



Importantly, although the alleged conduct of these defendants might be similar, it does not arise out of the *same* transaction or occurrence. The State claims that each company:

- *independently* reported to a price reporting service an average wholesale price (“AWP”) and/or wholesale acquisition cost (“WAC”) price that was greater than the actual price that providers paid for that company’s products;<sup>4</sup>
- *individually* failed to disclose discounts or rebates allegedly given to providers;<sup>5</sup> and
- *separately* acted in creating an alleged “spread” (between the actual price for each product and the reimbursement paid by the State) to induce providers to select that defendant’s product.<sup>6</sup>

The State seeks to recover under five separate legal theories against each of the 36 companies named in this case, ranging from alleged violations of Wisconsin’s Deceptive Trade Practices Act to common law unjust enrichment to Medicaid fraud.<sup>7</sup> To prove its claims against each defendant, the State will have to produce evidence specific to each defendant showing that it has satisfied each element of each of its five claims.

Despite such individuality of the claims and proof, the State has sought to join all 36 defendants into a single lawsuit. Although the State’s claims against each defendant are worded similarly, they describe separate transactions involving each defendant. In these circumstances, joinder is improper. Moreover, a single trial of such a large number of defendants and such a large volume of claims is on its face unworkable and virtually certain to result in juror confusion.

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<sup>4</sup> Complaint ¶¶ 40, 43, 49.

<sup>5</sup> Complaint ¶¶ 49, 53.

<sup>6</sup> Complaint ¶¶ 40-41.

<sup>7</sup> Plaintiff asserts (1) violations of Wisconsin’s Deceptive Trade Practices Act § 100.18(1); (2) violation of § 100.18(10)(b); (3) violations of Wisconsin’s Medical Assistance Fraud Act; (4) violations of Wisconsin’s Secret Rebate statute; and (5) common law unjust enrichment.

In other so-called AWP cases brought in other jurisdictions, courts have been quick to reject this “one size fits all” approach, and have either ordered severance<sup>8</sup> or separate trials<sup>9</sup> of the defendants. Consistent with these decisions, defendants request that the State’s claims against each defendant be severed from the claims against each other defendant.<sup>10</sup> Alternatively, and at a minimum, defendants request that the Court order separate trials for each defendant to avoid the clear prejudice and risk of confusion inherent in a single trial of multiple claims against multiple defendants.

### Argument

#### **I. THE STATE HAS FAILED TO SATISFY THE STANDARD GOVERNING PERMISSIVE JOINDER UNDER WIS. STAT. § 803.04(1).**

##### **A. The State may join multiple defendants in a single action only if the claims arise from the *same* transaction or series of transactions.**

Under the rule governing permissive joinder in Wisconsin, a plaintiff’s claims against the defendants must arise “out of the *same* transaction, occurrence or series of transactions.”<sup>11</sup> A misjoinder occurs if this requirement is not satisfied.<sup>12</sup> Wis. Stat. § 803.06 provides for severance of claims if joinder of the defendants’ claims was improper.

Courts are reluctant to find that claims arise out of the same transaction in cases in which a plaintiff alleges similar wrongdoing by multiple defendants with no allegations

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<sup>8</sup> *Ex parte Novartis Pharmaceuticals Corporation*, No. 1060224, 2007 WL 1576114, at \*5-6 (Ala. June 1, 2007).

<sup>9</sup> *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, Civil Action No. 01-12257-PBS (D. Mass.), which comprises several AWP-related private class actions and state lawsuits since 2001. Although the court ordered four defendants to be tried together for a bench trial, it ordered separate jury trials.

<sup>10</sup> The defendants recognize, however, that there may be some benefit to coordinating discovery of the State and all third parties between the separate cases.

<sup>11</sup> Wis. Stat. § 803.04(1)(2006)(emphasis added). Wis. Stat. § 803.04(1) also requires that there be a “question of law or fact common to all of the defendants.” Although defendants do not concede that the State has satisfied this requirement, the State’s failure to meet the first requirement—that its claims arise out of same transaction—is sufficient to establish misjoinder under Wis. Stat. § 803.06.

<sup>12</sup> See *Leverence v. United States Fid. and Guar.*, 158 Wis.2d 64, 94-96, 462 N.W.2d 218, 231-32 (Wis. App. 1990) (overruled on other grounds).

that defendants conspired or acted jointly. In fact, that reasoning was recently applied by the Supreme Court of Alabama in a case also asserting claims against numerous pharmaceutical companies, including many defendants in this case, based upon the reporting of allegedly false AWP's.<sup>13</sup> In that case, the Alabama Supreme Court reversed the trial court's denial of various defendants' motions to sever, and ordered the trial court to sever the State of Alabama's claims against 73 different pharmaceutical companies from one another.<sup>14</sup> The Court determined that joinder was patently improper because, although the complaint asserted claims arising from similar transactions, it did not assert claims arising from the *same* transaction. The court held, "[i]n the absence of combined and concurring tortious conduct causing a single injury, the same transaction or series of transactions requires more than just similarity or coincidence—some coordination between parties is required."<sup>15</sup>

In reaching its decision, the Alabama Supreme Court relied, in part, on a series of DIRECTV cases filed in federal courts across the country. The courts in those cases consistently ruled that DIRECTV's joinder of multiple defendants, each of which was alleged to have obtained DIRECTV's television programming illegally, was improper.<sup>16</sup> The

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<sup>13</sup> *Ex parte Novartis Pharmaceuticals Corporation*, No. 1060224, 2007 WL 1576114, at \*5-6 (Ala. June 1, 2007).

<sup>14</sup> Alabama's permissive joinder rule, Rule 20(a) is identical in all relevant respects to Wisconsin's permissive joinder rule, Wis. Stat. 803.04.

<sup>15</sup> *Ex Parte Novartis*, 2007 WL 1576114 at \*6.

<sup>16</sup> *Id.* at \*5, citing *DIRECTV, Inc. v. Boggess*, 300 F.Supp.2d 444 (S.D.W.Va. 2004); *DIRECTV, Inc. v. Beecher*, 296 F.Supp.2d 937 (S.D.Ind. 2003); *DIRECTV v. Loussaert*, 218 F.R.D. at 642-43; *DIRECTV, Inc. v. Armellino*, 216 F.R.D. 240 (E.D.N.Y. 2003); *In re DIRECTV, Inc.*, No. C-02-5912-JW, 2004 WL 2645971 (N.D.Cal. July 26, 2004) (not reported in F.Supp.2d); *DIRECTV, Inc. v. Lewis*, No. 03-CV-6241CJS(F), 2004 WL 941805 (W.D.N.Y. January 6, 2004) (not reported in F.Supp.2d); *DIRECTV, Inc. v. Westerheide*, No. 03-C3476 (N.D.Ill. February 4, 2004) (not reported in F.Supp.2d); *DIRECTV, Inc. v. Davlantis*, No. 03-C3506, 2003 WL 22844401 (N.D.Ill. November 26, 2003) (not reported in F.Supp.2d); *DIRECTV, Inc. v. Perez*, No. 03-C3504, 2003 WL 22682344 (N.D.Ill. November 12, 2003) (not reported in F.Supp.2d); *DIRECTV, Inc. v. Geenen*, No. 03-C3542 (N.D.Ill. November 10, 2003) (not reported in F.Supp.2d); *DIRECTV, Inc. v. Gatsiolis*, No. 03-C3534, 2003 WL 22669033 (N.D.Ill. November 10, 2003) (not reported in F.Supp.2d); *DIRECTV, Inc. v. Patel*, No. 03-C3442, 2003 WL 22669031 (N.D.Ill. November 10, 2003) (not reported in F.Supp.2d); *DIRECTV, Inc.*

courts reasoned that although the complaints asserted claims against various defendants arising from *similar* transactions, they did not assert claims arising from the *same* transaction nor did they claim that any of the defendants conspired together or acted in concert with one another.<sup>17</sup>

Moreover, numerous courts applying the federal permissive joinder rule,<sup>18</sup> which is virtually identical to Wisconsin's joinder rule,<sup>19</sup> have found that allegations of *similar* conduct are not sufficient to meet the requirement that claims arise out of the *same* transaction for purposes of joinder. For example, in *Insolia v. Phillip Morris, Inc.*,<sup>20</sup> Judge Crabb of the United States District Court for the Western District of Wisconsin held that the plaintiffs' claims against several defendant tobacco companies did not arise from the same transaction because there was no indication that each plaintiff was induced to act by the same supposed misrepresentation.<sup>21</sup> Other federal courts faced with similar facts in the insurance, cable-television, and entertainment industry also have ruled that joinder is improper where a plaintiff has alleged only similar but unrelated wrongdoing by defendants.<sup>22</sup>

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*v. Long*, No. SA-03-CA-360-XR (W.D.Tex. October 29, 2003) (not reported in F.Supp.2d); *DIRECTV, Inc. v. Smith*, No. 03-C3540 (N.D.Ill. September 18, 2003) (not reported in F.Supp.2d).

<sup>17</sup> *Id.*

<sup>18</sup> Fed. R. Civ. P. 20(a).

<sup>19</sup> Wisconsin courts look to federal court interpretations for guidance when applying Wis. Stat. 803.04. See *Kluth v. Gen. Cas. Co. of Wisconsin*, 178 Wis.2d 808, 817-18, 505 N.W.2d 442, 446 (Wis. Ct. App. 1993), citing *Wisconsin's Envtl. Decade, Inc. v. Public Serv. Comm'n*, 79 Wis.2d 161, 174, 255 N.W.2d 917, 925 (Wis. 1977).

<sup>20</sup> 186 F.R.D. 547 (W.D. Wis. 1999).

<sup>21</sup> *Id.* at 549-51. The State's likely response – that this case involves only a *single* misrepresentation of AWP by *all* defendants and that the method and degree of the misrepresentation is irrelevant—ignores the required elements of the State's claims. The elements of the State's claims clearly will require the jury to make particularized, fact-based determinations relating to *each* defendant's individual conduct. See discussion *infra* at n.48.

<sup>22</sup> See *Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co.*, 497 F.2d 1151, 1154 (2d Cir. 1974), *cert. denied* 419 U.S. 968 (1974); *Tele-Media Co. of West. Conn. v. Antidormi*, 179 F.R.D. 75, 76 (D.C. Conn. 1998); *Magnavox Co. v. APF Electronics, Inc.*, 496 F. Supp. 29, 34-35 (D.C. Ill. 1980); *Rappaport v. Spielberg*, 16 F. Supp. 2d 481, 496 (D.N.J. 1998).

**B. The State's claims against each defendant do not arise out of the "same transaction, occurrence, or series of transactions or occurrences."**

Like the cases cited above, the State's claims against each defendant in this case do not arise out of the *same* transaction or series of transactions. Rather, at most, they arise out of a series of unrelated (albeit arguably similar) transactions or occurrences involving pricing decisions made by different, and sometimes, competing companies.

The Court need look no further than the State's own complaint to conclude that this case does not involve claims against defendants that arise out of the *same* transaction or series of transactions. The State alleges that each defendant *individually* and *independently* caused Wisconsin's Medicaid to pay inflated prices for numerous drugs.<sup>23</sup> The State further alleges that each defendant *separately* reported false pricing information to a price reporting service.<sup>24</sup> Importantly, however, the State does not allege that defendants conspired or acted in concert in reporting this pricing information. Such allegation, in fact, would be inconsistent with allegations that defendants intentionally inflated the AWP's for competitive purposes.<sup>25</sup>

And, as the attached affidavits of Dr. Gregory Bell and numerous defendants reveal, the companies named in this litigation clearly are not involved in the "same transactions" with the State and providers.<sup>26</sup> First, each pharmaceutical company uses its own business model to market its products, which is often different from others and can change over time as its product mix changes. Second, the price reporting practices differ among defendants and may vary over time.

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<sup>23</sup> Complaint ¶¶ 40, 43, 65-66.

<sup>24</sup> Complaint ¶ 40.

<sup>25</sup> Complaint ¶¶ 40-41.

<sup>26</sup> See Affidavit of Gregory K. Bell ("Bell Aff.") (attached as Exh. A); Affidavits of Numerous Defendants (attached as Exh. B-U).

**1) There are significant marketing and pricing differences among defendants.**

Some defendants focus primarily on discovering and launching new patented brand name pharmaceuticals; others focus primarily on the marketing and sale of generic products, which are products that enter the market once patents expire.<sup>27</sup>

Some market a broad array of products, including products that are dispensed by a pharmacy; others tend to concentrate their research activities on products that are administered in the physician's office, often by injection or intravenously.<sup>28</sup>

In fact, various defendants market one or more of at least six different categories of products relevant to the claims here:

- single-source self-administered drugs ("SADs") that have no therapeutic competition (i.e., this is the only drug available to treat a particular condition or illness);
- single-source SADs subject to therapeutic competition (i.e., other drugs may be available to treat the condition, but once the doctor prescribes one, the patient can only be given the specific drug prescribed);
- multi-source SADs (i.e., a prescription can be filled by both branded drugs or their generic equivalents);
- single-source physician-administered drugs ("PADs") without therapeutic competition;
- single-source PADs subject to therapeutic competition; and
- multi-source PADs.

Each of these types of drugs ordinarily are marketed using a different business model.<sup>29</sup>

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<sup>27</sup> See Bell Aff. ¶¶ 6-8; Affidavit of Gary Rosenthal ("Rosenthal Aff.") ¶¶ 6-7 (attached as Exh. B); Affidavit of Thomas Sammler ("Sammler Aff.") ¶ 5 (attached as Exh. C).

<sup>28</sup> See Bell Aff. ¶¶ 6-8; Sammler Aff. ¶ 4; Rosenthal Aff. ¶ 9; Affidavit of Douglas Chia ("Chia Aff.") ¶¶ 6, 10, 13-14, 18 (attached as Exh. D).

<sup>29</sup> See Bell Aff. ¶ 15-49; Affidavit of Joseph Fiske ("Fiske Aff.") ¶10 (attached as Exh. E); Affidavit of David A. Moules ("Moules Aff.") ¶ 8 (attached as Exh. F); Affidavit of Jill M. Ondos ("Ondos Aff.") ¶¶9-10 (attached as Exh. G); Affidavit of Pamela Marrs ("Marrs Aff.") ¶¶ 9-10 (attached as Exh. H); Chia Aff. ¶ 22; Rosenthal Aff. ¶¶14-16.

In addition, some defendants focus on a particular set of conditions, while others have product portfolios that tend to cover a broad range of diseases.<sup>30</sup> These differences have implications for the manner in which products are priced, marketed, distributed, and sold.<sup>31</sup> For those reasons, the differences among the drugs at issue and the differences across the business practices at issue among the 36 defendants render any joint evaluation of liability or damages impractical.<sup>32</sup>

**2) There is significant variation in the price reporting practices of the various defendants.**

Pharmaceutical companies may report product prices to a number of commercial price reporting services.<sup>33</sup> AWP is published by commercial price reporting services such as First DataBank (formerly known as the "Blue Book"), Thomson-Medical Publishers (the "Red Book") and Medispan.<sup>34</sup>

For single-source products (i.e., those that are still patent-protected or otherwise available only from one company), pharmaceutical manufacturers set and generally sell at WAC, which is generally understood to be a list price to wholesalers, without adjustment for discounts or other price concessions, minus a small discount if the wholesaler pays promptly.<sup>35</sup> Some pharmaceutical companies marketing single-source products report only WAC to the pricing publications, while others report WAC and AWP, and some have changed their price reporting practices over time.<sup>36</sup>

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<sup>30</sup> See Bell Aff. ¶ 8; Marrs Aff. ¶ 4; Chia Aff. ¶¶ 6, 12, 16; Sawyer Aff. ¶ 7.

<sup>31</sup> See Bell Aff. ¶ 8; Sawyer Aff. ¶14.

<sup>32</sup> See Bell Aff. ¶ 9.

<sup>33</sup> See Bell Aff. ¶¶ 6, 11; Sawyer Aff. ¶11; Affidavit of Lesli Paoletti ("Paoletti Aff.") ¶ 10 (attached as Exh. I).

<sup>34</sup> See Bell Aff. ¶ 11.

<sup>35</sup> See Bell Aff. ¶ 12.

<sup>36</sup> See Bell Aff. ¶ 12; Affidavit of David Gaugh ("Gaugh Aff.") ¶ 10 (attached as Exh. J); Affidavit of Zoltan Szabo ("Szabo Aff.") ¶ 4 (attached as Exh. K); Affidavit of Christine G. Marsh ("Marsh Aff.") ¶ 11 (attached as Exh. L); Rosenthal Aff. ¶ 21; Affidavit of Donald Sawyer ("Sawyer Aff.") ¶ 11 (attached as Exh. M); Moules Aff. ¶ 4-7; Ondos Aff. ¶ 11.

For brand-name drugs, AWP reported by First DataBank is generally higher than WAC, often by a given ration such as 1.2 or 1.25, although the ratio has varied by company, by product, and over time.<sup>37</sup> It is also independent of whatever the manufacturer may have reported. For example, virtually none of the AWP's that First DataBank published for Novartis Pharmaceutical Company's ("Novartis") drugs between 2002 and 2005 were equal to the AWP's reported by Novartis for such products.<sup>38</sup>

Moreover, some companies include disclosures with their submissions to First DataBank stating that AWP does not reflect actual cost to pharmacy or charge to consumer.<sup>39</sup> And, the business methods used to determine WAC prices tend to vary by defendant, over time, and by drug.<sup>40</sup> Given that the complaint alleges that defendants engaged in fraudulent conduct in the manner in which they set their prices, these differences have significant implications for trial. Moreover, it is clear the AWP's do not arise from the *same* transaction or occurrence.

In sum, as Dr. Bell concludes in his affidavit, an assessment of the claims against any defendant will require attention to that defendant's business model, pricing practices, price reporting practices, distribution channels, marketing approaches, and sales practices.<sup>41</sup>

**C. Other courts have found that allegations of fraudulent AWP reporting by pharmaceutical companies do not arise out of the same transaction.**

The Alabama Supreme Court, which recently addressed this very issue in a case with virtually identical allegations against some of the same defendants, found that the

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<sup>37</sup> See Bell Aff. ¶ 13; Affidavit of Claire Brunken ("Brunken Aff.") ¶ 15 (attached as Exh. N).

<sup>38</sup> See Bell Aff. ¶ 13.

<sup>39</sup> See Affidavit of Michael J. Bolton ("Bolton Aff.") ¶ 9 (attached as Exh. O); Affidavit of Glenn Weiglein ("Weiglein Aff.") ¶ 12 (attached as Exh. P); Affidavit of John G. Wodarczyk ("Wodarczyk Aff.") ¶ 12 (attached as Exh. Q); Szabo Aff. ¶ 4.

<sup>40</sup> See Bell Aff. ¶ 14; Moules Aff. ¶ 4-6.

<sup>41</sup> See Bell Aff. ¶ 50.

State of Alabama's AWP-related allegations against numerous pharmaceutical companies did not arise out of the *same* transaction. Rather, the allegations arose out of separate transactions by each defendant.<sup>42</sup>

Furthermore, United States District Judge Patti Saris, who has presided over several AWP-related cases in a multidistrict litigation action<sup>43</sup> since 2001 and has issued numerous opinions in those cases, recently stated that although these AWP cases present issues common to most or all defendants (i.e., the cross-cutting issues), they involve important and distinct company-by-company and drug-by-drug issues:

- “[O]ne thing I did learn from that trial, this case has been litigated for five years on crosscutting issues, and really, when it comes down to it, it’s company by company.”<sup>44</sup>
- “[I]f there’s anything I’ve learned from AWP, its that there are cross-cutting issues, but of equal significance is the company-by-company, drug-by-drug issues.”<sup>45</sup>
- “[W]hen it came down to it, for me, it was not only company by company, but drug by drug, NDC by NDC, and even – year by year.”<sup>46</sup>

As is apparent from the decision by the highest court in Alabama, Judge Saris’ observations, Dr. Bell’s report, and the declarations of the individual defendants herein, the differences between defendants here are not minor – they go to the very nature of each defendant’s business. Because Plaintiff does not allege—and indeed cannot show—that the

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<sup>42</sup> *Ex parte Novartis*, 2007 WL 1576114, at \*6.

<sup>43</sup> *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, Civil Action No. 01-12257-PBS (D. Mass.), which comprises several AWP-related private class actions and several federal, state and county lawsuits.

<sup>44</sup> Transcript of Motion Hearing at 15, *In re Pharmaceutical Industry* (D. Mass. March 26, 2007) (excerpt attached as Exh. V). Defendants are happy to supplement the record with a full transcript of any proceeding cited herein should the Court so desire.

<sup>45</sup> Transcript of Status Conference at 7, *In re Pharmaceutical Industry* (D. Mass. May 16, 2007) (excerpt attached as Exh. W).

<sup>46</sup> Transcript of Hearing at 23, *In re Pharmaceutical Industry* (D. Mass. July 3, 2007) (excerpt attached as Exh. X).

same transaction or series of transactions gave rise to its claims against all defendants in this matter, the State's claims against all defendants must be severed from one another.

## II. SEPARATE TRIALS SHOULD BE ORDERED TO AVOID THE PREJUDICE INHERENT IN A SINGLE TRIAL OF 36 DEFENDANTS.

Even if the standard for permissive joinder was met here (and it is not), this Court has the discretion to order a separate trial of the State's claims against each defendant.<sup>47</sup> Such relief is, at a minimum, plainly warranted here in order to avoid the prejudice, unmanageability, and risk of confusion inherent in a trial of this case, which if it occurs, promises to be massive and complex.

*First*, a single trial against all 36 defendants will unduly prejudice the defendants; separate trials would not prejudice the State. A trial against all 36 defendants would subject a jury to an enormous amount of evidence, including documentary evidence, fact witnesses, and expert witnesses, for each of the State's claims against each defendant.<sup>48</sup>

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<sup>47</sup> Wis. Stat. 805.05(2)(2006). *See also Kluth*, 178 Wis.2d at 818, 505 N.W.2d at 446.

<sup>48</sup> By way of example, in order to prevail, Plaintiff will need to establish, among other things, and *as to each defendant* the following for each claim:

1. Wis. Stat. § 133.05 claim:

- Whether discounts were given for a particular drug off of AWP and/or WAC;
- Whether Wisconsin was aware of those discounts (through its own purchases or through communications with third parties or individual defendants);
- Whether competition was adversely effected.

2. Unjust enrichment claim:

- Whether a defendant's market share/sales increased;
- Whether this increase was the result of marketing "spread";
- Whether Wisconsin paid on the basis of the published price or other factor.

3. Wis. Stat. § 49.49 claim:

- Whether a defendant's "statement" was false;
- Whether it was made "knowingly";
- Whether it was material;
- Whether the reported price was actually used in establishing reimbursement.

4. Wis. Stat. § 100.18 claims:

- Whether and what representation was made;

The volume of evidence alone would likely lead to jury confusion as well as prejudice to each defendant created by the probability—if not certainty—that a jury would not be able to sort through and weigh the relevant evidence against the appropriate defendant. Moreover, defendants will almost certainly present factual and legal arguments that may appear inconsistent with, or even inimical to, defense theories offered by one or more of their co-defendants. Each defendant is entitled to an individualized determination on the merits of its own defenses, apart from the disparate facts, conduct and circumstances pertaining to its co-defendants. As Judge Saris noted recently: “[T]here are different issues, and you all have the right to present it in your own way . . .”.<sup>49</sup>

Against these considerations, ordering separate trials against the defendants would not prejudice the State, which will be required to prove its individual claims against each defendant regardless of whether defendants are tried together or apart.

*Second*, a single trial against all 36 defendants is impracticable, not to mention unmanageable. As noted, the State has brought five separate claims against each defendant, each of which requires proof of specific elements as to each defendant. Keeping track of the evidence relating to different elements for each of these five claims for each of the 36 different defendants in a single proceeding invites, if indeed it does not assure, confusion on the part of the fact-finder. For example, the State has brought a claim for violation of Wisconsin’s Medical Assistance Fraud Statute<sup>50</sup> against each defendant. To establish liability under this statute, that State must prove, at a minimum, that: (1) the defendant made a representation; (2) the representation was false; (3) the false

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- Whether the representation was untrue;
  - Whether the representation was made with intent to increase purchases.

<sup>49</sup> Transcript of Settlement Status Conference at 30 (D. Mass. May 22, 2007) (excerpt attached as Exh. Y).

<sup>50</sup> Wis. Stat. § 49.49(4m)(a)(2) (2006).

representation was made knowingly; (4) the representation was of a material fact; and (5) the representation was made for use in determining rights to a benefit or payment.<sup>51</sup>

This count alone—not even taking into account questions relating to affirmative defenses, damages and other issues—would require the State to produce evidence in support of no fewer than 180 separate factual findings (36 defendants x 5 required elements), and would further require that each element be based on individualized proof and an individualized jury determination relating to the conduct of each defendant.<sup>52</sup> This calculation does not even account for the fact that the State has alleged that each defendant reported false prices for numerous drugs and literally hundreds of other NDC codes, described in the Complaint as “too voluminous to attach in hard copy.”<sup>53</sup> Nor does it take into account the fact that the State seeks to recover for alleged conduct dating back to January 1, 1993. Adding numerous drugs and numerous representations regarding prices into the mix exponentially increases the number of individual elements the State would have to prove. The verdict form alone for this single claim would number in the hundreds of pages.<sup>54</sup>

Contrast this to the only AWP trial of multiple defendants—importantly a *bench* trial—that has gone forward in one of these so-called AWP cases. That trial, in front of Judge Saris, involved only one claim against four defendants with only nine drugs at issue, but it took more than 20 days and resulted in a 183-page opinion.<sup>55</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> This analysis applies to only one of the State’s five claims and is provided for illustrative purposes.

<sup>53</sup> Complaint ¶ 48.

<sup>54</sup> Another logistical difficulty is presented by the fact that at trial the State will introduce confidential and proprietary information obtained from each defendant pursuant to a protective order. The protection of this information in a trial involving multiple commercial competitors would involve procedures that would burden trial to an intolerable degree.

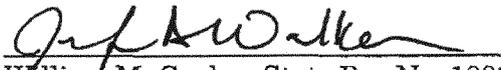
<sup>55</sup> *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, Civil Action No. 01-12257-PBS (D. Mass.). Judge Saris later stated, “I found it confusing enough, really

Accordingly, because one trial against all 36 defendants will unduly prejudice the defendants, be impracticable, and an inefficient use of judicial resources, the Court should order separate trials against each defendant.

#### Conclusion

For all the foregoing reasons, the Court should sever the State's claims against all defendants from one another. Alternatively, the Court should order separate trials for each defendant.

July 16, 2007

  
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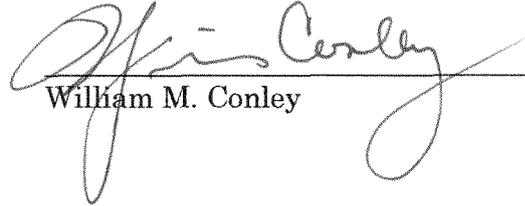
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confusing, to sit through four defendants with dramatically different histories of marketing, with very different drugs. ... I think 13 [defendants] is impossible." Transcript of Hearing at 55, *In re Pharmaceutical Industry* (D. Mass. July 3, 2007) (excerpt attached as Exh. X).

Certificate of Service

I certify that on July 16, 2007 a true and correct copy of the foregoing motion and supporting exhibits was served on all counsel of record by Lexis Nexis File & Serve®, except for the sealed Exhibit B to the Affidavit of Robert B. Funkhouser which was hand delivered to Attorney Charles Barnhill.

  
William M. Conley