

STATE OF WISCONSIN

CIRCUIT COURT
Branch 7

DANE COUNTY

_____)
STATE OF WISCONSIN,)
)
Plaintiff,)
)
v.)
)
ABBOTT LABORATORIES, INC., et. al.,)
)
Defendants.)
_____)

Case No.: 04 CV 1709

**ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT DEY, INC.
TO THE STATE OF WISCONSIN'S SECOND AMENDED COMPLAINT**

Defendant Dey, Inc. ("Dey"), by its undersigned attorneys, hereby answers the Second Amended Complaint (the "Complaint") of the State of Wisconsin ("Wisconsin"), as follows:

Dey specifically denies any and all allegations contained in headings, footnotes, unnumbered Paragraphs, or "Wherefore" claims in the Complaint.

1. Dey denies the allegations in Paragraph 1 of the Complaint, except admits that Dey manufactures prescription drugs.

2. Dey denies the allegations in Paragraph 2 of the Complaint.

3. Dey denies the allegations in Paragraph 3 of the Complaint.

4-10. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 4 through 10 of the Complaint, and therefore denies those allegations.

11. Dey admits the allegations in paragraph 11 of the Complaint.

12-23. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 12 through 23 of the Complaint, and therefore denies those

allegations.

24. Dey denies the allegations of Paragraph 24 of the Complaint and refers to the referenced statutes and common law for their content.

25. Dey denies the allegations in Paragraph 25 of the Complaint.

26. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 26 of the Complaint, and therefore denies those allegations.

27. Dey denies the allegations in Paragraph 27 of the Complaint.

28. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 28 of the Complaint, and therefore denies those allegations.

29. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 29 of the Complaint, and therefore denies those allegations.

30. Dey denies the allegations in Paragraph 30 of the Complaint insofar as they pertain to Dey, and to the extent the allegations in Paragraph 30 of the Complaint are directed to parties other than Dey, Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 30, and therefore denies those allegations.

31. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 31 of the Complaint, and therefore denies those allegations.

32. Dey denies the allegation in Paragraph 32 of the Complaint, except admits that it participated in the Wisconsin Medicaid program.

33. To the extent a response is required, Dey denies the allegations of Paragraph 33 of the Complaint, and refers the Court to the regulations for a true and complete statement of their content.

34. Dey denies the allegations in Paragraph 34 directed to Dey, except admits that

First DataBank and RedBook publish pricing information. To the extent the allegations in Paragraph 34 of the Complaint are directed to parties other than Dey, Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 34, and therefore denies those allegations.

35. Dey refers to the document annexed to the Complaint at Exhibit A for its content, and is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 35 of the Complaint, and therefore denies those allegations.

36. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 36 of the Complaint, and therefore denies those allegations.

37. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 37 of the Complaint, and therefore denies those allegations.

38. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 38 of the Complaint, and therefore denies those allegations.

39. Dey denies the allegations in Paragraph 39 of the Complaint.

40. Dey denies the allegations in Paragraph 40 of the Complaint.

41. Dey denies the allegations in Paragraph 41 of the Complaint.

42. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 42 of the Complaint, and therefore denies those allegations.

43. Dey denies the allegations in Paragraph 43 of the Complaint.

44. Dey denies the allegations in Paragraph 44 of the Complaint, except admits the quoted language appears in the testimony of Pamela R. Marrs given on December 7, 2004 at a Hearing before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the United States House of Representatives, and Dey refers to that testimony

for a complete and accurate version of its content.

45. Dey denies the allegations in Paragraph 45 of the Complaint, except admits that it has brought a lawsuit against First DataBank.

46. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 46 of the Complaint, and therefore denies those allegations.

47. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 47 of the Complaint, and therefore denies those allegations.

48. Dey denies the allegations in Paragraph 48 of the Complaint insofar as they pertain to Dey. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 48 as they pertain to other parties, and therefore denies those allegations.

49. Dey denies the allegations in Paragraph 49 of the Complaint.

50. Dey denies the allegations in Paragraph 50 of the Complaint.

51. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 51 of the Complaint, and therefore denies those allegations.

52. Dey denies the allegations in Paragraph 52 of the Complaint insofar as they pertain to Dey. To the extent the allegations in Paragraph 52 of the Complaint are directed to parties other than Dey, Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 52, and therefore denies those allegations.

53. Dey denies the allegations in Paragraph 53 of the Complaint insofar as they pertain to Dey, except admits that it has sold to wholesalers at WAC, which can sometimes be discounted for a variety of legitimate business reasons. To the extent the allegations in Paragraph 53 of the Complaint are directed to parties other than Dey, Dey is without knowledge

or information sufficient to form a belief as to the truth of the allegations in Paragraph 53, and therefore denies those allegations.

54. Dey denies the allegations in Paragraph 54 of the Complaint insofar as they pertain to Dey, except admits to entering into sales agreements that have confidentiality provisions and refers to those documents for a true statement of their terms. To the extent the allegations in Paragraph 54 of the Complaint are directed to parties other than Dey, Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 54, and therefore denies those allegations.

55. Dey denies the allegations in Paragraph 55 of the Complaint insofar as they pertain to Dey, except admits that some customers pay different prices than others for legitimate competitive reasons. To the extent the allegations in Paragraph 55 of the Complaint are directed to parties other than Dey, Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 55, and therefore denies those allegations.

56. Dey denies the allegations in Paragraph 56 of the Complaint insofar as they pertain to Dey. To the extent the allegations in Paragraph 56 of the Complaint are directed to parties other than Dey, Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 56, and therefore denies those allegations.

57. Dey denies the allegations in Paragraph 57 of the Complaint.

58. Dey denies the allegations in Paragraph 58 of the Complaint.

59. Dey denies the allegations in Paragraph 59 of the Complaint insofar as they pertain to Dey. To the extent the allegations in Paragraph 59 of the Complaint are directed to parties other than Dey, Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 59, and therefore denies those allegations.

60. Dey denies the allegations in Paragraph 60 of the Complaint.

61. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 61 of the Complaint, and therefore denies those allegations, except admits Medicaid is a joint state and federal program.

62. Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 62 of the Complaint, and therefore denies those allegations.

63. Dey refers to the relevant statutes and regulations governing Wisconsin's Medicaid program for their content, and is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 63, and therefore denies those allegations.

64. Dey denies the allegations in Paragraph 64 of the Complaint.

65. Dey denies the allegations in Paragraph 65 of the Complaint.

66. Dey denies the allegations in Paragraph 66 of the Complaint.

67-69. Dey avers that, to the extent the allegations in Paragraphs 67-69 of the Complaint consist of conclusions of law, no response is required. To the extent a response is required, Dey refers to the relevant statutes referenced in Paragraph 67-69 of the Complaint for their content, and otherwise is without knowledge or information sufficient to form a belief as to the truth of those allegations, and therefore denies those allegations.

70. Dey avers that, to the extent the allegations in Paragraph 70 of the Complaint consist of conclusions of law, no response is required. Dey refers to the relevant regulations concerning Medicare reimbursement for their content. To the extent a response is required, Dey denies the allegations in Paragraph 70.

71. Dey denies the allegations in Paragraph 71 of the Complaint insofar as they pertain to Dey. To the extent the allegations in Paragraph 71 of the Complaint are directed to

parties other than Dey, Dey is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 71, and therefore denies those allegations.

72. Dey avers that, to the extent the allegations in Paragraph 72 of the Complaint consist of conclusions of law, no response is required, and otherwise denies the allegations in Paragraph 72.

73. Dey denies the allegations in Paragraph 73 of the Complaint.

74. Dey avers that, to the extent the allegations in Paragraph 74 of the Complaint consist of conclusions of law, no response is required. Dey refers to the relevant statute cited in Paragraph 74 for its content. To the extent a response is required, Dey denies the allegations in Paragraph 74 of the Complaint.

75. Dey denies the allegations in Paragraph 75 of the Complaint.

76. Dey denies the allegations in Paragraph 76 of the Complaint.

77. Dey denies the allegations in Paragraph 77 of the Complaint.

78. Dey denies the allegations in Paragraph 78 of the Complaint.

COUNT I

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

80-82. Dey denies the allegations in Paragraphs 80-82 of the Complaint.

COUNT II

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

84-86. Dey refers to the relevant statutes for their content, and otherwise denies the allegations in Paragraphs 84-86 of the Complaint.

COUNT III

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

86.

88-91. Dey refers to the relevant statutes for their content, and otherwise denies the allegations in Paragraphs 88-91 of the Complaint.

COUNT IV

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

91.

93. Dey is without knowledge or information sufficient to form a belief as to the truth of those allegations in Paragraph 93 of the Complaint, and therefore denies those allegations.

94-95. Dey denies the allegations in Paragraphs 94-95 of the Complaint.

COUNT V

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

95.

97-100. Dey denies the allegations in Paragraphs 97-100 of the Complaint.

Dey further denies that Plaintiff has asserted any viable claims that would necessitate a trial by jury.

DEY'S DEFENSES

AFFIRMATIVE AND OTHER DEFENSES

First Defense

The Complaint fails to state a claim against Dey upon which relief can be granted.

Second Defense

The Complaint fails to satisfy the pleading requirements of Wis. Stat. §§ 802.02(1) and (5).

Third Defense

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

Fourth Defense

Plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitations, and Plaintiff is not entitled to any tolling of any limitations period.

Fifth Defense

Plaintiff is estopped from claiming entitlement to the sums it seeks because it has known throughout the relevant time period, from various public sources including government reports provided to Plaintiff, that the AWP and WACs published in industry sources were not what Plaintiff now claims them to have been.

Sixth Defense

Plaintiff was aware that the reimbursement rates it was using to reimburse providers were greater than the estimated acquisition cost of those drugs, and knowingly set their reimbursement rates higher than estimated acquisition cost.

Seventh Defense

Plaintiff fails to allege with particularity facts to support the fraud and/or fraudulent concealment allegations against Dey as required by Wis. Stat. § 802.03(2).

Eighth Defense

Plaintiff's claims are barred, in whole or in part, by the doctrines of laches, estoppel, waiver, and unclean hands.

Ninth Defense

Plaintiff's claims are barred to the extent that the claims involve drugs reimbursed without reference to AWP or WAC.

Tenth Defense

Plaintiff's claims are barred, in whole or in part, because Dey's alleged statements, actions, or omissions were not the proximate cause of any alleged loss by Plaintiff.

Eleventh Defense

Plaintiff was negligent, careless, committed willful misconduct or was otherwise at fault in and about the matter referred to in the Complaint, and such conduct on the part of Plaintiff caused and contributed to the injury complained of, if any actually occurred.

Twelfth Defense

Plaintiff directed, ordered, approved and/or ratified Dey's conduct, and the Plaintiff is, therefore, barred from asserting any claims based thereon.

Thirteenth Defense

Any and all actions taken by Dey with respect to any of the matters alleged in the Complaint were taken in good faith and in accordance with established industry practice. Moreover, publishers, including First Data Bank, rather than Dey, determine the AWP that they publish for drugs.

Fourteenth Defense

Plaintiff's claims against Dey are barred because Dey has complied with all applicable regulations of the federal government and the State of Wisconsin.

Fifteenth Defense

Plaintiff's claims are barred, in whole or in part, because any injuries sustained by Plaintiff, if any, were the result of its own conduct or intervening or superseding acts or omissions of third parties.

Sixteenth Defense

Plaintiff's claims against Dey for damages are barred, in whole or in part, because Plaintiff failed to mitigate and/or neglected to minimize its damages, and its failure to mitigate damages should proportionately reduce its recovery and the allocation of any fault, if any exists, attributable to Dey.

Seventeenth Defense

Plaintiff receives funding from the federal government for a percentage of the prescription drug reimbursements made under the Wisconsin Medicaid program. Any of Plaintiff's recovery should be substantially if not entirely set off by appropriate percentages of those amounts and should also be reduced by any benefits and rebates they received from Dey. Plaintiff's claims against Dey for damages are barred, in whole or in part, because the Plaintiff would be unjustly enriched if allowed to recover any portion of the damages alleged in the Complaint.

Eighteenth Defense

Dey 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 Plaintiff with respect to the same alleged injuries.

Nineteenth Defense

Plaintiff's claims for damages against Dey are barred, in whole or in part, by the doctrine of consent and/or ratification to the extent that the Plaintiff has received and paid for pharmaceuticals manufactured, marketed and sold by Dey after the filing of Plaintiff's Complaint and after first learning of the information that forms the basis for the allegations in the Complaint.

Twentieth Defense

Any damages recovered by the Plaintiff must be limited by the applicable statutory ceilings on recoverable damages.

Twenty-First Defense

Plaintiff fails to state a claim against Dey sufficient to support an award for costs, treble damages, attorneys' fees and/or legal fees.

Twenty-Second Defense

Plaintiff's claims are barred, in whole or in part, by the doctrines of mistake and mutual mistake.

Twenty-Third Defense

The civil penalties sought against Dey cannot be sustained because an award of the civil penalties sought by Plaintiff would violate the United States Constitution, Excessive Fines Clause of the Eighth Amendment, U.S. Const. amend. VIII, and the Due Process Clauses of the Fifth and Fourteenth Amendments, U.S. Const. amend. V and XIV, and the analogous provisions in the Constitution of the State of Wisconsin.

Twenty-Fourth Defense

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

Twenty-Fifth Defense

The granting of relief prayed for in Plaintiff's Complaint is unconstitutional under the United States Constitution and Constitution of the State of Wisconsin in that it violates Due

Process and Equal Protection guarantees, places an undue burden on interstate commerce, and violates Constitutional proscriptions against excessive fines.

Twenty-Sixth Defense

The granting of the relief prayed for in Plaintiff's Complaint is unconstitutional in that it would violate Dey's right of commercial speech under the United States Constitution and Constitution of the State of Wisconsin.

Twenty-Seventh Defense

Plaintiff has failed to join all persons and parties necessary for a just adjudication of the controversy.

Twenty-Eighth Defense

Any or all causes of action in Plaintiff's Complaint are barred because of the lack of privity between Plaintiff and Dey.

Twenty-Ninth Defense

Any or all causes of action in Plaintiff's Complaint are barred because the statutes upon which Plaintiff relies are vague and ambiguous.

Thirtieth Defense

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

Thirty-First Defense

Plaintiff's claims are barred, in whole or in part, because Dey did not make any statements to Plaintiff. As to any statement asserted against Dey that Plaintiff claims to be false or misleading, Dey had no reasonable grounds to believe, and did not believe at the time such statements were made, that the statements were false or misleading.

Thirty-Second Defense

Plaintiff's claims are barred, in whole or in part, by the political question and separation of powers doctrines.

Thirty-Third Defense

Plaintiff'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 thereunder.

Thirty-Fourth Defense

Plaintiff's claims are preempted by the dormant Commerce Clause of the United States Constitution.

Thirty-Fifth Defense

Dey did not owe any duty to Plaintiff and did not breach any duty owed to the Plaintiff.

Thirty-Sixth Defense

Plaintiff's claims are barred, in whole or in part, by the government contractor and similar defenses because the reimbursement system, including the use of AWP in excess of actual average prices, was designed and approved by Plaintiff to serve its purposes.

Thirty-Seventh Defense

Plaintiff's claims against Dey are barred, in whole or in part, because it has suffered no damages as a result of the matters alleged in the Complaint.

Thirty-Eighth Defense

Plaintiff's claims for damages are barred, in whole or in part, because its alleged damages, if any, are speculative and because of the impossibility of the ascertainment and allocation of these alleged damages.

Thirty-Ninth Defense

To the extent equitable relief is sought, such claims cannot be sustained because Plaintiff has an adequate remedy at law.

Fortieth Defense

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

Forty-First Defense

Plaintiff has no standing or capacity to bring some or all of the claims raised in this suit.

Forty-Second Defense

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

Forty-Third Defense

To the extent punitive damages and/or penalty assessments are sought, Plaintiff's punitive damages and/or penalty assessments claims against Dey: (1) have no basis in law or fact; (2) are not recoverable because the allegations of the Complaint are legally insufficient to support a claim for punitive damages and/or penalty assessments against Dey; (3) cannot be sustained because the laws regarding the standards for determining liability for and the amount of punitive damages and/or penalty assessments fail to give Dey prior notice of the conduct for which punitive damages and/or penalty assessments may be imposed and the severity of the penalty that may be imposed, and are void for vagueness in violation of Dey's

Due Process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Wisconsin; (4) cannot be sustained because any award of punitive damages and/or penalty assessments exceeding the limits authorized by law would violate Dey's Due Process and Equal Protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and would be improper under the Constitution, common law and laws of the State of Wisconsin; (5) cannot be sustained because an award of punitive damages and/or penalty assessments in this case, combined with any prior, contemporaneous, or subsequent judgments against Dey for punitive damages and/or penalty assessments arising from the design, development, manufacture, fabrication, distribution, supply, marketing, sale, or use of Dey's products would constitute impermissible multiple punishments for the same wrong, in violation of Dey's Due Process and Equal Protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and would constitute double jeopardy in violation of the Constitution, common law, and statutory laws of the State of Wisconsin; (6) cannot be sustained because any award of punitive damages and/or penalty assessments without the apportionment of the award separately and severally between or among the alleged joint tortfeasors, as determined by the alleged percentage of the wrong committed by each alleged tortfeasor, would violate Dey's Due Process and Equal Protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and would be improper under the Constitution, common law, and public policies of the State of Wisconsin; and (7) cannot be sustained because any award of punitive damages and/or penalty assessments, which are penal in nature, without according Dey the same protections that are accorded to all criminal defendants, including the protection against unreasonable searches and seizures, the privilege against self-incrimination, and the rights to confront adverse witnesses, a speedy trial,

and the effective assistance of counsel, would violate Dey's rights guaranteed by the Fourth, Fifth, and Sixth Amendment as incorporated into the Fourteenth Amendment to the United States Constitution and would be improper under the Constitution, common law, and public policies of the State of Wisconsin.

Forty-Fourth Defense

To the extent punitive damages and/or penalty assessments are sought, Plaintiff's claims for punitive damages and/or penalty assessments against Dey cannot be sustained because an award of punitive damages and/or penalty assessments by a jury that: (1) is not provided constitutionally adequate standards of sufficient clarity for determining the appropriate imposition of, and the appropriate size of, a punitive damages and/or penalty assessments award; (2) is not adequately instructed on the limits of punitive damages and/or penalty assessments imposed by the applicable principles of deterrence and punishment; (3) is not expressly prohibited from awarding punitive damages and/or penalty assessments, or determining the amount of an award of punitive damages and/or penalty assessments, in whole or in part on the basis of invidiously discriminatory characteristics, including without limitation the residence, wealth, and corporate status of Dey; (4) is permitted to award punitive damages and/or penalty assessments under a standard for determining liability for punitive damages and/or penalty assessments that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes punitive damages and/or penalty assessments permissible; (5) is not properly instructed regarding Plaintiff's burden of proof with respect to each and every element of a claim for punitive damages and/or penalty assessments; and (6) is not subject to trial court and appellate judicial review for reasonableness and furtherance of legitimate purposes on the basis of constitutionally adequate and objective standards, would violate Dey's Due Process and

Equal Protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and would be improper under the Constitution, common law, and public policies of the State of Wisconsin.

Forty-Fifth Defense

Plaintiff's unjust enrichment claims are barred, in whole or in part because Dey has not accepted or retained any benefits under circumstances where it would be inequitable for Dey to do so.

Forty-Sixth Defense

Dey hereby adopts and incorporates by reference, as if fully set forth herein, any affirmative defenses listed by any other defendant in its answer to Plaintiff's Complaint to the extent that such defenses are factually and/or legally consistent with Dey's position.

Forty-Seventh Defense

Subject to confirmation during discovery, Dey hereby reserves those affirmative defenses required to be specifically pled under Wis. Stat. § 802.02(3) not specifically pled above and incorporates them as if fully set forth in separate paragraphs. Dey reserves the right to amend its answer to assert additional affirmative defenses and to supplement those asserted herein upon discovery of further information regarding the claims asserted in the Complaint. These additional defenses cannot be asserted at this time because of the lack of detail in the Complaint concerning Plaintiff's claims.

Forty-Eighth Defense

To the extent Plaintiff or any of its citizens for whom it is seeking relief has obtained or obtains recovery in any other action or proceeding predicated on the same factual allegations, it is barred from seeking recovery against Dey based on the Complaint pursuant to

the doctrines of res judicata and collateral estoppel and the prohibition on double recovery for the same injury.

Forty-Ninth Defense

Some or all of Plaintiff's claims against Dey arise from Plaintiff's failure to follow its federal and state statutory and regulatory obligations to properly establish appropriate reimbursement rates.

Fiftieth Defense

Plaintiff's claims are barred, in whole or in part, because Plaintiff has not suffered any actual injury or damage as a result of any conduct alleged as a basis of this lawsuit.

Fifty-First Defense

Plaintiff's claims are barred, in whole or in part, because Dey's alleged conduct was reasonable and based on independent, legitimate business and economic justifications.

Fifty-Second Defense

Plaintiff's claims are barred, in whole or in part, because any and all of Dey's actions alleged by Plaintiff were lawful, justified, pro-competitive, carried out in furtherance of Dey's legitimate business interests, and constitute bona fide business competition.

Fifty-Third Defense

Plaintiff's claims are barred, in whole or in part, by the First Amendment of the United States Constitution and the analogous provisions of the Constitution of the State of Wisconsin.

Fifty-Fourth Defense

Plaintiff's claims against Dey are misjoined with Plaintiff's claims against other defendants and must be severed.

Fifty-Fifth Defense

Plaintiff's claims are barred by the Supremacy Clause of the United States Constitution.

Fifty-Sixth Defense

Plaintiff'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 occurring in judicial, legislative or administrative proceedings of any kind or at any level of government.

Fifty-Seventh Defense

Plaintiff's claims for costs and attorneys' fees under Counts I and II are barred because Wis. Stat. § 100.18 (11) (d) does not provide for the recovery of costs or attorneys' fees.

Fifty-Eighth Defense

Plaintiff's claims under Wis. Stat. § 49.49 are barred because Dey did not possess the requisite mental state under the statute.

Fifty-Ninth Defense

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

Sixtieth Defense

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

Sixty-First Defense

Plaintiff's claims under Wis. Stat. §§ 100.18 and 133.05 are barred to the extent that the claims involve the insurance business.

Sixty-Second Defense

Plaintiff knowingly uses the undiscounted benchmarks of AWP or WAC in order to provide a margin that encourages providers to participate and to compensate for inadequate dispensing fees. Plaintiff is not entitled to any recovery of the so-called "spread", and for this reason, any recovery is entirely set off by those amounts attributable to the deficient dispensing fee.

Sixty-Third Defense

Plaintiff's claims under Wis. Stat. § 133.05 are barred, in whole or in part, because Dey has not engaged in any conduct that has restrained competition.

Sixty-Fourth Defense

Plaintiff's unjust enrichment claims are barred, in whole or in part, because Plaintiff has no authority to bring such claims either on behalf of itself or on behalf of Medicare Part B participants.

WHEREFORE, Dey prays for judgment: (i) dismissing the Complaint in its entirety with prejudice and entering judgment in favor of Dey against the Plaintiff; (ii) awarding to Dey costs and fees incurred in this action; and (iii) granting to Dey such other and further relief as the Court may deem just and proper.

Dated: August 11, 2006

Respectfully submitted,



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Certificate of Service

I, JoAnn Phillips, hereby certify that on this 11th day of August, 2006, a true and correct copy of the foregoing Answer and Affirmative Defenses of Defendant Dey, Inc. to the State of Wisconsin's Second Amended Complaint was served on all counsel of record by Lexis Nexis File & Serve®.

A handwritten signature in cursive script that reads "JoAnn Phillips". The signature is written in black ink and is positioned to the right of the main text block.