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

Case No.: 04 CV 1709

ANSWER AND DEFENSES OF DEFENDANTS SCHERING-PLOUGH CORPORATION AND WARRICK PHARMACEUTICALS CORPORATION TO THE STATE OF WISCONSIN'S SECOND AMENDED COMPLAINT

Schering-Plough Corporation ("Schering-Plough") and Warrick Pharmaceuticals Corporation ("Warrick") (collectively, the "Warrick defendants"), by and through its undersigned counsel, hereby answer the State of Wisconsin's ("Plaintiff," "Wisconsin" or the "State") Second Amended Complaint (the "Complaint") as follows:

1. To the extent the allegations in Paragraph 1 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 1 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

2. To the extent the allegations in Paragraph 2 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 2 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

3. To the extent the allegations in Paragraph 3 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 3 are directed at the Warrick defendants, the Warrick defendants admit that Warrick is a company engaged in the manufacture and sale of generic pharmaceuticals, but deny the remaining allegations in Paragraph 3.

4-17. The allegations in Paragraphs 4 through 17 of the Complaint are directed at entities other than the Warrick defendants, and therefore require no response from the Warrick defendants. To the extent a response is required, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraphs 4 through 17, and therefore deny same.

18. The Warrick defendants admit that Schering-Plough is a New Jersey corporation with its principal place of business located at 2000 Galloping Hill Road, Kenilworth, New Jersey, 07033-0530. The Warrick defendants further admit that: 1) Warrick is a Delaware corporation with its principal place of business at 1095 Morris Avenue, Union, New Jersey, 07083; 2) Warrick is a second tier subsidiary of Schering-Plough and has been since its formation in 1993; and 3) Warrick manufactures generic pharmaceuticals. The Warrick defendants deny the remaining allegations of Paragraph 18, including its subparts.

19-23. The allegations in Paragraphs 19 through 23 of the Complaint are directed at entities other than the Warrick defendants and therefore require no response from the Warrick defendants. To the extent a response is required, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraphs 19 through 23, and therefore deny same.

24. Paragraph 24 of the Complaint states legal conclusions to which no response is required.

25. Paragraph 25 of the Complaint states legal conclusions to which no response is required. To the extent the remaining allegations in Paragraph 25 are directed at parties other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 25 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

26-29. To the extent the allegations in Paragraphs 26 through 29 of the Complaint are directed at parties other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraphs 26 through 29 regarding the general market for prescription drugs are directed at the Warrick defendants, the Warrick defendants admit that in certain instances the general market for prescription drugs operates in a manner similar to that described by Plaintiff. In other instances, however, the general market for prescription drugs operates in a manner different than what is described by Plaintiff. Accordingly, in light of the variety of possible responses about the general description of the prescription drug market, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraphs 26 through 29, and therefore deny same. The Warrick defendants deny the remaining allegations of Paragraphs 26 through 29.

30. To the extent the allegations in Paragraph 30 of the Complaint are directed at parties other than the Warrick defendants, the Warrick defendants are without knowledge or

information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 30 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

31-33. To the extent Paragraphs 31 through 33 of the Complaint purport to recite laws or regulations, no response is required. To the extent a response is required, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same.

34. To the extent the allegations in Paragraph 34 of the Complaint are directed at parties other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 34 are directed at the Warrick defendants, the Warrick defendants admit that pharmaceutical industry compendia, including Red Book and First DataBank, periodically publish reference pricing information for certain prescription medicines sold in this country. The Warrick defendants deny the remaining allegations in Paragraph 34.

35. To the extent the allegations in Paragraph 35 of the Complaint are directed at parties other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 35 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

36-39. The Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraphs 36 through 39 of the Complaint, and therefore deny same. Furthermore, with respect to the allegations in the last sentence of

Paragraph 38 and all of the allegations in Paragraph 39, the Warrick defendants deny the allegations.

40. To the extent the allegations in Paragraph 40 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 40 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

41. To the extent the allegations in Paragraph 41 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 41 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

42. To the extent the allegations in Paragraph 42 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 42 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

43. To the extent the allegations in Paragraph 43 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 43 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

44-45. The allegations in Paragraphs 44 through 45 of the Complaint are directed at entities other than the Warrick defendants, and therefore no response is required from the Warrick defendants. To the extent a response is required, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same.

46. To the extent the allegations in Paragraph 46 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 46 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

47. The allegations in Paragraph 47 of the Complaint are directed at entities other than the Warrick defendants, and therefore no response is required from the Warrick defendants. To the extent a response is required, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same.

48. To the extent the allegations in Paragraph 48 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 48 are directed at the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same.

49. To the extent the allegations in Paragraph 49 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or

information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 49 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

50. To the extent the allegations in Paragraph 50 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent that allegations in Paragraph 50 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

51. To the extent the allegations in Paragraph 51 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent that allegations in Paragraph 51 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

52. To the extent the allegations in Paragraph 52 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent that allegations in Paragraph 52 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

53. To the extent the allegations in Paragraph 53 of the Complaint are directed at parties other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 53 are directed at the Warrick defendants, the Warrick defendants admit that at times Warrick offers different net prices to different

customers on different products at different times, based generally on the customer's bargaining power. The Warrick defendants deny the remaining allegations in Paragraph 53.

54. To the extent the allegations in Paragraph 54 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 54 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

55. To the extent the allegations in Paragraph 55 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 55 are directed at the Warrick defendants, the Warrick defendants admit that at times Warrick offers different net prices to different customers on different products at different times, based generally on the customer's bargaining power. The Warrick defendants deny the remaining allegations of Paragraph 55.

56. To the extent the allegations in Paragraph 56 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 56 are directed to the Warrick defendants, the Warrick defendants deny the allegations.

57. To the extent the allegations in Paragraph 57 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore

deny same. To the extent the allegations in Paragraph 57 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

58. To the extent the allegations in Paragraph 58 of the Complaint are directed at parties other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 58 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

59. To the extent the allegations in Paragraph 59 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 59 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

60. To the extent the allegations in Paragraph 60 of the Complaint are directed at parties other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 60 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

61. To the extent the allegations in Paragraph 61 of the Complaint are directed at parties other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 61 are directed at the Warrick defendants, the Warrick defendants admit that Wisconsin Medicaid is a joint state and federal program which pays for medical care, including prescription drug benefits, for certain Wisconsin citizens. The

Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 61 of the Complaint, and therefore deny same.

62-63. To the extent the allegations in Paragraphs 62 through 63 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or sufficient information to form a belief as to the truth or falsity of the allegations, and therefore deny same. To the extent the allegations in Paragraphs 62 through 63 are directed at the Warrick defendants, the Warrick defendants admit the existence of a Federal Upper Limit ("FUL") for a majority of generic drugs. The Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraphs 62 through 63, and therefore deny same.

64. To the extent the allegations in Paragraph 64 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations, and therefore deny same. To the extent the allegations in Paragraph 64 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

65. To the extent the allegations in Paragraph 65 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 65 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

66. To the extent the allegations in Paragraph 66 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or

information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraph 66 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

67-71. To the extent the allegations in Paragraphs 67 through 71 of the Complaint state legal conclusions, no response is required. To the extent the allegations are directed at entities other than the Warrick defendants, Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraphs 67 through 71 are directed at the Warrick defendants, the Warrick defendants admit that federal law governs the manner in which Medicare Part B reimburses providers for certain drugs. The Warrick defendants refer to the laws and regulations cited for their content. The Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 67 through 71, and therefore deny same.

72-76. To the extent the allegations in Paragraphs 72 through 76 of the Complaint state legal conclusions, no response is required. To the extent the allegations are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraphs 72 through 76 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

77. To the extent the allegations in Paragraph 77 are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent

the allegations in Paragraph 77 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

78. To the extent the allegations in Paragraph 78 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or sufficient information to form a belief as to the truth or falsity of the allegations, and on that basis deny the allegations. To the extent the allegations in Paragraph 78 are directed at the Warrick defendants, the Warrick defendants deny the allegations.

79. The Warrick defendants reallege and incorporate by reference their responses to Paragraphs 1 through 78 of the Complaint.

80-82. To the extent the allegations in Paragraphs 80 through 82 of the Complaint state legal conclusions, no response is required. The Warrick defendants refer to the laws and regulations cited for their content. To the extent the allegations in Paragraphs 80 through 82 are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraphs 80 through 82 are directed at the Warrick defendants, the Warrick defendants deny the allegations. The Warrick defendants further deny 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.

83. The Warrick defendants reallege and incorporate by reference their responses to Paragraphs 1 through 82 of the Complaint.

84-86. To the extent the allegations in Paragraphs 84 through 86 of the Complaint state legal conclusions, no response is required. The Warrick defendants refer to the laws and regulations cited for their content. To the extent the allegations in Paragraphs 84 through 86 are

directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraphs 84 through 86 are directed at the Warrick defendants, the Warrick defendants deny the allegations. The Warrick defendants further deny 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.

87. The Warrick defendants reallege and incorporate by reference their responses to Paragraphs 1 through 86 of the Complaint.

88-91. To the extent the allegations in Paragraphs 88 through 91 of the Complaint state legal conclusions, no response is required. The Warrick defendants refer to the laws and regulations cited for their content. To the extent the allegations in Paragraphs 88 through 91 are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraphs 88 through 91 are directed at the Warrick defendants, the Warrick defendants deny the allegations. The Warrick defendants further deny 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.

92. The Warrick defendants reallege and incorporate by reference their responses to Paragraphs 1 through 91 of the Complaint.

93. To the extent the allegations in Paragraph 93 of the Complaint are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or sufficient information to form a belief as to the truth or falsity of the allegations, and therefore deny same. To the extent the allegations in Paragraph 93 are directed at the Warrick defendants,

the Warrick defendants admit that Warrick produces, markets and sells pharmaceutical products some of which are sold to entities and individuals in the State of Wisconsin. Furthermore, the Warrick defendants specifically deny that Schering-Plough produces, markets or sells any pharmaceutical products. The Warrick defendants are without knowledge or sufficient information to form a belief as to the truth or falsity of the remaining allegations in Paragraph 93, and therefore deny same.

94-95. To the extent the allegations in Paragraphs 94 through 95 of the Complaint state legal conclusions, no response is required. The Warrick defendants refer to the laws and regulations cited for their content. To the extent the allegations in Paragraphs 94 through 95 are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraphs 94 through 95 are directed at the Warrick defendants, the Warrick defendants deny the allegations. The Warrick defendants further deny 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.

96. The Warrick defendants reallege and incorporate by reference their responses to Paragraphs 1 through 95 of the Complaint.

97-100. To the extent the allegations in Paragraphs 97 through 100 are directed at entities other than the Warrick defendants, the Warrick defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of those allegations, and therefore deny same. To the extent the allegations in Paragraphs 97 through 100 are directed at the Warrick defendants, the Warrick defendants deny the allegations. The Warrick defendants

further deny 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

The Warrick defendants deny that the State has asserted any viable claims that would necessitate a trial by jury.

AFFIRMATIVE DEFENSES

By alleging the matters set forth below, the Warrick 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 for their affirmative defenses, the Warrick defendants reassert and reincorporate as if fully set forth herein its responses to Paragraphs 1 through 100 of the Complaint above:

First Defense (Failure to State a Claim)

Plaintiff's Complaint, and each claim for relief stated therein, fail to state a claim upon which relief may be granted.

Second Defense (Contributory Fault)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Under the applicable Wisconsin statutes and regulations, the relevant legislative and executive branches in Wisconsin chose to base prescription drug reimbursement, in part, on the AWP's published by third-party publishing services. Over the past several decades, numerous publicly available agency reports, studies, news articles, materials from third-party publishing services, and other publications have set forth that the AWP's published by the third-party publishing services do not reflect, and are not intended to reflect, actual provider acquisition costs, and are often substantially higher. Additionally, since January 2002, Warrick

has sent the Wisconsin Division of Medical Services and the Wisconsin Board of Pharmacy a monthly letter providing Warrick's high and low product prices to its three main classes of trade (wholesalers, retail pharmacy chains, and generic distributors). Thus, Plaintiff was aware, and all persons on whose behalf Plaintiff purports to bring this action were aware or should have been aware, during the relevant time period, that the reimbursement rates Plaintiff was using to pay providers were greater than the acquisition cost generally paid by those providers. Notwithstanding this information and Plaintiff's knowledge, Plaintiff knowingly set its reimbursement rates at amounts higher than estimated acquisition cost. Thus, the harm complained of by Plaintiff could have reasonably been avoided under the circumstances. As a result, Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, are barred by the doctrine of contributory fault.

Third Defense (Good Faith)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Any and all actions taken by the Warrick defendants with respect to any of the matters alleged in the Complaint were taken in good faith and in accordance with established industry practice. Average Wholesale Price, or AWP, is a pricing benchmark that does not have a uniformly accepted meaning within the pharmaceutical generic drug industry, other than as a reference price. AWP's are reported by several industry sources and publications, including First DataBank. First DataBank – not any of the Warrick defendants – determines the AWP that First DataBank may publish for Warrick drugs. Based on the foregoing, Plaintiff cannot establish that the Warrick defendants' conduct was fraudulent or otherwise actionable, and Plaintiff cannot recover.

Fourth Defense (Statute of Limitations)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, are barred, in whole or in part, by the applicable statutes of limitations and repose.

Fifth Defense (Failure to Join Indispensable Parties)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, against the Warrick defendants are barred, in whole or in part, due to Plaintiff's failure to join the providers, who received the excess payments as alleged by Plaintiff, as indispensable parties.

Sixth Defense (Proximate Cause, Producing Cause, or Cause in Fact)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. The Warrick defendants' statements or actions were not the proximate cause, producing cause, or cause in fact of any injury or alleged loss, in that Plaintiff enacted its drug reimbursement schedule with full knowledge that AWP and WAC function only as benchmark reference prices, and/or that any alleged injury was proximately and in fact caused by intervening third parties. Over the past several decades, numerous publicly available agency reports, studies, news articles, materials from third-party publishing services, and other publications have set forth that the AWPs published by third-party publishing services do not reflect, and are not intended to reflect, actual provider acquisition costs, and are often substantially higher. Notwithstanding this information, Plaintiff knowingly set reimbursement rates for providers at amounts greater than the acquisition cost generally paid by those providers – using the AWPs and/or WACs published by third-party publishing services, not any AWPs or

WACs allegedly received by Plaintiff from any of the Warrick defendants. Thus, Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, are barred because any injuries sustained by Plaintiff, or any person on whose behalf Plaintiff purports to bring this action, were the result of their own conduct or the superseding conduct of third parties.

Seventh Defense (Standing)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff has no standing or capacity to bring some or all of the claims.

Eighth Defense (Waiver)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Over the past several decades, numerous publicly available agency reports, studies, news articles, materials from third-party publishing services, and other publications have set forth that the AWP's published by third-party publishing services do not reflect, and are not intended to reflect, actual provider acquisition costs, and are often substantially higher. Additionally, since January 2002, Warrick has been voluntarily providing both the Wisconsin Division of Health Care Financing and the Wisconsin Board of Pharmacy with a monthly letter providing Warrick's high and low product contract prices to its three main classes of trade (wholesalers, retail pharmacy chains, and generic distributors). This monthly report lists the high and low contract price range for Warrick's currently marketed products to these customers. Thus, Plaintiff was aware, and all persons on whose behalf Plaintiff purports to bring this action were aware or should have been aware, during the relevant time period, that the reimbursement rates Plaintiff was paying providers was greater than the acquisition cost generally paid by those providers. In choosing to establish and administer the system of prescription drug reimbursement as it did, Plaintiff intentionally relinquished known rights to its claims in this case. Based on the

foregoing, Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, are barred by the doctrine of waiver.

Ninth Defense (Failure to Mitigate)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Over the past several decades, numerous publicly available agency reports, studies, news articles, materials from third-party publishing services, and other publications have set forth that the AWP's published by third-party publishing services do not reflect, and are not intended to reflect, actual provider acquisition costs, and are often substantially higher. Additionally, since January 2002, Warrick has been voluntarily providing both the Wisconsin Division of Health Care Financing and the Wisconsin Board of Pharmacy with a monthly letter providing Warrick's high and low product contract prices to its three main classes of trade (wholesalers, retail pharmacy chains, and generic distributors). This monthly report lists the high and low contract price range for Warrick's currently marketed products to these customers. Notwithstanding this information, Plaintiff knowingly chose to base Wisconsin Medicaid Program prescription drug reimbursement, in part, on the AWP's and/or WAC's published by third-party publishing services. Furthermore, Plaintiff was aware, and all persons on whose behalf Plaintiff purports to bring this action were aware or should have been aware, during the relevant time period, that the reimbursement rates Plaintiff was choosing to pay providers were greater than the acquisition cost generally paid by those providers. Thus, Plaintiff's claims against the Warrick defendants for damages or other relief are barred because Plaintiff, and all persons on whose behalf Plaintiff purports to bring this action, failed to mitigate their damages, and that failure to mitigate damages should at minimum proportionately reduce the recovery of Plaintiff and the allocation of any fault, if any exists, attributable to the Warrick defendants.

Tenth Defense (Ratification)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Over the past several decades, numerous publicly available agency reports, studies, news articles, materials from third-party publishing services, and other publications have set forth that the AWP's published by third-party publishing services do not reflect, and are not intended to reflect, actual provider acquisition costs, and are often substantially higher. Additionally, since January 2002, Warrick has been voluntarily providing both the Wisconsin Division of Health Care Financing and the Wisconsin Board of Pharmacy with a monthly letter providing Warrick's high and low product contract prices to its three main classes of trade (wholesalers, retail pharmacy chains, and generic distributors). This monthly report lists the high and low contract price range for Warrick's currently marketed products to these customers. Notwithstanding this information, Plaintiff knowingly chose to base Wisconsin Medicaid Program prescription drug reimbursement, in part, on the AWP's and/or WAC's published by third-party publishing services. Furthermore, Plaintiff was aware, and all persons on whose behalf Plaintiff purports to bring this action were aware or should have been aware, during the relevant time period, that the reimbursement rates Plaintiff was choosing to pay providers were greater than the acquisition cost generally paid by those providers. Thus, Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, against the Warrick defendants for damages or other relief are barred by the doctrine of ratification.

Eleventh Defense (Laches)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Over the past several decades, numerous publicly available agency reports, studies, news articles, materials from third-party publishing services, and other publications have

set forth that the AWP's published by third-party publishing services do not reflect, and are not intended to reflect, actual provider acquisition costs, and are often substantially higher.

Additionally, since January 2002, Warrick has been voluntarily providing both the Wisconsin Division of Health Care Financing and the Wisconsin Board of Pharmacy with a monthly letter providing Warrick's high and low product contract prices to its three main classes of trade (wholesalers, retail pharmacy chains, and generic distributors). This monthly report lists the high and low contract price range for Warrick's currently marketed products to these customers.

Notwithstanding this information, Plaintiff knowingly set reimbursement rates it was choosing to pay providers at amounts greater than the acquisition cost generally paid by those providers.

Because Plaintiff was aware, and all persons on whose behalf Plaintiff purports to bring this action were aware or should have been aware, since at least the early 1990s that the reimbursement rates Plaintiff was paying to providers were higher than estimated acquisition cost, Plaintiff's delay in bringing its claims is inexcusable and has prejudiced the Warrick defendants. Based on the foregoing, Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, against the Warrick defendants are barred by the doctrine of laches.

Twelfth Defense (Set Off)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Every year, Plaintiff receives funding from the federal government through the Federal Medicaid Program for a percentage of the prescription drug reimbursements made under the Wisconsin Medicaid Program. Additionally, the State of Wisconsin collects tax revenue on any profits earned by pharmacies through reimbursement of the relevant prescription drugs based on the AWP's and/or WAC's published by third-party publishers. Any recovery by Plaintiff should be substantially if not entirely set off by appropriate percentages of the amounts

described above in order to avoid unjust enrichment. Additionally, Plaintiff's alleged recovery must be reduced by the benefits and rebates it received from the Warrick defendants.

Thirteenth Defense (Unjust Enrichment)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's damages should be barred or substantially reduced under the doctrine of unjust enrichment. Every year, Plaintiff receives funding from the federal government through the Federal Medicaid Program for a percentage of the prescription drug reimbursements made under the Wisconsin Medicaid Program. Additionally, the State of Wisconsin collects tax revenue on any profits earned by pharmacies through reimbursement of the relevant prescription drugs based on the AWP and/or WAC published by third-party publishers. Finally, Plaintiff received benefits and rebates from the Warrick defendants. Plaintiff, and all persons on whose behalf Plaintiff purports to bring this action, will be unjustly enriched if any recovery is not reduced appropriately.

Fourteenth Defense (Mutual Mistake)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Any recovery by Plaintiff is barred by the doctrine of mutual mistake. Plaintiff, and all persons on whose behalf Plaintiff purports to bring this action, knew or reasonably should have known that the AWP and WAC published by the third-party publishing services do not reflect, and are not intended to reflect, actual provider acquisition costs, and are often substantially higher. If Plaintiff, or any person on whose behalf Plaintiff purports to bring this action, was in fact unaware that AWP and WAC do not reflect actual provider acquisition costs, the Warrick defendants in no way contributed to this lack of knowledge. AWP and WAC are reported by several industry sources and publications, including First DataBank. First

DataBank – not any of the Warrick defendants – determines the AWP and WAC that First DataBank may publish for the Warrick defendants' drugs. The Warrick defendants neither caused nor contributed to any mistake Plaintiff, or any person on whose behalf Plaintiff purports to bring this action, may or may not have experienced. Thus, Plaintiff cannot recover.

Fifteenth Defense (Estoppel)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Over the past several decades, numerous publicly available agency reports, studies, news articles, materials from third-party publishing services, and other publications have set forth that the AWPs published by third-party publishing services do not reflect, and are not intended to reflect, actual provider acquisition costs, and are often substantially higher. Additionally, since January 2002, Warrick has been voluntarily providing both the Wisconsin Division of Health Care Financing and the Wisconsin Board of Pharmacy with a monthly letter providing Warrick's high and low product contract prices to its three main classes of trade (wholesalers, retail pharmacy chains, and generic distributors). This monthly report lists the high and low contract price range for Warrick's currently marketed products to these customers. Thus, Plaintiff was aware, and all persons on whose behalf Plaintiff purports to bring this action were aware or should have been aware, during the relevant time period, that the reimbursement rates Plaintiff was paying providers was greater than the acquisition cost generally paid by those providers. Plaintiff's knowing, continuous use of AWPs and/or WACs in calculating drug reimbursement amounts functioned as an approval of such AWPs and/or WACs, on which the Warrick defendants reasonably relied. Based on the foregoing, Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, against the Warrick defendants are barred by the doctrine of estoppel.

Sixteenth Defense (Federal and State Due Process)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Any recovery by Plaintiff is barred by the Due Process Clauses of the United States and Wisconsin Constitutions. The statutes under which Plaintiff seeks to recover are so vague and standardless regarding both liability and penalties that they leave the public uncertain as to the conduct prohibited and the expected penalty.

Seventeenth Defense (Excessive Penalties)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Any recovery by Plaintiff is barred because the excessive penalties requested under Wisconsin law are so high as to bear no rational relation to a legitimate state interest or compensate for the alleged loss. As penalty assessments, the amounts requested are so grossly excessive in relation to Plaintiff's interest in punishment as to be arbitrary, and violate the Due Process Clause of the United States Constitution.

Eighteenth Defense (Statutory Limits)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. The applicable statutory ceilings on recoverable damages must limit any damages recovered by Plaintiff from the Warrick defendants.

Nineteenth Defense (No Attorneys' Fees, Treble Damages, and/or Legal Fees)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff fails to allege facts or a cause of action against the Warrick defendants sufficient to support a claim for attorneys' fees, treble damages and/or legal fees.

Twentieth Defense (Plaintiff's Own Negligence)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. The claims alleged herein, based on the facts alleged, are barred by Plaintiff's

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

Twenty-First Defense (Supremacy Clause)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff'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 Defense (Commerce Clause)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, are preempted by the Commerce Clause and/or the dormant Commerce Clause of the United State Constitution.

Twenty-Third Defense (Preemption)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, 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.

Twenty-Fourth Defense (Res Judicata and Collateral Estoppel)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. To the extent that Plaintiff, or any person on whose behalf Plaintiff purports to bring this action, obtains, or is barred from, recovery in any other case predicated on the same factual allegations, Plaintiff, and all persons on whose behalf Plaintiff purports to bring this action, are barred from seeking recovery against the Warrick defendants based on the Complaint pursuant to the doctrines of *res judicata* and collateral estoppel, and the prohibition on double recovery for the same injury.

Twenty-Fifth Defense (Compliance with Federal and State Law)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, against the Warrick defendants are barred because the Warrick defendants have complied with all applicable laws or regulations of the federal and state governments.

Twenty-Sixth Defense (Mootness of Injunctive Relief)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's claims against the Warrick defendants for injunctive relief were mooted by the passage of the Medicare Prescription Drug, Improvement and Modernization Act of 2003.

Twenty-Seventh Defense (In Pari Delicto and Unclean Hands)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's claims for injunctive relief against the Warrick defendants are barred by the doctrines of *in pari delicto* and/or unclean hands.

Twenty-Eighth Defense (Misjoinder)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, against the Warrick defendants are misjoined with Plaintiff's claims against other defendants and must be severed.

Twenty-Ninth Defense (Speculative and Remote Claims)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, against the Warrick defendants for damages are barred, in whole or in part, because the claims are speculative and remote and because of the impossibility of ascertaining and allocating of the alleged damages.

Thirtieth Defense (No Conduct Justifying Penalty Assessments)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. The Warrick defendants deny that they have engaged in any conduct that entitles Plaintiff to recover penalty assessments and aver that Plaintiff's Complaint fails to state a claim upon which penalty assessments may be awarded to Plaintiff.

Thirty-First Defense (Penalty Assessments Unconstitutional Under U.S. Constitution)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. 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 Plaintiff'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 the Warrick defendants, 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.

Thirty-Second Defense
(Penalty Assessments Unconstitutional Under Wisconsin Constitution)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. The recovery of penalty assessments by Plaintiff 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 the Warrick defendants;

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;

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

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

Thirty-Third Defense (Failure to Allege Fraud with Specificity)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff fails to state with particularity facts to support its fraud allegations against the Warrick defendants.

Thirty-Fourth Defense (Adequate Remedy at Law)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. To the extent that Plaintiff attempts to seek equitable relief against the Warrick defendants, Plaintiff is not entitled to such relief because Plaintiff, and all persons on whose behalf Plaintiff purports to bring this action, have an adequate remedy at law.

Thirty-Fifth Defense (No Grounds for Unjust Enrichment)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's unjust enrichment claims are barred, in whole or in part, because the Warrick defendants did not collect or retain any money belonging to Plaintiff, or belonging to any person on whose behalf Plaintiff purports to bring this action, as a result of any alleged overpayments as required under Wisconsin law.

Thirty-Sixth Defense (Filed Rate Doctrine)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, are barred, in whole or in part, by the filed rate doctrine.

Thirty-Seventh Defense (No Reliance)

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. Plaintiff's claims, and the claims of any person on whose behalf Plaintiff purports to bring this action, are barred in whole or in part because Plaintiff, and all persons on

whose behalf Plaintiff purports to bring this action, did not rely on the allegedly fraudulent statements or conduct of the Warrick defendants.

Thirty-Eighth Defense

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. The Warrick defendants adopts by reference any additional applicable defense pled by any other defendant in this case, not otherwise pled herein.

Thirty-Ninth Defense

The Warrick defendants incorporate by reference all preceding paragraphs as though set forth fully herein. The Warrick defendants hereby give notice that they intend to rely upon any other 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 reserve their right to amend their answer to assert such defense.

WHEREFORE, the Warrick defendants pray that this Court:

- (1) dismiss the Complaint with prejudice and enter judgment in favor of the Warrick defendants against the State of Wisconsin;
- (2) award the Warrick defendants their costs and expenses; and
- (3) award such other and further relief as the Court may deem just and proper.

Dated: August 18, 2006



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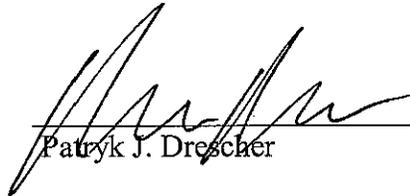
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*Attorneys for Defendants Schering-Plough
Corp., and Warrick Pharmaceuticals Corp.*

CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of August, 2006, a true and correct copy of Answer and Defenses of Defendants Schering-Plough Corporation and Warrick Pharmaceuticals Corporation to the State of Wisconsin's Second Amended Complaint was served upon all counsel of record via Lexis Nexis File & Serve.



Patryk J. Drescher