STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN,	)	
Plaintiff,	)	
v.	)	**Case No 04 CV 1709**
AMGEN INC., ET AL.	)	**Unclassified - Civil: 30703**
Defendants.	)	

DEFENDANT ABBOTT LABORATORIES' INDIVIDUAL REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

In its individual memorandum in support of defendants' motion to dismiss, Defendant Abbott Laboratories ("Abbott") established that: 1) the State failed to allege fraud against Abbott with the specificity required by Section 802.03 of the Wisconsin Rules of Civil Procedure; and 2) any claims based on the alleged overpayment for multiple-source drugs under Medicare Part B should be dismissed because it is impossible for any one multiple-source drug manufacturer to gain a "spread" advantage over another multiple-source drug manufacturer. Nothing in the State's response briefs can corrects these deficiencies. Therefore, dismissal against Abbott is appropriate.[1]

I. Rule 802.03 Applies to the State's Claims, and The State Cannot Point To Any Specific Allegations Against Abbott.

The State responds to the first argument in its response to defendants' joint brief (*see* Pltf. Resp. to Defs. Jt. Mem. at 37-44). The State contends that: 1) Rule 802.03 does not apply to its claims; and 2) even if it did, the complaint satisfies the rule's heightened pleading requirements.

[1] Abbott adopts and incorporates by reference defendants' joint reply and, to the extent applicable, the arguments contained in any other defendant's individual reply in support of defendants' motion to dismiss.

As explained in defendants' joint reply, both arguments lack merit. Rule 802.03 applies to more than merely claims of common law fraud, but to any averments of fraud. Because plaintiff's claims are grounded in fraud, they must be pled with particularity. (*See* Defs. Jt. Reply, at 1-5.) The State's second contention, that its complaint in fact satisfies the specificity requirements of Rule 802.03, defies reality. The State does not dispute that its complaint fails to make any particularized allegations against Abbott, including, for instance, which Abbott products are at issue; the allegedly fraudulent prices that Abbott submitted for the unidentified products; and what prices Abbott should have submitted instead. Nor can the State point to any allegation in the complaint that it or any individual actually paid for a specific Abbott product based on AWP. These omissions require dismissal of the State's claims. (*See* Defs. Jt. Reply at 5-9.)

II. The State's Medicare Part B Claims for Multiple Source Drugs May And Should Be Dismissed.

In response to Abbott's second argument, that any Medicare Part B claims for multiple-source drugs should be dismissed because Medicare reimburses based on a median AWP, the State contends that this argument has been "routinely" rejected at the motion to dismiss stage, and that Abbott "is free to make this argument at trial." (*See* Pltf. Resp. to Ind. Defs. Mem at 1-2.). Again, the State's response is unpersuasive.

Despite its use of the word "routine," the State cites a single opinion from a Nevada state court to which the "median multiple-source" argument was made. *See Nevada v. Abbott Labs, Inc.*, No. CV02-00260 (Washoe Cty. NV, July 16, 2004). In briefly addressing the argument, the Nevada court found merely that the allegations of the complaint in that case satisfied Nevada's heightened pleading requirements for fraud, and that the allegations with respect to multiple-source drugs "f[e]ll within the paradigm of the complaint." The Nevada court neither ruled nor found that a multiple-source drug manufacturer could somehow gain a competitive spread

advantage over a competing multiple-source drug manufacturer for purposes of Medicare Part B reimbursement. The Nevada court's decision, the only one cited by the State, should not deter this Court from dismissing a category of drugs whose reimbursement formula is squarely at odds with the State's theory of the case. Tellingly, the State neither rebuts nor distinguishes the cases cited by Abbott requiring, at the motion to dismiss stage, that a complaint "must make economic and factual sense" or be "economically plausible." (*See* Abbott's Ind. Mem. at 4.)

The State argues that defendants can still be liable under § 100.18 with respect to multiple-source drugs regardless of their motive because "motive" is not an element under § 100.18. The State misses the point. The issue is not motive but causation. If it is impossible for a single multiple-source drug manufacturer to affect the median AWP, then the State cannot legitimately allege that that manufacturer caused any injury.

The State further contends that defendants can be liable for multiple source-drugs because even though Medicare reimbursement is based on a median AWP, the consumer "is paying 20% of a number that has been inflated by false AWPs." (Pltf. Resp. to Ind. Mem. at 2.) This allegation, however, is nowhere in the complaint, and contradicts several allegations in the complaint that defendants purportedly used the spread competitively against their competitors. *See, e.g.,* Am. Compl. ¶ 1 ("Defendants attempt to profit from their scheme by using the lure of these windfall profits *competitively* to encourage providers to buy more of their drugs . . . "), ¶ 38 ("Defendants often market their products by pointing out (explicitly and implicitly) that their drug's spread is higher than a competing drug's"). The State's theory that defendants inflated AWPs to create larger "spreads" for their products, and thereby induce providers to purchase their products instead of a competitor's, makes no sense for multiple-source drugs under

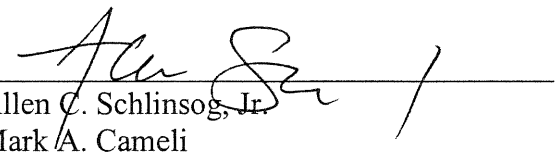
Medicare Part B. Thus, any claims based on the alleged overpayment for multiple-source drugs under Medicare Part B should be dismissed.

For the foregoing reasons, and those identified in defendants' joint reply memorandum, Abbott respectfully requests that this Court dismiss the State's Amended Complaint with prejudice.

Dated: April 19, 2005

Respectfully Submitted,

DEFENDANT ABBOTT LABORATORIES



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