

August 8, 2008

**VIA HAND DELIVERY**

CLIENT/MATTER NUMBER  
045152-0101

Honorable Richard Niess  
Branch 9  
Dane County Circuit Court  
215 South Hamilton Street, Room 5103  
Madison, WI 53703-3289

Re: *State of Wisconsin v. Abbott Labs., et al.*  
Case No. 04-CV-1709

Dear Judge Niess:

Enclosed please find Defendants' Supplemental Submission Regarding Plaintiff's Right to a Jury Trial on Its Unjust Enrichment Claim.

All counsel of record have been served electronically via Lexis-Nexis File & Serve.

Sincerely yours,

FOLEY & LARDNER

  
Matthew D. Lee

Enclosures

cc: Attorney Frank D. Remington (via U.S. Mail, with enclosures)  
Attorney Charles J. Barnhill, Jr. (via U.S. Mail, with enclosures)  
Attorney P. Jeffrey Archibald (via U.S. Mail, with enclosures)  
All Counsel of Record (via Lexis-Nexis File & Serve, with enclosures)

STATE OF WISCONSIN,

)

Plaintiff,

)

Case No.: 04 CV 1709

v.

)

ABBOTT LABORATORIES, *et. al.*,

)

Defendants.

)

)

**DEFENDANTS' SUPPLEMENTAL SUBMISSION REGARDING PLAINTIFF'S  
RIGHT TO A JURY TRIAL ON ITS UNJUST ENRICHMENT CLAIM**

Defendants submit this brief in response to Plaintiff's belated and improper attempt to assert a right to a jury trial on its unjust enrichment claim.<sup>1</sup> No such right exists.

**ARGUMENT**

Plaintiff has no right to a jury trial on its unjust enrichment claim because this claim is equitable in nature and seeks purely equitable relief. The Wisconsin Supreme Court has narrowly interpreted the right to a jury trial under Article I, Section 5 of the Wisconsin Constitution (which provides the right "shall *remain* inviolate, and shall extend to all cases *at law*"<sup>2</sup>), holding that "this right shall continue *as it was at the time of the formation and adoption of the constitution* by the people of this State."<sup>3</sup> Wisconsin courts have consistently held that no right to a jury trial exists when a plaintiff is seeking equitable relief because such a claim would have been pursued at equity before the passage

<sup>1</sup> See Plaintiff State of Wisconsin's Response Brief In Support of Its Claim to a Trial by Jury ("Plaintiff's Br.") at 3-6 (July 23, 2008).

<sup>2</sup> Wis. Const., art. 1, § 5 (emphasis added).

<sup>3</sup> *Village Food & Liquor Mart v. H&S Petroleum, Inc.*, 2002 WI 92, ¶ 10 n.5, 254 Wis.2d 478, 647 N.W.2d 177, citing *Gaston v. Babcock*, 6 Wis. 490, 494 (1887) (emphasis added).

of the state constitution in 1848, not at law.<sup>4</sup> Moreover, at the time of the adoption of the Wisconsin Constitution, claims for “unjust enrichment” – and more specifically, actions to recover profits obtained through alleged fraud – did not exist “at law.”

### **I. Plaintiff Seeks Equitable Relief Under Its Unjust Enrichment Claim.**

Contrary to Plaintiff’s repeated assertions, it clearly seeks equitable relief under its unjust enrichment claim. Such relief could only have been pursued in a court of equity in 1848, and thus would not have been tried to a jury. Specifically, Plaintiff seeks an injunction and the disgorgement of profits allegedly obtained from an increased market share resulting from Defendants’ alleged misconduct.<sup>5</sup> Plaintiff is *not* seeking traditional money damages, measured by the harm *it* allegedly suffered as a result of Defendants’ conduct – rather, it is seeking a sum equal to Defendants’ gain from the alleged misconduct.<sup>6</sup> As discussed in prior briefing, both an injunction and disgorgement of profits are inherently equitable forms of relief,<sup>7</sup> and thus preclude a jury trial on Plaintiff’s unjust enrichment claim.

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<sup>4</sup> See *Bender v. Town of Kronenwetter*, 2002 WI App 284, ¶¶ 17-18, 258 Wis.2d 321, 654 N.W.2d 57 (holding no right to jury trial where plaintiff sought to invalidate special assessment because the relief sought was equitable, even though the underlying claims for breach of contract and fraud were considered “at law”); *Neff v. Barber*, 165 Wis. 503, 162 N.W. 667 (1917) (“That the right to a trial by jury does not extend to equitable actions is too well settled in our jurisprudence to be now successfully questioned. In an action in equity all the issues, whether legal or equitable, are triable by the court.”).

<sup>5</sup> See Second Amended Complaint, ¶ 100. Plaintiff repeatedly and incorrectly represents that it seeks “only monetary relief” under its unjust enrichment claim (Plaintiff’s Br. at 3-4), despite the fact that the Complaint clearly requests that the Court “[e]njoin the defendants from continuing the unlawful practices described above.” *Id.*, ¶ 100.B.

<sup>6</sup> Despite Plaintiff’s recent attempts to avoid the denial of a jury trial by seeking leave to amend its Complaint to seek “damages” under its unjust enrichment claim, rather than “disgorgement,” the Second Amended Complaint controls here. *Cf.* Decision and Order on Certain Defense Cross-Motions for Summary Judgment at 4-5, n.1 (July 29, 2008) (limiting the relief sought under Wis. Stat. § 100.18 to that requested in the Second Amended Complaint “pending further order of the court.”).

<sup>7</sup> See, e.g., *Schweda*, 2007 WI 130, ¶ 140 (noting that an injunction is an equitable remedy); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (“we have

## II. Plaintiff's Unjust Enrichment Claim Did Not Exist "At Law" in 1848.

Plaintiff has no right to a jury trial on its unjust enrichment claim, because unjust enrichment actions seeking to recover profits earned by a defendant through alleged misconduct did not exist "at law" in 1848. In fact, actions for "unjust enrichment" did not exist at all in 1848.<sup>8</sup> Rather, the modern doctrine of unjust enrichment is an amalgam of several different causes of action that existed in 1848 – some of which were equitable in nature and some of which were legal – but each of which relied on distinct legal theories.<sup>9</sup> The relevant inquiry is not whether courts today consider certain unjust enrichment claims to be legal or equitable in nature (indeed, courts have found both depending on the legal theory underlying the claim<sup>10</sup>), but whether *Plaintiff's* unjust enrichment claim – based on its specific underlying theory of recovery – would have been tried to a jury in 1848.

Plaintiff's unjust enrichment claim alleges that Defendants obtained an increased market share as a result of a fraudulent scheme, and that they unjustly retained profits from this increased market share.<sup>11</sup> Actions seeking profits realized by alleged misconduct are analogous to the historical common-law actions of "accounting for profits" and

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characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits')(internal citations omitted).

<sup>8</sup> See Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 Oxford J. Legal Stud. 297, 303 (2005) ("The modern law of unjust enrichment actually assumed recognizable form ... in 1887."); 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES – EQUITY – RESTITUTION § 4.2(1) (p. 570) (2d ed. 1993).

<sup>9</sup> For example, actions for replevin, ejectment, assumpsit, quasi-contract and quantum meruit were pursued "at law," whereas actions for constructive trust, equitable lien, subrogation and accounting for profits were pursued at equity. See DOBBS at §§ 4.2, 4.3. Each of these historical common-law actions involved the resitutional theory of recovery that underlies unjust enrichment— and focus on recovering the defendant's gain rather than the plaintiff's loss. *Id.*

<sup>10</sup> Compare *Ludyjan v. Continental Cas. Co.*, 2008 WI App 41, ¶ 6, \_\_ Wis.2d \_\_, 747 N.W.2d 745 ("unjust enrichment is an equitable doctrine"); *The Kinetic Co., Inc. v. Svetovanje*, 361 F. Supp. 2d 878, 883 (E.D. Wis. 2005) (applying Wisconsin law, and noting that "unjust enrichment is an equitable claim"), citing *General Split Corp. v. P&V Atlas Corp.*, 91 Wis. 2d 119, 124, 280 N.W.2d 765 (1979); with *Boldt v. State*, 101 Wis.2d 566, 573, 305 N.W.2d 133, 138 (Wis. 1981) (noting that actions in quasi-contract, one form of unjust enrichment, is a legal action) (cited in Plaintiff's Br. at 3).

<sup>11</sup> Second Amended Complaint, ¶¶ 1, 40-41, 60, 96-100.

“constructive trust,” actions pursued solely in equity courts.<sup>12</sup> Such claims therefore would not have been considered “at law” and would not have been tried to a jury at the time of the adoption of the Wisconsin Constitution.

The same is true today. Courts have recognized that unjust enrichment claims seeking to recover profits are equitable in nature, and thus do not warrant a trial by jury.<sup>13</sup> Indeed, courts in other jurisdictions considering similar AWP-related cases have specifically found that the type of unjust enrichment claim Plaintiff asserts here – seeking disgorgement of pharmaceutical manufacturers’ profits from an increased market share allegedly obtained through an unlawful pricing scheme – is an equitable claim.<sup>14</sup>

The Wisconsin cases cited by Plaintiff holding that quasi-contract claims for “money had and received” are considered “legal” in nature are inapposite,<sup>15</sup> because Plaintiff’s unjust enrichment claim is not based on a theory of quasi-contract or “money had and

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<sup>12</sup> See DOBBS at § 4.3(1) (pp. 586-88). Actions for “accounting for profits” and “constructive trust” developed at equity due to the inadequacy of remedies “at law” in situations where a defendant obtained formal title to property through misconduct (such as fraud), and used such property to generate profit. Courts at law could not grant relief in such situations, because their jurisdiction was limited by the conception of formal title. *Id.*

<sup>13</sup> See, e.g., *Roberts v. Sears, Roebuck & Co.*, 617 F.2d 460, 465 (7th Cir. 1980), *cert. denied*, 449 U.S. 975, 101 S.Ct. 386, 66 L.Ed.2d 237 (1980) (“Restitution for the disgorgement of unjust enrichment is an equitable remedy with no right to a trial by jury.”); *Metal Processing Co., Inc. v. Amoco Oil Co.*, 173 F.R.D. 244, 247 (E.D.Wis. 1997) (same); *Empresa Cubana Del Tabaco v. Culbro Corp.*, 123 F.Supp.2d 203, 206 (S.D.N.Y. 2000) (citing numerous cases for the proposition that an unjust enrichment claim for profits stemming from an alleged trademark violation is purely equitable in nature, and thus not entitled to a jury trial); *Merriam-Webster, Inc. v. Random House, Inc.*, 1993 WL 205043, \*2-3 (S.D.N.Y. 1993) (comparing the plaintiff’s unjust enrichment suit for profits to the historical common-law action for constructive trust, and finding that such a claim is triable without a jury).

<sup>14</sup> See *Massachusetts v. Mylan Laboratories*, 357 F.Supp.2d 314, 323-24 (D.Mass. 2005) (finding that the plaintiff’s unjust enrichment claim “to recover Defendants’ ‘increased sales and market share’ that were ‘a result of the Commonwealth’s excessive payments to its Medicaid pharmacy providers’” is equitable in nature); *Com. ex rel. Pappert v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127, 1137-38 (Pa.Cmwlt. 2005) (“Unjust Enrichment is an equitable doctrine.”).

<sup>15</sup> Plaintiff’s Br. at 3-4.

received.”<sup>16</sup> Plaintiff’s unjust enrichment claim seeks the recovery of profits obtained through the alleged increased market share resulting from Defendants’ alleged misconduct and to enjoin Defendants from further alleged misconduct. In contrast, each of the quasi-contract cases cited by Plaintiff involves claims based on a theory that money wrongfully paid by one party to another should be returned.<sup>17</sup> One of the cases Plaintiff cites, *CleanSoils Wis., Inc. v. Dept. of Trasp.*, specifically distinguishes quasi-contract claims for “money had and received,” which are legal in nature, from other unjust enrichment theories, which are equitable, stating that “where no money is had and received, the assertion of a claim based solely on unjust enrichment remains categorized as an equitable doctrine.”<sup>18</sup> Here, the benefit Defendants allegedly received was an increased market share,<sup>19</sup> *not* money wrongfully paid by Plaintiff to Defendants (indeed, Plaintiff never paid Defendants any money, it paid providers).

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<sup>16</sup> Quasi-contract is but one form of unjust enrichment, and has been defined as “a rule of law that requires restitution to the plaintiff of something that came into defendant’s hands but in justice belongs to the plaintiff.” See DOBBS at § 4.2(3) (p. 580). Quasi-contract comprises a number of specific fact patterns, including actions for “money had and received,” which provided for recovery when “the defendant himself received money that belonged in good conscience to the plaintiff, for instance, if the plaintiff paid money to the defendant by mistake, or under duress, or by reason of fraud...” See *Id.* (p. 582). Here, Plaintiff is seeking the profits Defendants derived from an increased market share gained through alleged misconduct – not money Plaintiff wrongfully paid or that rightfully belongs to Plaintiff.

<sup>17</sup> See, e.g., *Boldt*, 101 Wis.2d at 570, 573 (action to recover social security payments rightfully belonging to a mental patient which were wrongfully retained by the State to pay for his care); *Hicks v. Milwaukee County*, 71 Wis.2d 401, 402, 238 N.W.2d 509 (1976) (action against the county to recover excessive amounts charged to the plaintiff’s account while he was confined in the county jail); *Arjay Inv. Co. v. Kohlmetz*, 9 Wis.2d 535, 538, 101 N.W.2d 700 (Wis. 1960); (action to recover money paid under alleged void oral agreement) *Trempealeau County v. State*, 260 Wis. 602, 602-603, 51 N.W.2d 499 (1952) (action to recover county funds wrongfully paid by a county clerk to the State). Plaintiff also cites *Seegers v. Sprague*, an action seeking *quantum meruit* recovery for the value of services rendered by the plaintiff to the defendant. 70 Wis.2d 997, 236 N.W. 2d 227 (1975); see also DOBBS at §4.2(3) (p.583). But *quantum meruit* is a cause of action distinct from unjust enrichment, with distinct elements and a distinct measure of damages. See *CleanSoils*, 229 Wis.2d at 613 n.8; *Ramsey v. Ellis*, 168 Wis.2d 779, 785, 484 N.W.2d 331 (1992).

<sup>18</sup> *CleanSoils Wisconsin, Inc. v. State Dept. of Transp.*, 229 Wis.2d 600, 613, 599 N.W.2d 903 (Ct. App. 1999).

<sup>19</sup> Second Amended Complaint, ¶ 100.

The federal cases cited by Plaintiff also are inapplicable. Each of these cases involve an analysis of the right to a jury trial under the Seventh Amendment of the United States Constitution. Wisconsin courts have held that such analyses are neither binding nor persuasive in determining the right to a jury trial under the Wisconsin Constitution.<sup>20</sup> Even if they were, they do not help Plaintiff here. Federal courts have specifically held that unjust enrichment claims for disgorgement of profits, like Plaintiff's claim here, are equitable, and do not give rise to a jury trial right.<sup>21</sup> Those that have held otherwise, including those cited by Plaintiff, involved quasi-contract claims like those distinguished above, seeking to recover money damages based *solely* on the plaintiff's loss.<sup>22</sup> Here, Plaintiff's unjust enrichment claim is not premised on Plaintiff's loss, nor on money paid by Plaintiff to Defendants. Rather, Plaintiff's unjust enrichment claim seeks to enjoin Defendants' conduct and to disgorge profits – an equitable claim that could not have been pursued at law in 1848.

### CONCLUSION

For the reasons discussed above, Defendants request that the Court deny Plaintiff's request for a jury trial on its unjust enrichment claim.

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<sup>20</sup> See *Village Food*, 2002 WI 92, ¶ 7 n.3; *State v. Ameritech Corp.*, 185 Wis. 2d 686, 698, 417 N.W.2d 705 (Ct. App. 1994) (rejecting the State's argument that the United States Supreme Court had held that a right to jury trial attached to forfeiture actions under statutes that did not provide for a right to jury trial, because such cases were based on an analysis of the Seventh Amendment of the United States Constitution, and therefore are not binding in state courts).

<sup>21</sup> See, e.g., *Roberts* 617 F.2d at 465; *Metal Processing Co.*, 173 F.R.D. at 247; *Empresa Cubana*, 123 F.Supp.2d at 206; *Merriam-Webster*, 1993 WL 205043 at \*2-3.

<sup>22</sup> See *In re Automotive Professionals, Inc.*, 2008 WL 2358590, 4 (Bkrtcy.N.D.Ill. 2008) (seeking restitution of the insurance premium paid by the plaintiff to the defendant); *Austin v. Shalala*, 994 F.2d 1170, 1174 (5th Cir. 1993) (seeking recovery of alleged overpayment of social security benefits); *Pel-Star Energy, Inc. v. U.S. Dept. of Energy*, 890 F.Supp. 532, 537, 540 (W.D.La. 1995) (seeking recovery of alleged overcharges stemming from regulatory violations).

August 8, 2008

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on August 8, 2008, a true and correct copy of the foregoing was served upon all counsel of record via electronic service pursuant to Case Management Order No. 1 by causing a copy to be sent to LexisNexis File & Serve for posting and notification.

  
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