

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
IN RE: CLOZAPINE ANTITRUST \*  
LITIGATION \* 90 Civ. 8055, 8060,  
\* 8062-8065, 8067, 8069,  
\* 8071, 8073-8077, 8079-  
\* 8082, 8084, 8086-8087,  
\* 8089, 8092; 91 Civ. 244,  
\* 921, 1043, 1165, 1219, 1220,  
\* 1392 (JFK)  
-----\*  
The Document Relates to All \*  
Cases \*  
\*\*\*\*\*

PLAINTIFF STATES' MEMORANDUM OF POINTS  
AND AUTHORITIES OPPOSING CAREMARK INC.'S  
MOTION TO DISMISS

STEVEN M. RUTSTEIN (SMR 2736)  
ASSISTANT ATTORNEY GENERAL  
110 SHERMAN STREET  
HARTFORD, CT 06105  
TEL: (203) 566-5374

Counsel for Plaintiff State of Connecticut  
(List of Additional Counsel on Signature Pages)

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	2
ARGUMENT.....	4
I. THE STATES HAVE STANDING TO BRING THESE ACTIONS.....	4
A. The States Have Standing to Sue on Behalf of Their Institutions, Agencies, Departments, Divisions, and Political Subdivisions.....	5
1. Each State may sue on behalf of itself its institutions, agencies, departments, and divisions.....	5
2. The States have standing to represent as yet unidentified political subdivisions.....	6
B. Antitrust Standing Is Properly Alleged Under Section 4 of the Clayton Act for the States and Their Agencies.....	8
1. The States allege antitrust injury to themselves and their agencies.....	9
2. The States are proper plaintiffs.....	10
C. States Have <u>Parens Patriae</u> Standing to Represent Schizophrenia Patients.....	13
1. The States have alleged that they represent purchasers of Clozaril.....	13
a. The States have standing to represent those schizophrenia patients who pay for all or a portion of their treatment.....	14
b. The States have standing to represent insured schizophrenia patients.....	14
2. The States have standing to represent non- purchasers paying for substitute treatments that are more expensive than unbundled Clozaril.....	15
D. States Have <u>Parens Patriae</u> Standing to Obtain Injunctive Relief to Prevent Injury to Their General Economies.....	16

II.	THE STATES HAVE PROPERLY ALLEGED CLAIMS UNDER SECTION ONE OF THE SHERMAN ACT.....	17
A.	The States Have Sufficiently Alleged that Caremark Has Participated in an Illegal Tie.....	17
1.	Even if Caremark is an agent of Sandoz, Caremark is liable for an illegal tie under Section One.....	18
2.	The States allege sufficiently that Caremark and Sandoz are separate entities that conspired with each other.....	20
B.	The States Have Sufficiently Alleged That The Tie Involves a "Not Insubstantial" Amount of Commerce in the Tied Market.....	20
C.	The States Have Properly Alleged a Claim for Relief Based upon Vertical Price Fixing.....	22
1.	A vertical relationship between Sandoz and Caremark has been alleged.....	23
2.	The States have alleged sufficient facts to support the claim that Caremark agreed to adhere to Sandoz's suggested price.....	24
III.	THE STATES ALLEGE THE SUBSTANTIVE ELEMENTS OF A CONSPIRACY TO MONOPOLIZE CLAIM UNDER SECTION 2 OF THE SHERMAN ACT.....	25
IV.	THE GENERAL RESTRAINT OF TRADE CLAIM IS WELL- PLEADED.....	27
V.	THE STATES HAVE PROPERLY ALLEGED PENDENT STATE CLAIMS.....	29
	CONCLUSION.....	32

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
IN RE: CLOZAPINE ANTITRUST \*  
LITIGATION \* 90 Civ. 8055, 8060,  
\* 8062-8065, 8067, 8069,  
\* 8071, 8073-8077, 8079-  
\* 8082, 8084, 8086-8087,  
\* 8089, 8092; 91 Civ. 244,  
\* 921, 1043, 1165, 1219, 1220,  
\* 1392 (JFK)  
-----\*  
\*  
The Document Relates to All \*  
Cases \*  
\*\*\*\*\*

PLAINTIFF STATES' MEMORANDUM OF POINTS  
AND AUTHORITIES OPPOSING CAREMARK INC.'S  
MOTION TO DISMISS

The Plaintiff States<sup>1</sup> respectfully submit this Memorandum of Points and Authorities in response to the Motion to Dismiss these actions filed by Caremark Inc. ("Caremark"), having return dates of February 12, 1991, and March 22, 1991.

---

<sup>1</sup> This Memorandum is jointly submitted by all States, Commonwealths and the District of Columbia that have filed related actions in this Court. These plaintiffs are identified on the signature pages.

## INTRODUCTION

The Complaints properly assert claims upon which relief can be granted. Caremark and Sandoz Pharmaceuticals Corporation ("Sandoz") are alleged to have agreed to distribute Clozaril by tying it to the purchase of a blood testing system, the Clozaril Patient Management System ("CPMS"); by fixing the price of this packaged sale; and by conspiring to monopolize the market for this unique and vital therapy.

Purchasers, potential purchasers, and competitors have suffered and will continue to suffer substantial injury because of this restricted marketing program. The primary victims are among the most vulnerable members of our society: persons suffering from schizophrenia. Were it not for the restrained distribution and its attendant, excessive price, Clozaril would be in greater use today.

In evaluating Caremark's motion to dismiss, the Court must accept the facts pleaded as true and must construe them in the light most favorable to the non-moving party. Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740 (1976). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 746. Particularly "in antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving plaintiff ample opportunity for

discovery should be granted very sparingly." Id. See also Radovich v. National Football League, 352 U.S. 445, 453 (1957) (suggesting that unless an antitrust claim is "wholly frivolous," it should not be dismissed); George C. Frey Ready-Mixed Concrete v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 554 (2d Cir. 1977); Nagler v. Admiral Corporation, 248 F.2d 319 (2d Cir. 1957).

Rule 8(a)(2) of the Federal Rules of Civil Procedure merely requires that the complaint give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957). A Sherman Act claim need only allege "enough data ... so that each element of the alleged antitrust violation can be properly identified." Quality Foods de Centro America v. Latin American Agribusiness Development Corp., 711 F.2d 989, 995 (11th Cir. 1983). The States have alleged more than enough information to identify each element of Caremark's antitrust violations. Moreover, a motion to dismiss must be denied if the allegations contained in the complaint provide for relief on any possible theory. Bowers v. Hardwick, 478 U.S. 186, 202 (1986) (Blackmun, J., dissenting); Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1375 n. 5 (10th Cir. 1979); Bonner v. Circuit Court of City of St. Louis, Mo., 526 F.2d 1331, 1334 (8th Cir. 1975), cert. denied, 424 U.S. 946 (1976). 5A C. Wright & A. Miller, Federal Practice and Procedure Sec. 1357, p. 337 (2d ed. 1990).

Notwithstanding Caremark's assertions to the contrary, the discussion that follows demonstrates the States' properly have

alleged violations of state and federal law, have set forth more than adequate grounds for standing, and have sufficiently established the jurisdictional basis for this Court to exercise its authority to grant the relief sought by the States.

In sum, the allegations in the States' Complaints provide Caremark with fair and ample notice of the claims against it and the grounds upon which the claims rest. Because, at this stage, the Court must accept the facts pleaded as true and must construe them in the light most favorable to the States, it must deny Defendant Caremark's Motion to Dismiss.

#### ARGUMENT

##### I.

#### THE STATES HAVE STANDING TO BRING THESE ACTIONS

The States' complaints assert claims sufficient to establish standing to bring suit. Each plaintiff State has standing to bring this action on behalf of: (1) itself, its institutions, agencies, departments, and divisions, and its political subdivisions; (2) as parens patriae on behalf of all schizophrenia patients and other natural person residents; and (3) as parens patriae on behalf of its general welfare and economy. Complaint para. 5.<sup>2</sup>

---

<sup>2</sup> Citations to the "Complaint" are to the complaint in Minnesota v. Sandoz Pharmaceuticals Corp., 90 Civ. 8055. Each Complaint filed by the other states include substantially identical allegations.

A. The States Have Standing to Sue On Behalf of Their Institutions, Agencies, Departments, Divisions, and Political Subdivisions

Under sections 4 and 16 of the Clayton Act, 15 U.S.C. Secs. 15, 26, a party may seek damages and injunctive relief for injury caused by violation of the antitrust laws. Each State sues in its proprietary capacity for both damages and injunctive relief on behalf of its institutions, agencies, departments, divisions (hereinafter "agencies") and political subdivisions. Seeking to avoid the results of its illegal conduct, Caremark makes the sweeping and unsupported assertion that the States lack standing to sue on behalf of the State's "unnamed" agencies and political subdivisions. See Caremark Mem. at 6.

1. Each State may sue on behalf of itself its institutions, agencies, departments, and divisions

The Attorney General of each plaintiff State is authorized by statute or common law to sue on behalf of the State and the State's agencies, without prior authorization and without limitation. See, e.g., Ariz. Rev. Stat. Sec. 44-1407; Fla. Stat. Sec. 542.27 (1988); N.Y. Exec. Law Sec. 63.1 (McKinney's 1982). The right of an Attorney General to represent the State and its agencies, even when the agencies are not identified or have not affirmatively authorized suit, is absolute. See, e.g., Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 271-73 (5th Cir. 1976), cert. denied 429 U.S. 829 (1976); Ohio v. United Transportation, Inc., 506 F. Supp. 1278, 1282-83 (S.D. Ohio 1981). Therefore, a state and its agencies are legally indistinguishable from each other for purposes

of this lawsuit. See Alaska v. Chevron Chemical Co., 669 F.2d 1299, 1302 (9th Cir. 1982).

Inherent in a State's suit on its own behalf is a suit on behalf of its agencies. Whether an agency is named or unnamed in the suit is therefore immaterial to the right of each State's Attorney General to protect his or her State's interests under the antitrust laws. See Exxon, 526 F.2d at 274-75 (state attorney general has standing to maintain antitrust action on behalf of its agencies and political subdivisions that had not authorized suit).<sup>3</sup>

2. The States have standing to represent as yet unidentified political subdivisions

States also have standing to sue on behalf of unidentified political subdivisions. In Exxon, 526 F.2d at 266, the Fifth Circuit was faced with the argument raised by Caremark here. There Exxon challenged the right of the Florida Attorney General, under state law, to initiate an antitrust action in federal court without explicit authorization from other departments, agencies, and political subdivisions of the state. Id. at 267. Florida sought, as here, damages suffered by the state as a consumer, which accrued both to the state directly and to the constituent units of the state.

The Fifth Circuit held that the Attorney General could bring the action in federal court on behalf of all state entities,

---

<sup>3</sup> New York v. Cedar Park Concrete Corp., 665 F. Supp. 238 (S.D.N.Y. 1987), cited by Caremark in support of its argument, is not to the contrary. As discussed more fully in the next point, the court in Cedar Park assumed the New York Attorney General had authority to sue on behalf of unnamed governmental agencies.

including political subdivisions that had independent authority to sue for antitrust damages, without affirmative authorization. The court left completely undisturbed the Florida Attorney General's unlimited authority to prosecute actions on behalf of its state agencies. Id. at 272-73. The court also held the Attorney General had standing to represent political subdivisions that had not authorized suit. The court left questions of which political subdivisions were represented by Florida until "the stage of th[e] action ... at which those questions will become relevant: the calculation of damages." Id. at 273 n.23.

New York v. Cedar Park Concrete Corp., 665 F. Supp. 238 (S.D.N.Y. 1987), is not to the contrary. Instead, the court reached a conclusion similar to the Fifth Circuit's in Exxon. Cedar Park addressed only whether the New York Attorney General could seek damages on behalf of unidentified, quasi-independent state political subdivisions that had authority to sue on their own behalf. 665 F. Supp. at 241. Cedar Park construed N.Y. Gen. Bus. Law Sec. 342-b. Like the state court decisions analyzed in Exxon, Sec. 342-b provides that an action may be brought by the New York Attorney General upon the request of independent political subdivisions and public authorities. These entities may also sue for antitrust damages on their own behalf. Consequently, the court in Cedar Park merely dismissed without prejudice and with leave to replead claims on behalf of those subdivisions that had not authorized suit. 665 F. Supp. at 241.

Dismissal of the States' claims on behalf of unidentified

political subdivisions is inappropriate at this stage of the litigation. The issue of authorization to sue is more properly a subject of a motion for summary judgment, if the facts warrant it, than a motion to dismiss. Whether unnamed political subdivisions are represented by the States in this lawsuit can be resolved through discovery. Alternatively, if necessary under state law, the States may amend their complaints to name the specific political subdivisions on whose behalf they sue.

Finally, Caremark's demand that the complaints brought on behalf of unidentified political subdivisions be dismissed is at odds with the notice pleading concept which is at the foundation of federal practice. See Fed. R. Civ. P. 8a. This is particularly so for those States who sue on behalf of all political subdivisions. The Complaint meets the notice and specificity requirements of federal pleading.

B. Antitrust Standing Is Properly Alleged Under Section 4 of the Clayton Act for the States and Their Agencies

Caremark contends that the States have failed to allege sufficient antitrust injury to sue for relief under the Sherman Act. The contention is based on the factually incorrect assertion that the States have not alleged that they or their agencies purchased Clozaril therapy and the legally incorrect assertion that the States lack standing because they are not "proper plaintiffs."

In fact, the States have alleged that their agencies either purchased Clozaril or would have purchased Clozaril absent the illegal tie. As direct or potential purchasers of Clozaril and

CPMS, the States have standing to bring this action. Moreover, the States have alleged that they are potential competitors in the market for these services. Because the States allege that antitrust injury results from defendants' illegal conduct, they are entitled to injunctive relief.<sup>4</sup> Thus, in this context, the question of whether the States purchased Clozaril or related services is relevant only to whether the States are entitled to damages. Caremark's Motion to Dismiss must therefore be denied as a matter of law. See Radovich v. National Football League, 352 U.S. at 453.

1. The States allege antitrust injury to themselves and their agencies

The States' Complaints expressly provide:

Plaintiff brings this action on its own behalf, on behalf of its institutions, agencies, departments, divisions, and political subdivisions that purchase health care goods and services....

Complaint para. 5 (emphasis added).

The purchasers of Clozaril, including plaintiff and persons represented by plaintiff, are always charged the same price regardless of the treatment setting, dosage, or location.

---

<sup>4</sup> Under Section 16 of the Clayton Act, even indirect purchasers are entitled to injunctive relief. In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), cert. denied, 449 U.S. 905 (1980); Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 590-94 (3d Cir. 1979). See also Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969) (determining that equitable relief under section 16 requires proof of only a "significant threat of injury" from antitrust violations, not an "actual injury").

Id. para. 38 (emphasis added).

The States have alleged that they, their agencies, and their political subdivisions were subject to illegal restraints of trade as purchasers or potential purchasers of Clozaril. These allegations are sufficient, by themselves, to dispose of Caremark's claim that the States have failed to allege an antitrust injury. Clayton Act Secs. 4 and 16, 15 U.S.C. Secs. 15, 26. Furthermore, the States have alleged that they and their hospitals are capable of competing with Caremark because they perform the monitoring services that it has tied to the sale of Clozaril. Complaint para. 45. Caremark concedes that a competitor would have standing to bring the present action. See Caremark Mem. at 9-10.

## 2. The States are proper plaintiffs

Caremark argues that even if the States correctly asserted antitrust injury, they "are not 'proper plaintiffs' here." Caremark Mem. at 8. Caremark's argument appears to arise from the unfounded notion that the States' purchases are indirect.

Contrary to Caremark's belief, the States are direct purchasers of Clozaril and related blood monitoring services for use in their State hospitals and other institutions.<sup>5</sup> A direct

---

<sup>5</sup> Even if a portion of the States' purchases are deemed "indirect," damages may still be pursued under the pendent State law claims. Many States have statutes that expressly provide indirect purchasers with a right to recover damages under their state antitrust laws. E.g., Cal. Bus. & Prof. Code Sec. 16750(a) (West Supp. 1989); D.C. Code Ann. Sec. 28-4509(a) (1981); Kan. Stat. Ann. Sec. 50-801(b) (Supp. 1989); Me. Rev. Stat. Ann. tit. 10, Sec. 1104(1); Md. Com. Law Code Ann Sec. 11-209(b)(2)(II) (1983); Minn. Stat. Sec. 325D.57 (1990); S.D. Codified Laws. Ann. Sec. 37-1-33 (1986); Wis. Stat. Ann. Sec. 133.18(1)(a). Other state antitrust statutes may be construed to allow indirect

purchaser of a product or service who has been damaged by an antitrust violation may bring an action to recover its losses multiplied by three. Illinois Brick Co. v. Illinois, 321 U.S. 720 (1977).

The three cases cited by Caremark in support of its argument that the States are not proper plaintiffs -- Associated General Contractors of California v. California State Council of Carpenters; 459 U.S. 519 (1983) ("AGC"); Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982); and Cargill v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) -- are clearly not on point.<sup>6</sup>

---

purchasers to recover damages. E.g., Ariz. Rev. Stat. Ann. Sec. 44-1408(B) (1987); Colo. Rev. Stat. Sec. 6-4-108 (1973); Conn. Gen. Stat. Ann. Sec. 35-35 (West 1987); Del. Code Ann. tit. 6, Sec. 2108(a) (Supp. 1988); Fla. Stat. Ann. Sec. 542.22(1) (West 1988); Idaho Code Sec. 48-114 (1977); Iowa Code Ann. Sec. 24-1-2-7 (West 1987); Mass. Gen. Laws Ann. ch. 93, Sec. 12 (West 1984); Mo. Stat. Ann. Sec. 416.121 (Vernon 1979); N.H. Rev. Stat. Ann. Sec. 356:11(II) (1984); N.Y. Gen. Bus. Law Sec. 340(5) (McKinney 1988); N.C. Gen. Stat. Sec. 51-08.1-08 (Supp. 1987); Ohio Rev. Code Ann. Sec. 1331.08 (1984); Or. Rev. Stat. Sec. 646.780(1)(a) (1987); Tenn. Code Ann. Sec. 47-25-106 (1988); Tex. Bus. & Com. Code Ann. Sec. 15.21(a)(1) (Vernon 1987); Utah Code Ann. Sec. 76-10-919 (Supp. 1988); Va. Code Ann. Sec. 59.1-9.12(b) (1987); Wash. Rev. Code Sec. 19.86.090 (West 1989); W. Va. Code Sec. 47-18-9 (1986). The U.S. Supreme Court has unambiguously held, without dissent, that these statutes are not preempted by federal law. A federal court exercising pendent jurisdiction may award damages for indirect purchases under these state antitrust laws. California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661 (1990).

<sup>6</sup> In Associated General Contractors, 459 U.S. 519, the Supreme Court denied standing because, inter alia, the injury suffered by plaintiff, a Union, was a "labor-market" injury rather than an antitrust injury, and plaintiff, unlike the States here, was neither a consumer nor a competitor in the market in which trade was restrained. McCready, 457 U.S. 465, holds that the injuries of plaintiff, a consumer, which resulted from a conspiracy by insurance companies and psychiatrists intended to harm psychologists, and not plaintiff, were not too remote to confer standing. Cargill, 479 U.S. 104, involved "injury" resulting from increased competition due to an allegedly anticompetitive merger.

Even if one were to find these cases to be relevant, they do not support Caremark's argument. Instead, they lead to the conclusion that the States are, indeed, the proper plaintiffs to maintain these actions.

Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290 (2d Cir. 1983), the leading case in the Second Circuit on standing to claim damages for antitrust injury, analyzes AGC and McCready. Judge Friendly, interpreting McCready, held there are "two types of limitation on the availability of the Sec. 4 remedy to particular classes of persons and for redress of particular forms of injury." Crimpers, 724 F.2d at 293. Neither limitation applies in this case.

The first limitation is designed to prevent double recovery. Like the compensable injuries alleged in McCready and Crimpers, the injury suffered by each direct purchaser is necessarily "distinct and different," 724 F.2d at 293-94, from every other injury, and therefore is not duplicative.

The second limitation prevents recovery when the injury suffered is "too remote" from an antitrust violation. As in McCready and Crimpers, the States are not remote parties, but are among the immediate victims of Caremark's conduct. Antitrust injuries (overcharges for Clozaril and monitoring services) were inflicted directly on the States as purchasers.

In summary, the States sufficiently have alleged antitrust

---

By comparison, the States specifically allege here that their injury has been caused by decreased competition -- exactly the kind of injury the antitrust laws are intended to rectify.

standing. The States and their agencies are direct purchasers of Clozaril, the States and their agencies are competitors of Caremark in the market for monitoring services, and the States represent, in their statutory parens patriae capacity, all patients who purchased Clozaril.

C. States Have Parens Patriae Standing to Represent Schizophrenia Patients

The Attorneys General of the States have parens patriae standing to bring antitrust lawsuits on behalf of natural persons within their states who suffer injury. 15 U.S.C. Sec. 15C.

1. The States have alleged that they represent purchasers of Clozaril

In their Complaints, the States allege that the defendants, among other things, have illegally tied Clozaril to certain services. In tying cases, purchasers have standing to challenge the tie. Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 12-13 and n. 19 (1984); Ware v. Trailer Mart, Inc., 623 F.2d 1150 (6th Cir. 1980). To establish standing, the Complaint alleges that the parens patriae claims are brought on behalf of schizophrenia patient purchasers and that those persons have been injured in their business and property. Complaint para. 5a, 5b, 33, 38 and 58.

Accepting as true all material allegations of the complaint, and construing these allegations in favor of the complaining party, Warth v. Seldin, 422 U.S. 490, 501 (1975), the trial court must find that these allegations sufficiently establish standing.

- a. The States have standing to represent those schizophrenia patients who pay for all or a portion of their treatment.

The States have standing to represent those consumers who pay all or a portion of their Clozaril therapy. There is absolutely no support for the argument Caremark appears to make -- that the States have no parens patriae standing unless all schizophrenia patients paid the full cost for Clozaril.<sup>7</sup> In short, the fact that some patients may have had their entire Clozaril therapy costs reimbursed does not eliminate the States' parens patriae standing on behalf of those patients who did not.

- b. The States have standing to represent insured schizophrenia patients.

The States assert parens patriae standing to represent even those consumers who had all their Clozaril costs reimbursed by insurance companies. Caremark assumes that insurance companies will have a right of subrogation to any recoveries of their insureds for antitrust claims. It is not clear at this stage of the litigation, however, whether such rights of subrogation exist. Additionally, any right of subrogation would have arisen if consumers had "passed on" their costs to their insurers. The fact

---

<sup>7</sup> Caremark appears to take the position that the States lack standing as purchasers of Clozaril and that the States also lack parens patriae standing to represent Clozaril patients because many of those Clozaril patients have the cost of Clozaril paid by the state. Caremark Mem. at 6-10. These positions are completely contradictory. Caremark cannot use the complicated way in which medical costs are reimbursed to escape liability. See In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 282-83 (S.D.N.Y. 1971).

that plaintiffs pass on damages is not a defense to an antitrust action. Illinois Brick, 431 U.S. at 729-30; Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).<sup>8</sup> Even assuming that there were rights of subrogation, insurance companies may only be entitled to their out-of-pocket payments on behalf of an insured, not to the full treble damages an insured consumer will collect. See, e.g., Associated Hospital Service of Philadelphia v. Pustilnik, 497 Pa. 221, 439 A.2d 1149 (1981). Thus, complete or partial reimbursement by insurers of Clozaril costs provides no basis to deny parens patriae standing to the States on behalf of schizophrenia patients.

2. The States have standing to represent non-purchasers paying for substitute treatments that are more expensive than unbundled Clozaril

A non-purchaser sustains antitrust injury if it refused to purchase products because of a tie and instead purchased a more expensive alternative. Wells Real Estate v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 814-15 (1st Cir. 1988) ("A plaintiff need not have actually consented to the purchase of the tying and tied products in order to bring a [tying] claim under the Sherman Act.") cert. denied, 488 U.S. 955 (1988).

In Ware v. Trailer Mart, Inc., 623 F.2d at 1153, a consumer sought to rent a mobile home space from defendants, who refused to rent spaces unless a consumer also purchased a new mobile home.

---

<sup>8</sup> Whether an insured patient or any other person is a direct or indirect purchaser is a question of fact, not properly resolved on a Rule 12(b)(6) motion.

The consumer refused the purchase; he rented an apartment near his place of employment and a mobile home space at a remote location to store his home. Although the consumer did not purchase anything from defendants, the court found that he had standing to attempt to collect the double rent he paid. Similarly, here the States have standing to attempt to collect for expensive alternative therapies on behalf of non-purchaser schizophrenia patients.

In any event, the States may seek injunctive relief for consumers who do not purchase the drug because it is too expensive. For injunctive relief a plaintiff need only show threatened loss or injury and need not show injury to business or property. See, e.g., Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d at 591.

D. States Have Parens Patriae Standing to Obtain Injunctive Relief to Prevent Injury to Their General Economies

In the present case, the States seek injunctive relief to prevent further damage and injury to their general economies. It is well established that a State has standing to obtain this type of relief.<sup>9</sup> Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972).

---

<sup>9</sup> The States do not claim damages for injuries to their general economies.

## II

### THE STATES HAVE PROPERLY ALLEGED CLAIMS UNDER SECTION ONE OF THE SHERMAN ACT

#### A. The States Have Sufficiently Alleged that Caremark Has Participated in an Illegal Tie

In their first claim for relief the States allege that "defendants Sandoz, Caremark, and their co-conspirators have illegally tied the sale of Clozaril (tying product) to blood drawing, case administration, data base, dispensing, and laboratory services (tied products) in violation of section 1 of the Sherman Act, 15 U.S.C. Sec. 1." Complaint para. 54. This first claim for relief includes a claim against both Sandoz and Caremark for the illegal tie. The claim against Caremark alleges in the alternative that: (1) Caremark is an agent of Sandoz and is liable for the illegal tie as its agent; and (2) Sandoz and Caremark are separate entities that have conspired to engage in the illegal tie.<sup>10</sup> Under either theory, the States have adequately pleaded the elements required for the tying claim.

The Second Circuit has held that a per se illegal tying arrangement under Section 1 of the Sherman Act consists of five elements:

first, a tying and a tied product; second, evidence of actual coercion by the seller that forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive

---

<sup>10</sup> The Federal Rules of Civil Procedure sanction the practice of alleging claims in the alternative. Fed. R. Civ. P. 8(e)(2).

effects in the tied market; and fifth, the involvement of a 'not insubstantial' amount of interstate commerce in the 'tied' market.

Gonzalez v. St. Margaret's House Housing Dev. Fund Corp., 880 F.2d 1514, 1516-17 (2d Cir. 1989); See also Jefferson Parish, 466 U.S. 2.

The Complaint alleges that (1) the tying product, Clozaril, is a separate product from the tied CPMS services (Complaint para. 12-17, 55a); (2) if a patient wants to purchase clozapine, he is required also to purchase all the non-drug services of CPMS (Complaint para. 33, 37, 55b); (3) in the United States Sandoz possesses economic power due to a five-year period of exclusivity to market clozapine, a unique drug for which there is no substitute (Complaint para. 12, 48, 55c); (4) the tie establishes Caremark and Roche Laboratories as exclusive vendors of the required blood monitoring services and thereby forecloses competition in these tied markets (Complaint para. 46, 55d); and (5) the tie involves at least a million dollars of interstate commerce in the markets for blood monitoring services (Complaint para. 19, 26, 37, and 55e). These allegations state the essential elements of a tying claim.

1. Even if Caremark is an agent of Sandoz, Caremark is liable for an illegal tie under Section One.

Caremark cannot escape liability by arguing that the States allege only enough facts to enable this Court to treat Caremark as an agent of Sandoz. Caremark Mem. at 16-18. Even if Caremark's contention were true, Caremark, as an agent, would be jointly and

severally liable for the acts in which it engaged. That the agent acted on behalf or behest of a principal does not alter this rule. United States v. Wise, 370 U.S. 405, 410 (1962) ("[A]ll parties active in promoting [an antitrust violation], whether agents or not, are principals."); Restatement (Second) of Agency, Secs. 184-185, 210-210A and 343 (1957); Kintner, Federal Antitrust Laws, Sec. 9.8 at 23 and Sec. 49.45 at 190 ("Responsibility for unfair or deceptive acts or practices is not avoided because a party acts upon the instruction or initiative of another."). See also Raysor v. Port Authority of New York and New Jersey, 768 F.2d 34, 38 (2d Cir. 1985) ("an agent is not relieved of liability merely because he acted at the command of the principal").

Moreover, the States do not rely upon the arrangement between Sandoz and Caremark to supply the agreement element required by Section 1 of the Sherman Act. Rather, this requirement was met when a patient (or payor) agreed to the purchase of CPMS. Even the case relied upon by Caremark illustrates that the "conspiracy" or "agreement" element of a Section 1 tying claim is usually inferred from the coerced "agreement" between the entity imposing the tie and the purchaser who unwittingly facilitates the illegal tie by purchasing the bundle. McKenzie v. Mercy Hosp., 854 F.2d. 365, 368 n.9 (10th Cir. 1988).<sup>11</sup>

---

<sup>11</sup> "The Supreme Court has defined a tying arrangement as 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different or tied product or at least agrees he will not purchase that product from any other supplier.'" Id., citing Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958) (emphasis added).

2. The States allege that Caremark and Sandoz are separate entities that conspired with each other

In addition to alleging that Caremark, as an agent, is liable for the illegal tie, the States also allege, alternatively, that Sandoz and Caremark are two separate entities that unreasonably restrained trade by agreeing to institute and continue the illegal tying arrangement. The States make explicit that "[t]he Caremark contract defines the relationship between Caremark and Sandoz as that of independent contractors, not agents or partners." Complaint para. 40.<sup>12</sup>

Even if Caremark were not an agent of Sandoz and had not conspired with Sandoz as a separate entity, the States have sufficiently alleged, in the alternative, that Caremark independently enforced the illegal tie. As the sole distributor of Clozaril, Caremark has economic power over the tying product at that level of the distribution chain that it has used to force consumers also to purchase its CPMS services. See Jefferson Parish, 466 U.S. 2.

- B. The States alleged that the tie involves a "not insubstantial" amount of commerce in the tied market

The states explicitly allege that "the tie involves a not insubstantial amount of interstate commerce in the markets for

---

<sup>12</sup> In attacking this allegation, Caremark relies on Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). Copperweld merely holds that a wholly owned subsidiary and a parent corporation cannot conspire with each other. Nowhere in the complaint, however, is it alleged that Sandoz and Caremark are in a parent-subsidary relationship.

blood drawing, case administration, data base, dispensing, and laboratory services." Complaint para. 55e. The Supreme Court has explained that in determining whether a "not insubstantial" amount of commerce is restrained by the tie, "the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie." Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 501 (1969) ("Fortner I"); Accord Gonzalez, 880 F.2d at 1518 (adopting the de minimis standard of Fortner I); 305 East 24th Owners Corp. v. Parman Co., 714 F. Supp. 1296, 1308 (S.D.N.Y. 1989).<sup>13</sup>

The States have alleged that the geographic markets affected by the tie encompass the entire United States. Complaint para. 12-17. The States have further alleged that about 200,000 schizophrenia patients do not respond adequately to conventional treatment and could benefit from Clozaril therapy. Complaint para. 19. The price of the tied Clozaril/CPMS package is \$8,944 per patient annually. Complaint para. 37. Even if only a fraction of these patients used the drug, a not insubstantial amount of commerce would be involved.

If only 100 patients were treated with Clozaril and CPMS, the amount of commerce in dollar volume affected by the tie would be

---

<sup>13</sup> Following the Fortner I precedent, a court would determine if the amount of commerce is "not insubstantial" by looking at the total volume of sales affected by the particular tie and "not merely the portion of this total accounted for by the particular plaintiff who brings suit." Gonzalez, 880 F.2d at 1518.

about \$800,000 per year [8,944 x 100 patients = \$ 894,400 - 50,000 (cost of drug alone)<sup>14</sup> = \$ 844,400]. Although courts have differed over what dollar amount is "not insubstantial," all courts would agree that \$800,000 represents a "not insubstantial" amount of commerce. See, e.g., Fortner I, 394 U.S. at 502 (\$200,000 not insubstantial); United States v. Loew's Inc., 371 U.S. 38, 49 (1962) (\$60,800); Yentsch v. Texaco Inc., 630 F.2d 46, 58 (2d Cir. 1980) (\$600,000); Coniglio v. Highwood Services, Inc., 495 F.2d 1286, 1290 (2d Cir. 1974) (\$483,000); Johnson v. Soundview Apts. Housing Dev. Fund Co., 588 F. Supp. 1381, 1383 (S.D.N.Y. 1984) (\$75,000).

C. The States Have Properly Alleged A Claim For Relief Based Upon Vertical Price Fixing

Caremark's Motion to Dismiss the States' vertical price fixing claims must fail. First, the Complaint alleges facts pointing to the existence of a vertical distribution arrangement. Second, the transactional relationship alleged between Sandoz and Caremark is not exempt from the long standing ban on resale price maintenance.<sup>15</sup> Third, the States, in no uncertain terms, have

---

<sup>14</sup> The "CPMS Partnership Evaluation" states that "Clozaril drug cost [is] \$500/year [per patient]." Complaint para. 42.

<sup>15</sup> See discussion above in Section II.A.2, regarding the presence of allegations indicative of a non-agency relationship, that is not immune from antitrust scrutiny.

Additionally, it should be noted that Caremark's reference to Medical Arts Pharmacy v. Blue Cross & Blue Shield, 518 F. Supp. 1100, 1107 (D. Conn. 1981), aff'd, 675 F.2d 502 (2d Cir. 1982), provides no support for its contention that plaintiffs "fail to  
(continued...)

alleged facts that Caremark agreed to adhere to the retail price dictated by Sandoz.

1. A vertical relationship between Sandoz and Caremark has been alleged

The States allege a vertical relationship between Sandoz and Caremark. The States allege that Sandoz is the manufacturer of clozapine: "Unlike the manufacturer of any other drug, Sandoz distributes clozapine only through its proprietary CPMS system." Complaint para. 33. The Complaint provides that Caremark receives its Clozaril from Sandoz: "By exclusive contract dated October 2, 1989 with Sandoz (the 'Caremark Contract') ... Caremark takes title to all Clozaril upon delivery from Sandoz." Complaint para. 40. The allegation of a vertical distribution arrangement is completed when the States declare that "Caremark resells Clozaril and CPMS." Complaint para. 61c.

Caremark argues that since the services provided by the CPMS package originate with Caremark, the States are precluded from proving that Caremark is a reseller of CPMS, a condition necessary to plead or prove a vertical price fix. Caremark Mem. at 22. To the contrary, the States have alleged that Sandoz has packaged Clozaril and the blood monitoring system together and that Caremark only receives a fee from Sandoz for its services. Complaint para.

---

<sup>15</sup>(...continued)  
allege facts that would support a reselling relationship vulnerable to a charge of vertical price fixing." Medical Arts Pharmacy simply stands for the proposition that the price-constraining effect of an insurance company payment plan is not price-fixing, where, unlike the present situation, "there is no resale of anything." 518 F. Supp. at 1107 (emphasis added).

37, 41. These allegations establish Caremark is a reseller regardless of where these services originate.

In addition, as Caremark admits, the States have alleged that Caremark resells Clozaril and CPMS. Id. at 22, note 16; Complaint para. 60.<sup>16</sup> The States have alleged that Clozaril and CPMS are separate and distinct elements of the tied bundle; they have not merged to form a single item. Complaint para. 54, 55. Thus, regardless of whether Caremark is a reseller of CPMS, the States have clearly alleged that Caremark resells Clozaril at a resale price fixed by agreement with Sandoz. Id. at para. 61. The addition of the CPMS component does not negate or vitiate this claim.

2. The States have alleged sufficient facts to support the claim that Caremark agreed to adhere to Sandoz's suggested price

The States have alleged that Caremark agreed to adhere to the resale price established by Sandoz. Indeed, it is difficult to overlook the allegations in the Complaint of an actual agreement between Sandoz and Caremark on the price at which Caremark will resell the package it receives from Sandoz: "Sandoz has set the price of the tied Clozaril/CPMS package in the United States at

---

<sup>16</sup> Even if this allegation is somehow at odds with the statement that the services originate with Caremark, such is not fatal for purposes of the instant motion. Under Fed. R. Civ. P. 8(e)(2), an inconsistency may lie either in the statement of facts or in the legal theories adopted. The party will not be required to elect upon which legal theory or factual basis he will proceed, since this would defeat the whole purpose of allowing an alternative or hypothetical pleading. E.g., C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d Secs. 1282, 1283.

\$172.00 per week per patient or \$8,944 annually" and "Sandoz sets the resale price for the Clozaril/CPMS package." Complaint para. 37, 41. Furthermore, the Complaints at paragraph 61 describe the unlawful agreement in substantial detail:

The price fixing agreement consists of a continuing agreement, understanding, and concert of action between defendants and their co-conspirators, the substantial terms of which have been:

- a. Sandoz sets the resale price for Clozaril, blood drawing, case administration, data base, dispensing, and laboratory services constituting CPMS;
- b. Caremark has agreed to Sandoz's resale price for Clozaril and for blood drawing, case administration, data base, and dispensing services constituting CPMS; and
- c. Caremark resells Clozaril and CPMS at the agreed upon price.

These allegations easily meet the "notice pleading" requirements of Fed. R. Civ. P. 8(a).

### III.

#### THE STATES ALLEGE THE SUBSTANTIVE ELEMENTS OF A CONSPIRACY TO MONOPOLIZE CLAIM UNDER SECTION 2 OF THE SHERMAN ACT

The States' third claim for relief sufficiently alleges that Caremark has conspired with Sandoz to monopolize the market for clozapine therapy. It unambiguously states that in violation of Section 2 of the Sherman Act, "defendant Sandoz and others acting in concert with it have ... monopolized the relevant market for the drug clozapine." Complaint para. 66. The third claim for relief explicitly incorporates all the allegations contained in paragraphs 1-64 of the Complaint. Complaint, para. 65. By so doing, this

count incorporates paragraph 43 of the Complaint, which clearly names Caremark and alleges that Caremark has conspired with Sandoz to monopolize the clozapine market.<sup>17</sup>

Moreover, even if Caremark were not explicitly named in the Complaint, the conspiracy to monopolize claim should be sustained. See Quality Foods, 711 F.2d 989. There the court found enough facts to support the elements of an attempted monopolization by "deciphering" the facts from the entire complaint, even though the plaintiffs did not explicitly state the elements in one count. Certainly, the fair implication of the Complaint is that Caremark conspired to monopolize with Sandoz.

To prove a conspiracy to monopolize, a plaintiff must allege the following elements: (1) proof of concerted action; (2) overt acts in furtherance of the conspiracy; and (3) specific intent to monopolize. Volvo N. Amer. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988); Paralegal Institute Inc. v. American Bar Ass'n, 475 F. Supp. 1123, 1132 (E.D.N.Y. 1979).

The States have sufficiently alleged the above elements as follows: (1) Sandoz and Caremark have "agreed" or conspired, Complaint para. 43; (2) overt acts in furtherance of the conspiracy include the contract between Caremark and Sandoz, which

---

<sup>17</sup> See Complaint para. 43: "For the full fifteen years of the Caremark Contract, Caremark foreclosed actual and potential competition to Sandoz by agreeing not to sell or distribute any product containing clozapine other than Clozaril. For seven and a half years, Caremark has agreed not to perform any services in connection with the sale of any neuroleptic that could compete with Clozaril." (emphasis added).

memorializes the illegal tie and the refusal of Sandoz or Caremark to sell clozapine without the monitoring services, Complaint, para. 43, 67; and (3) Sandoz and Caremark intended to monopolize, Complaint para. 43, 53-58, 68.

The only case relied upon by Caremark to support its proposition that the court must dismiss a complaint that failed to indicate the defendants against whom relief was sought is inapposite to the present case. That case, Mathews v. Kilroe, 170 F. Supp. 416 (S.D.N.Y. 1959), involved a "strange, rambling document" drawn by plaintiff pro se against two individuals and two corporations as defendants. Id. at 417. At oral argument, the plaintiff represented that he was not suing the individuals named in the complaint as defendants. Id. Under those circumstances, it is not surprising that the court granted the motion to dismiss the complaint (with leave to amend). Id. Unlike the complaint in Mathews, the Complaints filed by the States clearly identify the defendants against whom relief is sought and the basis for that relief.

#### IV.

#### THE GENERAL RESTRAINT OF TRADE CLAIM IS WELL-PLEADED

The plaintiffs have properly and specifically pleaded the general restraint of trade claim by setting forth the factual elements necessary to put Caremark on "fair notice of what the [States'] claim is and the grounds on which it rests." Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 611 (2d Cir. 1964).

See also C. Wright & A. Miller, supra, Sec. 1228.

The Complaint states that Sandoz and Caremark agreed to: (1) tie the sale of Clozaril to the purchase of CPMS; (2) set the resale price of Clozaril; and (3) conspire to monopolize to relevant market for Clozaril; all such acts being in unreasonable restraint of trade. The Complaint further provides that "[a]s a result of the violations of law alleged in this [general restraint of trade] claim, plaintiff and the persons represented by plaintiff have been injured in their business and property in an amount that will be established at the trial of this action." Complaint para. 75. These allegations of concerted activity in unreasonable restraint of trade, having caused plaintiffs to sustain injury, are sufficient to state a claim based upon a general restraint of trade. Cf. Radovich v. National Football League, 352 U.S. at 453 (plaintiff need only allege a general restraint of trade and resulting injury).

The States' general restraint of trade claim allows the States to maintain an alternative antitrust cause of action grounded upon the rule of reason. At this stage of the litigation there is uncertainty as to how this Court will characterize the commercial relationship between Sandoz and Caremark. See Ally Gargano/MCA Advertising, Ltd. v. Cooke Properties, Inc., 1989-2 Trade Cas. (CCH) para. 68,817, 62,277 (S.D.N.Y. 1989).<sup>18</sup> Because distinct

---

<sup>18</sup> "To be sure, the relationship structured between [the parties to the commercial agreement] is not captured in every detail by either the 'agency' or 'independent entrepreneur' label." Id. at 62,277.

legal ramifications flow from a particular characterization of a relationship, the general restraint claim may be utilized to challenge the defendants' arrangement should the court determine that the restrictive marketing program does not lend itself to analysis under a traditional per se tying or price fixing approach.

Even if the general restraint claim does not supply the plaintiffs with an independent ground for relief, the court should not dismiss this claim. Cf. Federated Dept. Stores, Inc. v. Grinnell Corp., 287 F. Supp. 744, 746 (S.D.N.Y. 1968). Moreover, Caremark's motion under Fed. R. Civ. P. 12(b)(6), cannot be used to challenge a pleading as being redundant. C. Wright & A. Miller, supra, Sec. 1356, at 297-98.

Accordingly, the States' general restraint of trade claim is well-pleaded and should not be dismissed.

V.

THE STATES HAVE PROPERLY  
ALLEGED PENDENT STATE CLAIMS

Assuming, arguendo, that the States' federal claims were subject to dismissal before trial, this court is imparted with the discretion to retain all pendent state law claims. United Mineworkers v. Gibbs, 383 U.S. 715 (1966). C. Wright, A. Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d Sec. 3536.1 at 133-37 (collecting cases).

In Gibbs, Justice Brennan developed a two step approach for measuring the propriety of retaining a pendent claim. Consideration is first given to the power of the federal court to

entertain the pendent claim, followed by an analysis of whether in the exercise of sound discretion the federal court ought to exercise that jurisdiction.<sup>19</sup> Wright, Miller & Cooper, supra, Sec. 3567, at 113.

In the instant litigation, the state and federal claims "derive from a common nucleus of operative fact." They are of the type that ordinarily would be expected to be tried in a single judicial proceeding. The federal issues are substantial, and, thus, "there is power in the federal court[] to hear the whole." Gibbs, 383 U.S. at 725 (emphasis in original).

Turning to the "discretion" prong, the States recognize that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." 383 U.S. at 726.<sup>20</sup> Consistent with this view, consideration of judicial economy and convenience to the litigants, id., strongly counsel toward the exercise of pendent jurisdiction over the instant state law claims.

Without engaging in a comprehensive analysis of the fundamental similarities and distinctions between the various state laws and their federal counterparts, the States, for purposes of disposing of the present motion, are generally in agreement with Caremark that federal antitrust law provides a useful guide in

---

<sup>19</sup> See also Judicial Improvements Act of 1990 (Pub. L.101-650). Section 310 codifies the doctrine of pendent jurisdiction at 18 U.S.C. Sec. 1367.

<sup>20</sup> "Although there are cases in which courts have used their discretion to refuse to hear a pendent claim, these are exceptional, and ordinarily the power is exercised if it is found to exist." Jackson v. Stinchcomb, 635 F.2d 462, 472 (5th Cir. 1981).

analyzing the analogous state laws.<sup>21</sup>

Nonetheless, for all of the reasons provided in the previous sections of this Memorandum, the States properly allege viable causes of action under federal antitrust law. For these same reasons, the analogous state law claims are properly before this court.

---

<sup>21</sup> As this litigation proceeds, it will become necessary to provide this Court with important differences and similarities between federal and state law. For example, notwithstanding Caremark's erroneous statement to the contrary, Cal. Bus. & Prot. Code Sec. 16727 applies to services. People v. National Ass'n of Realtors, 120 Cal. App. 3d 459, 174 Cal. Rptr. 728 (1981). I ABA Antitrust Law Section, State Antitrust Practice and Statutes (1990) ch. 6, at 13-14.

CONCLUSION

For all the foregoing reasons, defendant Caremark's Motion to Dismiss must be denied.

Respectfully submitted,

RICHARD BLUMENTHAL  
Attorney General  
State of Connecticut

By:

  
STEVEN M. RUTSTEIN (SMR 2736)  
Assistant Attorney General  
110 Sherman Street  
Hartford, CT 06105  
Tel: (203) 566-5374

GRANT WOODS  
Attorney General  
State of Arizona  
CHUCK JOHNSON  
Assistant Attorney General  
1275 West Washington  
Phoenix, AZ 85007  
Tel: (602) 542-4751

GALE NORTON  
Attorney General  
State of Colorado  
JAMES R. LEWIS  
Assistant Attorney General  
110 Sixteenth St., 10th Floor  
Denver, CO 80202  
Tel: (303) 620-4476

DAN LUNGREN  
Attorney General  
State of California  
THOMAS GREENE  
Supervising Deputy  
Attorney General  
BARBARA MOTZ  
Deputy Attorney General  
1515 K Street, Suite 511  
Sacramento, CA 94244-2550  
Tel: (916) 324-7874

CHARLES M. OBERLY III  
Attorney General  
State of Delaware  
JOHN J. POLK  
Deputy Attorney General  
Department of Justice  
820 N. French Street  
Wilmington, DE 19801  
Tel: (302) 571-2055

JOHN PAYTON  
Corporation Counsel  
STUART CAMERON  
Asst. Corporation Counsel  
Judiciary Plaza  
450 5th St., N.W.  
om 8-I-52  
Washington, D.C. 20001  
Tel: (202) 727-6240

ROBERT A. BUTTERWORTH  
Attorney General  
State of Florida  
JEROME HOFFMAN  
PATRICIA CONNERS  
Assistant Attorneys General  
Suite 108  
2670 Executive Center Cir. W.  
Tallahassee, FL 32301  
Tel: (904) 488-9105

LARRY ECHOHAWK  
Attorney General  
State of Idaho  
BRETT T. DELANGE  
Deputy Attorney General  
Consumer Protection Unit  
Statehouse Mail, Room 113A  
Boise, ID 83720  
Tel: (208) 334-2424

BONNIE CAMPBELL  
Attorney General  
State of Iowa  
JOHN R. PERKINS  
Deputy Attorney General  
Hoover State Office Building  
Des Moines, IA 50319  
Tel: (515) 281-3349

ROBERT T. STEPHAN  
Attorney General  
State of Kansas  
JOHN W. CAMPBELL  
Deputy Attorney General  
Kansas Judicial Center  
Topeka, KS 66612  
Tel: (913) 296-2215

MICHAEL E. CARPENTER  
Attorney General  
State of Maine  
FRANCES E. ACKERMAN  
Assistant Attorney General  
State House Station 6  
Augusta, ME 04333  
Tel: (207) 289-3661

J. JOSEPH CURRAN, JR.  
Attorney General  
State of Maryland  
ELLEN S. COOPER  
Assistant Attorney General  
200 St. Paul Place  
19th Floor  
Baltimore, MD 21202  
Tel: (301) 576-6470

SCOTT HARSHBARGER  
Attorney General  
Commonwealth of Massachusetts  
GEORGE K. WEBER  
PASQUA SCIBELLI  
Assistant Attorneys General  
One Ashburton Place  
Boston, MA 02108  
Tel: (617) 727-2200

HUBERT H. HUMPHREY III  
Attorney General  
State of Minnesota  
THOMAS PURSELL  
JAMES P. SPENCER  
Assistant Attorneys General  
117 University Avenue  
200 Ford Building  
St. Paul, MN 55155  
Tel: (612) 296-7575

WILLIAM L. WEBSTER  
Attorney General  
State of Missouri  
CLAYTON S. FRIEDMAN  
Assistant Attorney General  
Penntower Office Building  
3100 Broadway, Suite 609  
Kansas City, MO 64111  
Tel: (314) 444-6816

JOHN P. ARNOLD  
Attorney General  
State of New Hampshire  
TERRY L. ROBERTSON  
Sr. Assistant Attorney General  
25 Capitol Street  
Concord, NH 03301  
Tel: (603) 271-3643

ROBERT J. DEL TUFO  
Attorney General  
State of New Jersey  
LAUREL A. PRICE  
Deputy Attorney General  
Div. of Criminal Justice  
25 Market St. CN 085  
Trenton, NJ 08625  
Tel: (609) 633-7804

ROBERT ABRAMS  
Attorney General  
State of New York  
ROBERT L. HUBBARD  
ANNE-MIRIAM V. HART  
Assistant Attorneys General  
120 Broadway, Suite 2601  
New York, NY 10271  
Tel: (212) 341-2267

LACY H. THORNBURG  
Attorney General  
State of North Carolina  
K. D. STURGIS  
JAMES C. GULICK  
Assistant Attorneys General  
200 New Bern Ave.  
Raleigh, NC 27602  
Tel: (919) 733-7741

LEE FISHER  
Attorney General  
State of Ohio  
DOREEN JOHNSON  
MITCHELL L. GENTILE  
Assistant Attorneys General  
65 East State St., Ste. 708  
Columbus, OH 43266-0590  
Tel: (614) 466-2677

DAVE FROHNMAYER  
Attorney General  
State of Oregon  
ANDREW E. AUBERTINE  
Assistant Attorney General  
100 Justice Building  
Salem, OR 97310  
Tel: (503) 378-4732

ERNEST D. PREATE, JR.  
Attorney General  
State of Pennsylvania  
JAMES DONAHUE, III  
Deputy Attorney General  
1435 Strawberry Square  
Harrisburg, PA 17120  
Tel: (717) 787-4530

MARK BARNETT  
Attorney General  
State of South Dakota  
JEFFREY HALLEM  
Assistant Attorney General  
Capitol Building  
Pierre, SD 57501  
Tel: (605) 773-3215

CHARLES W. BURSON  
Attorney General  
State of Tennessee  
PERRY A. CRAFT  
Deputy Attorney General  
450 James Robertson Parkway  
Nashville, TN 37243-0485  
Tel: (615) 741-2408

DAN MORALES  
Attorney General  
State of Texas  
HOLLY LEE WISEMAN  
Assistant Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548  
Tel: (512) 463-2185

PAUL VAN DAM  
Attorney General  
PATRICE M. ARENT  
Assistant Attorney General  
236 State Capital  
Salt Lake City, UT 84114  
Tel: (801) 538-1331

MARY SUE TERRY  
Attorney General  
Commonwealth of Virginia  
FRANK SEALES, JR.  
Sr. Assistant Attorney General  
MILTON A. MARQUIS  
Assistant Attorneys General  
101 North Eight Street  
Richmond, VA 23219  
Tel: (804) 786-2116

KEN EIKENBERRY  
Attorney General  
State of Washington  
CAROL A. SMITH  
Assistant Attorney General  
900 Fourth Ave.  
Suite 2000  
Seattle, WA 98164  
Tel: (206) 464-7663

MARIO PALUMBO  
Attorney General  
State of West Virginia  
ROBERT WM. SCHULENBERG III  
Sr. Assistant Attorney General  
812 Quarrier St., 5th Floor  
Charleston, WV 25301  
Tel: (304) 348-0246

JAMES E. DOYLE  
Attorney General  
State of Wisconsin  
KEVIN J. O'CONNOR  
Assistant Attorney General  
114 East  
State Capitol Box 7857  
Madison, WI 53707  
Tel: (606) 266-8986

CERTIFICATE OF SERVICE

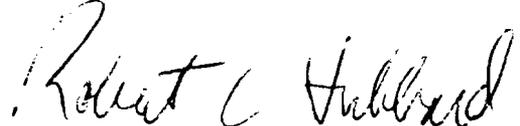
This is to certify that, on March 15, 1991, the undersigned served copies of the attached PLAINTIFF STATES' MEMORANDUM OF POINTS AND AUTHORITIES OPPOSING CAREMARK INC.'S MOTION TO DISMISS dated March 15, 1991, by causing same to be telecopied to Michael Sennett, Esq. (312) 372-2098, and by mailing same in sealed envelopes, with first-class postage prepaid thereon, in an official depository of the U.S. Postal Service within the State of New York, addressed to the last known addresses of counsel for all parties as follows:

Daniel R. Shulman, Esq.  
Gray, Plant, Mooty, Mooty  
& Bennett, P.A.  
3400 City Center  
33 South Sixth Street  
Minneapolis, MN 55402

Michael Sennett, Esq.  
Bell, Boyd & Lloyd  
70 West Madison, Suite 3200  
Chicago, IL 60602

Robert S. Smith, Esq.  
Paul, Weiss, Rifkind, Wharton  
& Garrison  
1285 Sixth Avenue, 26th floor  
New York, New York 10019

Theodore F. Shiells, Esq.  
Curtis, Morris & Safford, P.C.  
530 Fifth Avenue  
New York, New York 10036

  
Robert L. Hubbard RH 3821

Dated: New York, New York  
March 15, 1991

5:\RLH\service.mem

5-15-91 MB  
OFFICE OF THE CLERK  
U.S. DISTRICT S.D.N.Y.