COPY

STATE OF WISCONSIN | CIRCUIT COURT Branch 7 | DANE COUNTY

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DANE CO. CIRCUIT COURT

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN, INC., et. al.,

Defendants.

Case No. 04 CV 1709

Unclassified-Civil: 30703

ANSWER OF THE JOHNSON & JOHNSON DEFENDANTS TO THE SECOND AMENDED COMPLAINT

Johnson & Johnson, Janssen Pharmaceutica, Inc. (formerly Janssen Pharmaceutica Products, L.P. and sued herein as Janssen Pharmaceutical Products, L.P.), McNeil-PPC, Inc., Ortho Biotech Products, L.P., and Ortho-McNeil Pharmaceutical, Inc. ("the J&J Defendants"), by their undersigned counsel, hereby answer the Second Amended Complaint ("Complaint") as follows. Each allegation not expressly admitted is denied. To the extent that an allegation in the Complaint as to "defendants" is untrue as to the J&J Defendants, the J&J Defendants in this Answer deny each such allegation without inquiry into the conduct of the numerous other defendants in this action.

I. NATURE OF THE ACTION[1]

1. The J&J Defendants admit that the State of Wisconsin ("Wisconsin," "State," or "Plaintiff") purports to bring this action, but deny that there is any basis on which the State may do so. The J&J Defendants deny each and every remaining allegation in paragraph 1.

[1] For ease of reference, the J&J Defendants have included in this Answer the captions used in the Complaint, but do not thereby admit any inference that could be drawn from those captions.

II. PARTIES AND JURISDICTION

2. The J&J Defendants admit that the State purports to bring this action, and deny each and every remaining allegation in paragraph 2.

3. Except for Johnson & Johnson, which is a holding company, the J&J Defendants admit that they are companies engaged in the pharmaceutical industry. The J&J Defendants deny each and every remaining allegation contained in paragraph 3.

4-11. Paragraphs 4 through 11 allege identifying information as to other defendants. The J&J Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 4 through 11, and therefore they are denied.

12. Admit in part and deny in part. The J&J Defendants admit that Johnson & Johnson is a New Jersey corporation with its principal place of business located at One Johnson & Johnson Plaza, New Brunswick, New Jersey. The J&J Defendants deny that Johnson & Johnson is engaged in the business of manufacturing and selling pharmaceuticals. The J&J Defendants admit that Janssen L.P., which is a subsidiary operating company of Johnson & Johnson, was formerly a New Jersey limited partnership with its principal place of business at 1125 Trenton-Harbourton Road, Titusville, New Jersey. The J&J Defendants admit that Ortho-McNeil Pharmaceutical, Inc., which is a subsidiary operating company of Johnson & Johnson, is a Delaware corporation with its principal place of business located at 1000 U.S. Route 202, South Raritan, New Jersey. The J&J Defendants admit that Ortho Biotech Products, L.P. is a New Jersey limited partnership and a subsidiary operating company of Johnson & Johnson, except deny that its principal place of business is located at 700 U.S. Highway

202, Raritan, New Jersey. The J&J Defendants admit that McNeil-PPC, Inc., which is a subsidiary operating company of Johnson & Johnson, is a New Jersey corporation with its principal place of business located at 7050 Camp Hill Road, Fort Washington, Pennsylvania.

13-23. Paragraphs 13 through 23 allege identifying information as to other defendants. The J&J Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 13 through 23, and therefore they are denied.

24. The J&J Defendants state that paragraph 24 consists of conclusions of law to which no answer is required.

25. The J&J Defendants state that paragraph 25 consists of conclusions of law to which no answer is required.

III. FACTUAL BACKGROUND

A. <u>The Market For Prescription Drugs.</u>

26. The J&J Defendants admit that some of them manufacture pharmaceuticals, among other activities, and admit that some of them sell pharmaceuticals directly, or indirectly through intermediaries, to physicians, hospitals, and pharmacies, among other customers. With respect to the remaining allegations contained in paragraph 26, the J&J Defendants admit that the market for pharmaceuticals is complex and deny that they are fairly summarized in paragraph 26, and on that basis deny the allegations of paragraph 26.

27. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27, and on that basis deny the allegations.

28. The J&J Defendants state that the process by which a physician determines what prescription pharmaceutical to prescribe for a patient is complex, deny that that process is fairly summarized in paragraph 28, and on that basis deny the allegations of paragraph 28.

29. The J&J Defendants state that how and by whom a prescription pharmaceutical is paid for is a complex question, deny that it is fairly described in paragraph 29, and on that basis deny the allegations of paragraph 29.

30. The J&J Defendants deny each and every allegation set forth in paragraph 30.

B. <u>The Purpose of the Medicaid Program and How it Responds to the Complexity of the Drug Markets.</u>

31. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31, and on that basis deny the allegations.

32. The J&J Defendants admit that they participate in and sell drugs to Wisconsin's Medicaid program. Otherwise, the J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 32, and on that basis deny the remaining allegations.

33. The J&J Defendants refer to the relevant statutes and regulations governing Medicaid, and otherwise state that paragraph 33 contains conclusions of law as to which no answer is required.

34. The J&J Defendants admit that First DataBank and the Redbook purport to supply price information on defendants' drugs. The J&J Defendants deny each and every remaining allegation set forth in paragraph 34.

35. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 35, and on that basis deny the allegations.

36. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 36, and on that basis deny the allegations.

37. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37, and on that basis deny the allegations.

38. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 38, and on that basis deny the allegations.

39. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 39, and on that basis deny the allegations.

C. Defendant's Corruption of the Government Medicaid Assistance Programs.

40. The J&J Defendants deny each and every allegation set forth in paragraph 40 as to the J&J Defendants. Otherwise, the J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 40, and on that basis deny the allegations.

41. The J&J Defendants deny each and every allegation set forth in paragraph 41 as to the J&J Defendants. Otherwise, the J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 41, and on that basis deny the allegations.

42. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 42, including the source or authenticity of Exhibits B-1 through B-6, and on that basis deny the allegations.

43. The J&J Defendants deny that they have inflated the average wholesale prices of any of their drugs, and deny that it is the J&J Defendants' practice to do so. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 43, and on that basis deny the remaining allegations.

44. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 44, and on that basis deny the allegations.

45. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 45, and on that basis deny the allegations.

46. The J&J Defendants deny that Exhibit C lists any drugs manufactured by the J&J Defendants and their subsidiaries, and deny that Plaintiff has accurately summarized the conclusion of the report regarding Medicare Part B drugs. The J&J Defendants refer to the report, in its entirety, for the interpretation of the quoted statement. Otherwise, the J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 46, and on that basis deny the remaining allegations.

47. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 47, and on that basis deny the allegations.

48. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to source or meaning of the so-called "actual wholesale prices" for the J&J Defendants' drugs set forth in Exhibits D and E, deny that the Exhibits establish that the J&J Defendants caused "false prices" "to be published" for the J&J Defendants' drugs, deny that the J&J Defendants have caused false prices to be published for any of their products, and deny each and every other allegation set forth in paragraph 48 as to the J&J Defendants. Otherwise, the J&J Defendants state that they lack knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein, and on that basis deny the allegations.

49. The J&J Defendants deny each and every allegation set forth in paragraph 49 as to the J&J Defendants. Otherwise, the J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 49, and on that basis deny the allegations.

IV. DEFENDANTS' EXACERBATION OF THE COMPLEXITIES OF THE MARKET AND AFFIRMATIVE CONCEALMENT OF THEIR WRONGDOING

50. The J&J Defendants deny each and every allegation set forth in paragraph 50.

51. The J&J Defendants admit that the published AWPs of pharmaceuticals change from time to time, and deny each and every remaining allegation of paragraph 51.

52. The J&J Defendants deny each and every allegation contained in paragraph 52.

53. The J&J Defendants deny each and every allegation set forth in paragraph 53 as to the J&J Defendants, state that charge-backs are rarely, if ever, associated with sales to retail pharmacies, and otherwise state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein, and on that basis deny the allegations.

54. The J&J Defendants deny each and every allegation set forth in paragraph 54.

55. The J&J Defendants aver that different customers and classes of trade may negotiate different prices, depending on competitive factors, and deny each and every remaining allegation contained in paragraph 55.

56. The J&J Defendants deny each and every allegation set forth in paragraph 56 as to the J&J Defendants, and otherwise state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein, and on that basis deny the allegations.

57. The J&J Defendants deny each and every allegation set forth in paragraph 57 as to the J&J Defendants, and otherwise state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein, and on that basis deny the allegations.

58. The J&J Defendants deny each and every allegation set forth in paragraph 58 as to the J&J Defendants, and otherwise state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein, and on that basis deny the allegations.

59. The J&J Defendants deny each and every allegation set forth in paragraph 59 as to the J&J Defendants, and otherwise state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein, and on that basis deny the allegations.

60. The J&J Defendants deny that they have participated in any fraudulent scheme such as is described in paragraph 60, and deny each and every other allegation set forth in paragraph 60 as to the J&J Defendants. Otherwise, the J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 60, and on that basis deny the allegations.

V. THE INJURY TO GOVERNMENTAL HEALTH PRICES CAUSED BY DEFENDANTS' FALSE WHOLESALE PRICES

A. The Wisconsin Medicaid Program.

61. The J&J Defendants admit that Medicaid is a joint federal and state health care entitlement program authorized by federal law and state that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 61, and on that basis deny the remaining allegations.

62. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 62, and on that basis deny the allegations.

63. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 63, and on that basis deny the allegations.

64. The J&J Defendants aver that the reimbursement formulas used by the Wisconsin Medicaid Program were not always clear and therefore deny each and every allegation set forth in paragraph 64.

65. The J&J Defendants deny each and every allegation set forth in paragraph 65.

66. The J&J Defendants deny each and every allegation contained in paragraph 66.

B. Medicare.

67. The J&J Defendants refer to the relevant statutes and regulations governing Medicare, and otherwise admit that Medicare is the federal insurance program that covers persons 65 and older and certain disabled persons.

68. The J&J Defendants refer to the relevant statutes and regulations governing Medicare, and otherwise state that paragraph 68 contains conclusions of law to which no answer is required.

69. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 69, and on that basis deny the allegations.

70. The J&J Defendants deny that they have falsely reported the AWP for any of their drugs and state that the remaining allegations consist of paragraph 70 consist of conclusions of law to which no answer is required.

71. The J&J Defendants deny each and every allegation set forth in paragraph 71.

VI. DEFENDANTS' CONDUCT WAS INTENTIONALLY IN DISREGARD OF ESTABLISHED LAW

72. The J&J Defendants state that paragraph 72 contains conclusions of law to which no answer is required and deny any remaining allegations in paragraph 72 as to the J&J Defendants.

73. The J&J Defendants state that paragraph 73 contains conclusions of law to which no answer is required and deny any remaining allegations in paragraph 73 as to the J&J Defendants.

74. The J&J Defendants state that paragraph 74 contains conclusions of law to which no answer is required.

75. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 75, and on that basis deny the allegations.

76. The J&J Defendants deny each and every allegation set forth in paragraph 76.

77. The J&J Defendants state that paragraph 77 contains conclusions of law to which no answer is required and deny, as set forth in paragraph 77, that penalties and forfeitures are mandated in this case.

VII. HARM TO WISCONSIN AND ITS CITIZENS

78. The J&J Defendants deny each and every allegation in paragraph 78.

COUNT I -- Violation of Wis. Stat. § 100.18(1)

79. The J&J Defendants repeat and incorporate by reference their responses to all previous paragraphs, numbered 1 through 78 above.

80. The J&J Defendants state that paragraph 80 consists of conclusions of law to which no answer is required. Nonetheless, the J&J Defendants deny each and every allegation in paragraph 80.

81. The J&J Defendants state that paragraph 81 consists of conclusions of law to which no answer is required. Nonetheless, the J&J Defendants deny that their conduct violates Wis. Stat. § 100.18(1) and refer to the statute, associated regulations, and judicial and administrative interpretations of the statute in construing the statutory language.

82. The J&J Defendants deny each and every allegation in paragraph 82. The J&J Defendants further deny that the Plaintiff 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. The J&J Defendants repeat and incorporate by reference their responses to all previous paragraphs, numbered 1 through 82 above.

84. The J&J Defendants state that paragraph 84 consists of conclusions of law to which no answer is required. Nonetheless, the J&J Defendants deny that their conduct is a deceptive act within the meaning of Wis. Stat. 100.18(10) and refer to the statute, associated regulations, and judicial and administrative interpretations of the statute in construing the statutory language.

85. The J&J Defendants state that paragraph 85 consists of conclusions of law to which no answer is required. Nonetheless, the J&J Defendants deny each and every allegation in paragraph 85.

86. The J&J Defendants deny each and every allegation in paragraph 86. The J&J Defendants further deny that the Plaintiff 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. The J&J Defendants repeat and incorporate by reference their responses to all previous paragraphs, numbered 1 through 86 above.

88. The J&J Defendants deny each and every allegation set forth in paragraph 88 as to the J&J Defendants, and otherwise state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein, and on that basis deny the allegations.

89. The J&J Defendants deny each and every allegation set forth in paragraph 89 as to the J&J Defendants, and otherwise state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein, and on that basis deny the allegations.

90. The J&J Defendants state that paragraph 90 consists of conclusions of law to which no answer is required. Nonetheless, the J&J Defendants deny each and every allegation in paragraph 90.

91. The J&J Defendants deny each and every allegation in paragraph 91. The J&J Defendants further deny that the Plaintiff 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. The J&J Defendants repeat and incorporate by reference their responses to all previous paragraphs, numbered 1 through 91 above.

93. The J&J Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 93, and on that basis deny the allegations.

94. The J&J Defendants state that paragraph 94 consists of conclusions of law to which no answer is required. Nonetheless, the J&J Defendants deny each and every allegation in paragraph 94.

95. The J&J Defendants state that paragraph 95 consists of conclusions of law to which no answer is required. Nonetheless, the J&J Defendants deny each and every allegation in paragraph 95 as to the J&J Defendants, and otherwise state that they are

without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein, and on that basis deny the allegations. The J&J Defendants further deny that the Plaintiff 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. The J&J Defendants repeat and incorporate by reference their responses to all previous paragraphs, numbered 1 through 95 above.

97. The J&J Defendants deny each and every allegation in paragraph 97.

98. The J&J Defendants deny each and every allegation set forth in paragraph 98 as to the J&J Defendants, and otherwise state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein, and on that basis deny the allegations.

99. The J&J Defendants deny each and every allegation in paragraph 99.

100. The J&J Defendants deny each and every allegation set forth in paragraph 100 as to the J&J Defendants, and otherwise state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein, and on that basis deny the allegations. The J&J Defendants further deny that the Plaintiff 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

101. The J&J Defendants deny that the State has asserted any viable claims that would necessitate a trial by jury.

THE J&J DEFENDANTS' DEFENSES

102. By alleging the matters set forth below, the J&J Defendants do not allege or admit that they have 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 their affirmative defenses, the J&J Defendants allege as follows:

First Affirmative Defense

103. Plaintiff fails to state a claim against the J&J Defendants upon which relief can be granted.

Second Affirmative Defense

104. The State and its agents knew and were aware that AWP was not an actual average of wholesale prices or the actual acquisition cost of pharmaceuticals. Legal and equitable principles preclude this action for damages and injunctive relief.

Third Affirmative Defense

105. Plaintiff lacks standing or capacity to bring some or all of the claims raised, or relief sought, in this suit.

Fourth Affirmative Defense

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

Fifth Affirmative Defense

107. 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, by the dormant Commerce Clause, and by the Commerce Clause of the United States Constitution.

Sixth Affirmative Defense

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

Seventh Affirmative Defense

109. Plaintiff's claims against the J&J Defendants are barred, in whole or in part, by the applicable statutes of limitations and repose, and by the doctrines of laches, estoppel and waiver.

Eighth Affirmative Defense

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

Ninth Affirmative Defense

111. Plaintiff's claims are barred, in whole or in part, because the J&J Defendants' statements or actions were not the proximate cause or cause in fact of any injury to or alleged loss by Plaintiff, and injuries sustained by Plaintiff were the result of its own conduct or the intervening or superseding conduct of third parties.

Tenth Affirmative Defense

112. Plaintiff's claims against the J&J Defendants are barred, in whole or in part, due to its failure to join indispensable parties.

Eleventh Affirmative Defense

113. Plaintiff's claims against the J&J Defendants are misjoined with the Plaintiff's claims against other defendants and must be severed.

Twelfth Affirmative Defense

114. Plaintiff's claims against the J&J Defendants 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 of Plaintiff and the allocation of any fault, if any exists, attributable to the J&J Defendants; (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 that Plaintiff has paid for products manufactured, marketed and sold by the J&J Defendants after the filing of Plaintiff's original Complaint; and (4) because they are speculative and remote and because of the impossibility of ascertaining and allocating of those alleged damages.

Thirteenth Affirmative Defense

115. Any damages, forfeiture, or penalties recovered by the Plaintiff from the J&J Defendants must be limited by the applicable statutory ceilings on recoverable damages.

Fourteenth Affirmative Defense

116. The Complaint fails to allege the circumstances purportedly constituting fraud as to the J&J Defendants with the particularity required.

Fifteenth Affirmative Defense

117. Some or all of Plaintiff's claims against the J&J Defendants arise from Plaintiff's failure to fulfill its obligations under federal and state statutes and regulations to properly establish appropriate reimbursement rates.

Sixteenth Affirmative Defense

118. Plaintiff's prayers for relief in the form of restitution are barred, in whole or in part, because the J&J Defendants did not retain any money belonging to the State as a result of any alleged overpayments as required under Wisconsin law, and by the existence of express, written agreements covering the subject matter of Plaintiff's claims.

Seventeenth Affirmative Defense

119. Plaintiff has by its conduct waived, or is now estopped from obtaining, any recovery from the J&J Defendants.

Eighteenth Affirmative Defense

120. Plaintiff did not reasonably rely upon any alleged misrepresentations or omissions by the J&J Defendants.

Nineteenth Affirmative Defense

121. Plaintiff's claims against the J&J Defendants are barred, in whole or in part, because the J&J Defendants did not make any false statements to the State or its agents. As to any statement asserted against the J&J Defendants that the Plaintiff alleges to be false or misleading, the J&J Defendants had no reasonable grounds to believe, and did not believe at the time such a statement was made, that the statement was false or misleading.

Twentieth Affirmative Defense

122. Any statements, acts, or conduct attributed to the J&J Defendants did not occur in the conduct of business or commerce or to promote the sale or to increase the consumption of goods, was not consumer-oriented, and was not addressed to the public or a substantial number of persons.

Twenty-First Affirmative Defense

123. 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.

Twenty-Second Affirmative Defense

124. Plaintiff's claims against the J&J Defendants are barred in whole or in part by the doctrine of voluntary payment.

Twenty-Third Affirmative Defense

125. Plaintiff has failed to exhaust available statutory and administrative remedies.

Twenty-Fourth Affirmative Defense

126. To the extent penalty assessments are sought, Plaintiff's claims for penalty assessments against the J&J Defendants: (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 penalty assessments against the J&J Defendants; (3) cannot be sustained

because the laws regarding the standards for determining liability for and the amount of penalty assessments fail to give the J&J Defendants prior notice of the conduct for which penalty assessments may be imposed and the severity of the penalty that may be imposed, and are void for vagueness in violation of the J&J Defendants' 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 penalty assessments exceeding the limits authorized by the laws or other comparable laws would violate the J&J Defendants' 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 penalty assessments in this case, combined with any prior, contemporaneous, or subsequent judgments against the J&J Defendants for penalty assessments arising from the design, development, manufacture, fabrication, distribution, supply, marketing, sale, or use of the J&J Defendants' products would constitute impermissible multiple punishments for the same wrong, in violation of the J&J Defendants' 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 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 the J&J Defendants' 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 penalty assessments, which are penal in nature, without according the J&J Defendants the same protections that are accorded to criminal defendants, would violate the J&J Defendants' rights guaranteed by the Fourth, Fifth, and Sixth Amendments 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.

Twenty-Fifth Affirmative Defense

127. To the extent Plaintiff may obtain recovery in any other case predicated on the same factual allegations, Plaintiff is barred from seeking recovery against the J&J Defendants based on the prohibition on double recovery for the same injury.

Twenty-Sixth Affirmative Defense

128. Plaintiff's claims for equitable relief against the J&J Defendants are barred by the doctrines of adequate remedy at law and mootness due to the passage of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.

Twenty-Seventh Affirmative Defense

129. 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 the J&J Defendants in judicial, legislative, or administrative proceedings of any kind or at any level of government.

Twenty-Eighth Affirmative Defense

130. Plaintiff's claims against the J&J Defendants are barred in whole or in part by the doctrines of comparative and/or contributory fault.

Twenty-Ninth Affirmative Defense

131. 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.

Thirtieth Affirmative Defense

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

Thirty-First Affirmative Defense

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

Thirty-Second Affirmative Defense

134. The J&J Defendants deny that they have 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.

Thirty-Third Affirmative Defense

135. 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-Fourth Affirmative Defense

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

Thirty-Fifth Affirmative Defense

137. The State's claims are barred in whole or in part because the State has no authority to seek restitution for third parties based on any alleged violation of section 49.49(4).

Thirty-Sixth Affirmative Defense

138. 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.

Thirty-Seventh Affirmative Defense

139. The State's claims are barred in whole or in part because this action is being brought by attorneys not authorized to represent the State.

Thirty-Eighth Affirmative Defense

140. The State's claims under Wis. Stat. § 100.18 are barred, in whole or in part, to the extent the claims involve the insurance business.

Thirty-Ninth Affirmative Defense

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

Fortieth Affirmative Defense

142. The State's claims against the J&J Defendants are barred, in whole or in part, because it has suffered no damages as a result of the matters alleged in the Complaint.

Forty-First Affirmative Defense

143. The J&J Defendants adopt by reference any additional applicable defense pled by any other defendants not otherwise pled herein.

Forty-Second Affirmative Defense

144. The J&J Defendants hereby give notice that they intend to rely upon any other and additional defenses that are now or may become available or appear during, or as a result of, the discovery proceedings in this action and hereby reserve their right to amend their answer to assert such defenses.

WHEREFORE, the J&J Defendants demand: (1) that the Complaint be in all respects dismissed as to them; (2) their costs of defending this action; and (3) such other and further relief as the Court may deem just and proper.

Dated this 14th day of August, 2006.

Respectfully submitted,

By: _____

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