49 of the Complaint are directed at parties other than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations in Paragraphs 48 and 49 are directed at Baxter, Baxter admits that Plaintiff attaches Exhibits to the Complaint, which purport to contain pricing information. Baxter denies the remaining allegations.

#### **IV. DEFENDANTS’ EXACERBATION OF THE COMPLEXITIES OF THE MARKET AND AFFIRMATIVE CONCEALMENT OF THEIR WRONGDOING.**

Paragraphs 50 – 57. Denied. To the extent that the averments in Paragraphs 50 - 57 are directed at Baxter, Baxter admits only that that prices of pharmaceutical products with NDC numbers are subject to change. The remaining averments in Paragraphs 50 - 57 are denied.

58. Admitted in part; denied in part. To the extent that the averments in this paragraph are directed at Baxter, Baxter admits that it establishes prices to be paid by customers, and that certain contracts may require that pricing information be kept confidential. The remaining averments are denied.

59. Denied. Baxter denies the averments in this paragraph to the extent they are directed at Baxter. Baxter specifically denies that it has “concealed the true price” of its drugs. By way of further response, Baxter avers that it has reported pricing data to various pharmaceutical compendia and has understood such pricing data to be its list price, whether it be named “AWP,” “net wholesale price,” “suggested AWP,” or the like. Moreover, it has been common knowledge and universally understood for years, including by Wisconsin and/or its agents, that AWP is a reimbursement benchmark or reference price and does not reflect, nor is it intended to reflect, an actual average of wholesale prices.

60. Denied. Baxter denies the averments in this paragraph to the extent they are directed at Baxter. Baxter specifically denies that it “create[d] a powerful financial incentive for providers to prescribe drugs based primarily on the spread” and has been or continues to be “engaged in an insidious, deceptive scheme.” Further, Baxter specifically denies that it has ever engaged in an “unlawful scheme” or an “insidious, deceptive scheme that is causing Wisconsin and its citizens to pay scores of millions of dollars a year more than they should for their prescription drugs.”

**V. THE INJURY TO GOVERNMENTAL HEALTH PLANS CAUSED BY DEFENDANTS’ FALSE WHOLESALE PRICES.**

**A. The Wisconsin Medicaid Program.**

61. Denied. After reasonable investigation, Baxter is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 61 regarding the programs through which Wisconsin pays for prescription drugs and the other averments contained in this paragraph. Baxter therefore denies the allegations.

Paragraphs 62-63. Denied. Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 62 through 63 of the Complaint, and on that basis denies the allegations.

64. Denied. To the extent the allegations set forth in this paragraph are directed at defendants other than Baxter, Baxter is without knowledge or sufficient information to form a belief as to the truth of the allegations and on that basis denies the allegations. To the extent the allegations in this paragraph are directed at Baxter, Baxter denies the allegations.

65. Denied. To the extent the allegations set forth in this paragraph are directed at defendants other than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations in this paragraph are directed at Baxter, Baxter denies the allegations.

66. Denied. To the extent the allegations set forth in this paragraph are directed at defendants other than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations in this paragraph are directed at Baxter, Baxter denies the allegations.

**B. Medicare.**

67-70. Admitted in part, denied in part. To the extent the allegations in Paragraphs 67 through 70 of the Complaint state legal conclusions, no response is required. Baxter admits that federal law governs the manner in which Medicare Part B reimburses providers for certain drugs. Baxter is without knowledge or information sufficient to form a belief as to whether the summary of those laws set forth in Paragraphs 67 through 70 is accurate in all instances, and denies the remainder of the allegations.

71. Denied. To the extent that the averments in this paragraph are directed at Baxter, they are denied. Baxter specifically denies that Baxter has published “false and inflated AWP” for its drugs. Baxter admits only that it has reported pricing data to various compendia, and that it understood such pricing data to be its list price, whether it be named “AWP,” “net wholesale price,” “suggested AWP,” or the like.

**VI. DEFENDANTS’ CONDUCT WAS INTENTIONALLY IN DISREGARD OF ESTABLISHED LAW.**

72. Admitted in part, denied in part. Baxter admits it had a duty to deal honestly with the State of Wisconsin, and denies any wrongdoing alleged, averred, or implied by the Complaint.

Paragraphs 73-76. Denied. To the extent the allegations in Paragraphs 73 through 76 of the Complaint state legal conclusions, no response is required. To the extent the allegations are directed at parties other than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations are directed at Baxter, Baxter denies the allegations.

77. Denied.

**VII. HARM TO WISCONSIN AND ITS CITIZENS**

78. Denied. To the extent the allegations set forth in this paragraph of the Complaint are directed at parties other than Baxter, Baxter is without knowledge or sufficient information to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations in Paragraph 78 are directed at Baxter, Baxter denies the allegations.

**COUNT 1 – Violation of Wis. Stat. § 100.18(1)**

79. Baxter realleges and incorporates by reference its responses to Paragraphs 1 through 78.

80-82. Admitted in part, denied in part. Baxter admits the existence of the statutes set forth in Paragraphs 80-82. To the extent that the averments in Paragraphs 80-82 refer to statutes, those sources speak for themselves, and any characterization thereof is denied. To the extent the allegations in Paragraphs 80 through 82 of the Complaint state legal conclusions, no response is required. Baxter refers to the laws and regulations cited for their content. To the extent the allegations in Paragraphs 80 through 82 are directed at parties other than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations in Paragraphs 80 through 82 are directed at Baxter, Baxter denies the allegations. Baxter further denies that the State is entitled to a judgment or any other relief as requested in the unnumbered "WHEREFORE" paragraph following Paragraph 82 of the Complaint.

**COUNT II – Violation of Wis. Stat. § 100.18(10)(b)**

83. Baxter realleges and incorporates by reference its responses to Paragraphs 1 through 82.

84-86. Admitted in part, denied in part. Baxter admits the existence of the statutes set forth in Paragraphs 84-86. Baxter admits the existence of the statutes set forth in Paragraphs 84-86. To the extent the allegations in Paragraphs 84 through 86 of the Complaint state legal conclusions, no response is required. Baxter refers to the laws and regulations cited for their content. To the extent the allegations in Paragraphs 84 through 86 are directed at parties other than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations in Paragraphs 84 through 86 are directed at Baxter, Baxter denies the allegations. Baxter further

denies that the State is entitled to a judgment or any other relief as requested in the unnumbered “WHEREFORE” paragraph following Paragraph 86 of the Complaint.

**COUNT III – Violation of the Wisconsin Trust and Monopolies Act**

87. Baxter realleges and incorporates by reference its responses to Paragraphs 1 through 86.

Paragraphs 88-91. Admitted in part, denied in part. Baxter admits the existence of the statutes set forth in Paragraphs 88-91. To the extent the allegations in Paragraphs 88 through 91 of the Complaint state legal conclusions, no response is required. Baxter refers to the laws and regulations cited for their content. To the extent the allegations in Paragraphs 88 through 91 are directed at parties other than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations in Paragraphs 88 through 91 are directed at Baxter, Baxter denies the allegations. Baxter further denies that the State is entitled to a judgment or any other relief as requested in the unnumbered “WHEREFORE” paragraph following Paragraph 91 of the Complaint.

**COUNT IV – Violation of Wis. Stat. § 49.49(4m)(a)(2) Medical Assistance Fraud**

92. Baxter realleges and incorporates by reference its responses to Paragraphs 1 through 91.

93. Denied. To the extent the allegations in Paragraph 93 of the Complaint are directed at defendants other than Baxter, Baxter is without knowledge or sufficient information to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations in Paragraph 93 are directed at Baxter, Baxter admits that it produces, markets and sells pharmaceutical products some of which are sold to entities and individuals in

the State of Wisconsin. Baxter is without knowledge or sufficient information to form a belief as to the truth of the remaining allegations, and on that basis denies the allegations.

Paragraphs 94-95. Admitted in part, denied in part. Baxter admits the existence of the statutes set forth in Paragraphs 94-95. To the extent the allegations in Paragraphs 94 through 95 of the Complaint state legal conclusions, no response is required. Baxter refers to the laws and regulations cited for their content. To the extent the allegations in Paragraphs 94 through 95 are directed at parties other than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations in Paragraphs 94 through 95 are directed at Baxter, Baxter denies the allegations. Baxter further denies that the State is entitled to a judgment or any other relief as requested in the unnumbered "WHEREFORE" paragraph following Paragraph 95 of the Complaint.

#### **COUNT V – Unjust Enrichment**

96. Baxter realleges and incorporates by reference its responses to Paragraphs 1 through 95.

97-100. Denied. To the extent the allegations in Paragraphs 97 through 100 are directed at parties other than Baxter, Baxter is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies the allegations. To the extent the allegations in Paragraphs 97 through 100 are directed at Baxter, Baxter denies the allegations. Baxter further denies that the State is entitled to a judgment or any other relief as requested in the unnumbered "WHEREFORE" paragraph following Paragraph 100 of the Complaint.

### **DEMAND FOR JURY**

Baxter denies that the State has asserted any viable claims that would necessitate a trial by jury.

### **AFFIRMATIVE AND OTHER DEFENSES**

By alleging the matters set forth below, Baxter does not allege or admit that it has the burden of proof and/or the burden of persuasion with respect to any of these matters or that Plaintiff is relieved of its burdens to prove each and every element of its claims and the damages, if any, to which it is entitled. As and for its affirmative defenses, Baxter reasserts and reincorporates as if fully set forth herein its responses to Paragraphs 1 through 100 above:

#### **FIRST AFFIRMATIVE DEFENSE**

The State and/or its agents knew and were aware that AWP was not an actual average wholesale price or the actual acquisition cost of drugs. Legal and equitable principles preclude this action for damages and injunctive relief, and the Due Process Clause of the U.S. Constitution and Wisconsin Constitution preclude Plaintiff from bringing claims and seeking damages as alleged in the Complaint.

#### **SECOND AFFIRMATIVE DEFENSE**

Some or all of the State's claims against Baxter arise from the State's failure to follow its federal and state statutory and regulatory obligations to properly establish appropriate reimbursement rates. To the extent that the State established Medicaid reimbursement rates by reference to AWP, the State violated federal law in failing to establish Medicaid reimbursement rates as prescribed by federal law. The State is precluded by federal law from seeking damages, especially by reference to a different, lower AWP as alleged.

### **THIRD AFFIRMATIVE DEFENSE**

The State was required by federal law to conduct surveys and have statistics and data justifying, and to represent and warrant to the federal government, that its Medicaid reimbursement rates for single source drugs were necessary and appropriate, as a condition to obtaining federal funds. This action, with respect to single source drugs, is inconsistent with and precluded by the State's actions, representations and promises, and assumes that, with respect to single source drugs, the State made false claims to the federal government to obtain federal funds.

### **FOURTH AFFIRMATIVE DEFENSE**

The claims alleged herein, based on the facts alleged, are barred by the State's own negligence. Among other things, the claims disregard the State's obligations under federal law, and they ignore the State's affirmative misstatements and declarations that were intended to cover up and hide from view of the federal regulatory authority, and the State's citizens and taxpayers, the State's failings referred to herein, as well as other inappropriate conduct by the State.

### **FIFTH AFFIRMATIVE DEFENSE**

The State's reimbursement rates for drugs for Medicaid recipients were filed with, reviewed, and approved by a federal regulatory agency with authority to do so under the Medicaid Act. Actions in a state court seeking relief, including alleged damages, contending that rates approved by a federal regulatory agency do not apply are precluded by the Supremacy Clause. This action is barred by the Supremacy Clause of the Constitution.

**SIXTH AFFIRMATIVE DEFENSE**

The State's claims are preempted by the Commerce Clause and/or the dormant Commerce Clause of the United State Constitution.

**SEVENTH AFFIRMATIVE DEFENSE**

The State's claims are preempted, in whole or in part, by federal law, including without limitation the Federal Employment Retirement Income and Security Act of 1974, the Federal Medicare Act, and the Federal Medicaid Act, including all amendments to the same and all regulations promulgated there under.

**EIGHTH AFFIRMATIVE DEFENSE**

The State's claims against Baxter are barred in whole or in part by the doctrine of voluntary payment.

**NINTH AFFIRMATIVE DEFENSE**

The State's claims under Wis. Stat. § 100.18 are barred to the extent such claims involve the insurance business.

**TENTH AFFIRMATIVE DEFENSE**

The State's claims are barred, in whole or in part, by the *Noerr-Pennington* doctrine to the extent that such claims are premised, in whole or in part, on alleged statements or conduct by Baxter in judicial, legislative, or administrative proceedings of any kind or at any level of government.

**ELEVENTH AFFIRMATIVE DEFENSE**

The State fails to state a claim against Baxter upon which relief may be granted.

**TWELFTH AFFIRMATIVE DEFENSE**

The State has no standing or capacity to bring some or all of the claims.

**THIRTEENTH AFFIRMATIVE DEFENSE**

To the extent that the State obtains, or is barred from, recovery in any other case predicated on the same factual allegations, the State is barred from seeking recovery against Baxter based on the Complaint pursuant to the doctrines of *res judicata* and collateral estoppel, and the prohibition on double recovery for the same injury.

**FOURTEENTH AFFIRMATIVE DEFENSE**

The State's claims are barred, in whole or in part, to the extent that the State has released, settled, entered into an accord and satisfaction or otherwise compromised its claims.

**FIFTEENTH AFFIRMATIVE DEFENSE**

Any and all actions taken by Baxter with respect to any of the matters alleged in the Complaint were taken in good faith and in accordance with established industry practice.

**SIXTEENTH AFFIRMATIVE DEFENSE**

The State's claims against Baxter are barred because Baxter has complied with all applicable laws or regulations of the federal and state governments.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

The State's claims against Baxter are barred, in whole or in part, by the applicable statutes of limitations, and by the doctrines of laches, estoppel and waiver.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

The State's claims are barred, in whole or in part, because they violate Baxter's rights under the Due Process and *Ex Post Facto* clauses of the United States Constitution and Wisconsin Constitution, insofar as the State seeks to impose liability retroactively for conduct that was not actionable at the time it occurred.

**NINETEENTH AFFIRMATIVE DEFENSE**

Baxter's statements or actions were not the proximate cause or cause in fact of any injury to or alleged loss by the State.

**TWENTIETH AFFIRMATIVE DEFENSE**

The State's claims against Baxter for injunctive relief were mooted by the passage of the Medicare Prescription Drug, Improvement and Modernization Act of 2003.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

The State's claims for injunctive relief against Baxter are barred by the doctrines of *in pari delicto* and/or unclean hands.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

The State's claims are barred, in whole or in part, because any injuries it sustained were the result of its own conduct or the intervening or superseding conduct of third-parties.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

The State's claims against Baxter are barred, in whole or in part, due to the State's failure to join indispensable parties.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

The State's claims against Baxter are misjoined with the State's claims against other defendants and must be severed.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

The State's claims against Baxter for damages are barred, in whole or in part: (1) because it failed to mitigate its damages, and its failure to mitigate damages should proportionately reduce the recovery by the State and the allocation of any fault, if any exists, attributable to

Baxter; (2) because it would be unjustly enriched if allowed to recover any portion of the damages alleged in the Complaint; (3) by the doctrine of consent and/or ratification to the extent the State has paid for products manufactured, marketed and sold by Baxter after the filing of the State's original Complaint; and (4) because the claims are speculative and remote and because of the impossibility of ascertaining and allocating of the alleged damages.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

Baxter is entitled to a set-off, should any damages be awarded against it, for the entire amount of all damages or settlement amounts recovered by the State, with respect to the same alleged injuries.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

Baxter denies that it has engaged in any conduct that entitles the State to recover penalty assessments and avers that the State's Complaint fails to state a claim upon which penalty assessments may be awarded to the State.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

The claims contained in the Complaint, which seek the recovery of penalty assessments, under Wisconsin law, violate the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America on the following grounds:

a) it is a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution to impose penalty assessments, which are penal in nature, against a civil defendant upon the State's satisfying a burden of proof which is less than the "beyond a reasonable doubt" burden of proof required in criminal cases;

b) the procedures pursuant to which any penalty assessments would be awarded fail to provide a reasonable limit on the amount of the award against Baxter, which violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution;

c) the procedures pursuant to which any penalty assessments would be awarded fail to provide specific standards for the amount of the award of penalty assessments, which violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution;

d) the procedures pursuant to which any penalty assessments would be awarded result in the imposition of different penalties for the same or similar acts, and thus violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;

e) the procedures pursuant to which any penalty assessments would be awarded permit the imposition of penalty assessments in excess of the maximum criminal fine for the same or similar conduct, which thereby infringes the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; and

f) the procedures pursuant to which any penalty assessments would be awarded permit the imposition of excessive fines in violation of the Eighth Amendment of the United States Constitution.

#### **TWENTY-NINTH AFFIRMATIVE DEFENSE**

The recovery of penalty assessments by the State in this action would violate Article I, sections 1, 6, 7, 8 and 11 of the Wisconsin Constitution on the following grounds:

a) it is impermissible to impose penalty assessments, which are penal in nature, upon a civil defendant upon the State satisfying a burden of proof less than the “beyond a reasonable doubt” burden of proof required in criminal cases;

b) the procedures pursuant to which any penalty assessments would be awarded fail to provide a reasonable limit on the amount of the award against Baxter;

c) the procedures pursuant to which any penalty assessments would be awarded are unconstitutionally vague;

d) the procedures pursuant to which any penalty assessments would be awarded fail to provide specific standards for the amount of the award of penalty assessments;

e) the award of penalty assessments in this case would constitute a deprivation of property without due process; and

f) the procedures pursuant to which any penalty assessments would be awarded permit the imposition of an excessive fine.

**THIRTIETH AFFIRMATIVE DEFENSE**

The procedures pursuant to which any penalty assessments would be awarded permit the imposition of an excessive fine in violation of Article 1, Section 6 of the Wisconsin Constitution.

**THIRTY-FIRST AFFIRMATIVE DEFENSE**

The State fails to state with particularity facts to support its fraud claims against Baxter.

**THIRTY-SECOND AFFIRMATIVE DEFENSE**

To the extent that the State attempts to seek equitable relief against Baxter, the State is not entitled to such relief because the State has an adequate remedy at law.

**THIRTY-THIRD AFFIRMATIVE DEFENSE**

The State's unjust enrichment claims are barred, in whole or in part, because Baxter did not collect or retain any money belonging to the State as a result of any alleged overpayments as required under Wisconsin law.

**THIRTY-FOURTH AFFIRMATIVE DEFENSE**

The State's claims are barred, in whole or in part, by the filed rate doctrine.

**THIRTY-FIFTH AFFIRMATIVE DEFENSE**

The State's claims against Baxter are barred, in whole or in part, because Baxter did not make any false statements to the State or its agents. As to any statement asserted against Baxter that the State alleges to be false or misleading, Baxter did not have reasonable grounds to believe, and did not believe at the time such a statement was made, that statement was false or misleading.

**THIRTY-SIXTH AFFIRMATIVE DEFENSE**

The State's claims are barred in whole or in part because the State did not rely on the allegedly fraudulent statements or conduct of Baxter.

**THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

The State's claims are barred in whole or in part because Baxter's conduct was neither "deceptive," "misleading," "unlawful," nor "illegal."

**THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

The State's claims are barred in whole or in part because it did not consult with the Governor of the State of Wisconsin and/or the Department of Agriculture, Trade and Consumer Protection prior to bringing this suit.

**THIRTY-NINTH AFFIRMATIVE DEFENSE**

The State's claims under Wis. Stat. § 49.49 are barred because Baxter did not possess the requisite mental state required under that statute.

**FORTIETH AFFIRMATIVE DEFENSE**

The State's claims are barred in whole or in part with respect to any alleged overcharge or supracompetitive price because such supracompetitive price, if any, was absorbed in whole or in part by a person and/or entity that purchased the medicine directly, and/or by an intermediate indirect purchaser, and was not passed through to the Plaintiff.

**FORTY-FIRST AFFIRMATIVE DEFENSE**

Baxter adopts by reference any additional applicable defense pled by any other defendants not otherwise pled herein.

**FORTY-SECOND AFFIRMATIVE DEFENSE**

Baxter hereby gives notices that it intends to rely upon any other and additional defense that is now or may become available or appear during or as a result of the discovery proceedings in this action and hereby reserves its right to amend its Answer to assert such defense.

**FORTY-THIRD AFFIRMATIVE DEFENSE**

The State fails to allege facts or a cause of action to support a claim against Baxter for compensatory damages, attorneys' fees, enhanced damages, disgorgement, and/or legal fees and costs.

**FORTY-FOURTH AFFIRMATIVE DEFENSE**

The State has not suffered, and will not suffer, any injury to a legally protected or cognizable interest by reason of the conduct of Baxter as alleged in the Complaint.

**FORTY-FIFTH AFFIRMATIVE DEFENSE**

The State's unjust enrichment claim is barred by the existence of written agreements concerning the same subject matter.

Dated: August 14<sup>th</sup>, 2006

Respectfully submitted,

/s/ Bruce A. Schultz

Bruce A. Schultz

State Bar No. 01016100

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