

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANTITRUST BUREAU

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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, 0921,
1043, 1165, 1219, 1220, 1673,
1813, 1814, 91 Civ. 1392 (JFK)
:
: (See Attached Schedule of
: Actions)
:
: Return Date: April 16, 1991

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This Document Relates To All :
Captioned Docket Numbers :
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**DEFENDANT CAREMARK INC.'S REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS**

Defendant Caremark Inc. ("Caremark") respectfully sub-
mits this reply memorandum in support of its Motion to Dismiss.

PRELIMINARY STATEMENT

The Response filed by the Attorneys General ("States")
is a clear attempt to replead their Complaint.^{1/} Instead of
addressing Caremark's arguments head-on, the States make a last-
minute proffer of "alternative pleadings."

Apparently conceding the force of Caremark's argument
that an agreement between Sandoz and Caremark cannot constitute

^{1/} Citations to the "Complaint" are to the complaint captioned
Minnesota v. Sandoz Pharmaceuticals Corp., 90 Civ. 8055. The
other complaints filed by the other States, Commonwealths and the
District of Columbia are virtually identical to the complaint
filed by the Minnesota Attorney General.

concerted action under Section 1 of the Sherman Act, the States now suggest a purported illegal "agreement" among Sandoz and CLOZARIL® patients. This new theory, however, is as defective as the original and does not alleviate the States' failure to state a Section 1 Sherman Act claim. The States' most recent theory ignores the United States Supreme Court's holding that the "victims" of an alleged restraint of trade are not participants in the so-called conspiracy. For this reason, and the other reasons discussed herein, the States' First and Second Claims For Relief should be dismissed.

The States' Third Claim for Relief, which purports to state a monopolization claim, should meet a similar fate. Because the Complaint does not name Caremark as a monopolist or allege that Caremark engaged in any monopolistic conduct, it obviously is deficient. The States seek to "correct" these omissions by now asserting that Caremark has conspired to monopolize. This attempt to allege a totally new claim against Caremark should not be permitted; a brief in opposition to a motion to dismiss is not a surrogate for an amended complaint.

ARGUMENT

I

THE STATES HAVE FAILED TO ALLEGE CONCERTED ACTION

The States have failed to plead concerted action within the meaning of the Sherman Act because: (i) Caremark, which the States plead is an agent of Sandoz, cannot conspire with Sandoz; and (ii) patient acquiescence to the terms of the CLOZARIL®

Patient Management System ("CPMS") cannot constitute an illegal agreement. Because the States have not adequately pleaded concerted action, an essential element of any Section 1 Sherman Act claim, their Section 1 claims should be dismissed.^{2/}

A. The States' Allegation That Caremark is Sandoz's Agent Defeats Their Conspiracy Claim

Although the States have alleged that "Caremark is an agent of Sandoz," they attempt to avoid the consequences of this admission by arguing that "Caremark, as an agent, would be jointly and severally liable for the acts in which it engaged." (Response at 18-19) This argument, however, ignores the fact that an agent is "incapable of engaging in an antitrust conspiracy with [its] corporate principal." Ryko Manufacturing Co. v. Eden Services, 823 F.2d 1215, 1223 (8th Cir. 1987), cert. denied, 484 U.S. 1026 (1988). Thus, an agent cannot be found jointly and severally liable under the antitrust laws unless there is an underlying Section 1 violation based upon an illegal combination or conspiracy.

^{2/} The States are incorrect in their assertion that mere "notice of . . . plaintiff's claim" is sufficient to withstand a motion to dismiss. (Response at 3) To survive a motion to dismiss, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984); see also Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1359 (10th Cir. 1989) ("the complaint must allege facts sufficient, if they are proved, to allow the court to conclude that claimant has a legal right to relief") (emphasis added). Moreover, consideration of a motion to dismiss requires the court to accept only well pleaded facts as true. Vague or conclusory allegations are entitled to no such presumption. Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984).

Here, there can be no finding of illegal concerted conduct because the States already have conceded that Caremark is Sandoz's agent.

B. Patient Participation in CPMS Does Not
Constitute an "Agreement" under Section 1
of the Sherman Act

In an effort to salvage their tying claim, the States now argue that the concerted action "requirement [is] met when a patient (or payor) agreed [sic] to the purchase of CPMS."

(Response at 19) This new gloss on the States' tying claim, however, does nothing for their cause. Because an alleged agreement between the purported victim and the perpetrator of the tie-in cannot satisfy the concerted action requirement, the States' tying claim still must fail. See McKenzie v. Mercy Hospital of Independence, 854 F.2d 365 (10th Cir. 1988). In McKenzie, the Tenth Circuit unequivocally held that the action of a "single entity imposing a tying arrangement on its customers . . . [is not] proscribed by Section 1 of the Sherman Act."^{3/} Id. at 368. This rationale applies with equal force here: Sandoz's alleged coerced agreement with CPMS purchasers does not constitute an illegal tying agreement under Section 1 of the Sherman Act.

The Supreme Court's opinion in Fisher v. City of Berkeley, 475 U.S. 260 (1986), supports this conclusion. In Fisher,

^{3/} Contrary to the States' assertion, the McKenzie court never states 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." (Response at 19) Rather, the court in McKenzie "rejected the position . . . that the acquiescence of the victim of a tying arrangement may establish the needed contract or combination." W. Holmes, Antitrust Law Handbook § RD-5, p. 30 (1990).

the Court considered the price fixing implications of a rent ceiling imposed by the city of Berkeley. The Fisher appellants argued that the rent control ordinance was "a combination between [the city of Berkeley and its officials], on the one hand, and the property owners on the other." Id. at 267. The Court, however, rejected this alleged "combination" and held:

[A]ppellants [have] misconstrue[d] the concerted-action requirement of § 1" [because] a restraint imposed unilaterally . . . does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon the parties who must obey.

Id. The Court concluded by holding that "[w]ithout this element of concerted action, [a defendant's conduct] cannot run afoul of § 1." Id. Relying on this decision, the Third Circuit in Englert v. City of McKeesport, 872 F.2d 1144 (3d Cir.), cert. denied, 110 S. Ct. 149 (1989), likewise has held that mere acquiescence to a unilateral decision does not transform the challenged conduct into concerted action under Section 1 of the Sherman Act. Id. at 1151-52.

The decisions in Fisher v. City of Berkeley, supra, and Englert v. City of McKeesport, supra, recognize that a "coerced agreement" between the entity imposing the tie and a purchaser does not satisfy Section 1's concerted action requirement.^{4/}

^{4/} In instances where some courts have held that a defendant acting unilaterally could commit a tying violation, the parties typically have either relied upon Section 3 of the Clayton Act, 15 U.S.C. § 14, which contains no concerted action requirement, or failed to contest the issue of concerted action. Moreover, to the extent these decisions purport to impose Section 1 liability for unilateral restraints, they have been effectively overruled by the Supreme Court's decisions in Fisher v. City of Berkeley, supra, and Monsanto Co. v. Spray-Rite Services Corp., 465 U.S. 752, 761

Thus, the alleged acquiescence of CPMS patients to the purported tying arrangement cannot constitute an illegal agreement. Because the States have failed adequately to plead concerted action, their tying claim should be dismissed.^{5/}

C. The Proscription on Vertical Price Restraints Is Not Applicable to the Sandoz-Caremark Relationship

The States' allegation that Caremark is Sandoz's agent similarly defeats their Section 1 price fixing claim. The Supreme Court has held that the prohibition on vertical price agreements "does not apply to restrictions on price to be charged by one who is in reality an agent of, not a buyer from, the manufacturer." Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 733 (1988) (citing United States v. General Electric Co., 272 U.S. 476 (1926)).^{6/} Accordingly, as Sandoz's agent in the distri-

(1984) ("[i]ndependent action is not proscribed" by Section 1 of the Sherman Act).

^{5/} The States also have confused the jurisdictional requirement that the conduct at issue affect interstate commerce with the Sherman Act's substantive requirement that a tie foreclose a "substantial volume of commerce in the tied market." The States allege that "the tie involves a not insubstantial amount of interstate commerce. . . ." (Response at 20, citing Complaint ¶ 55) (emphasis added) Contrary to the States' contention, Caremark does not contest subject matter jurisdiction under the Commerce Clause. See McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 241-44 (1980). Rather, Caremark asserts that the States have failed to plead an essential element of its tying claim, namely, that "a substantial volume of commerce is foreclosed" in the tied product market. See Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984); 305 E. 24th Owners Corp. v. Parman Co., 714 F. Supp. 1296 (S.D.N.Y. 1989). The Complaint fails to meet this threshold requirement.

^{6/} Not surprisingly, the States have not even attempted to distinguish these controlling Supreme Court decisions.

bution of CLOZARIL®, Caremark is legally incapable of conspiring to maintain resale prices.

D. The States Allege a Relationship That Is Exempt from the Prohibitions Against Tying and Price Fixing

The States alternatively argue that "Sandoz and Caremark are two separate entities that unreasonably restrained trade by agreeing to institute and continue the illegal tying arrangement."

(Response at 20) In support of this conclusory allegation, the States claim that "[t]he Caremark Contract defines the relationship between Caremark and Sandoz as that of independent contractors, not agents or partners." (Response at 20; Complaint ¶ 40) However, "[i]n determining whether a principal agent or a principal-principal relationship exists, courts consistently have ignored the technical terms with which the parties describe themselves in legal documents and have scrutinized the substance and conduct of the legal relationship." Loom Crafters, Inc. v. New Central Jute Mills Co., 1971 Trade Cas. (CCH) ¶ 73,734 at 91,073 (S.D.N.Y.). See also Grand Union Co. v. FTC, 300 F.2d 92, 97 n.14 (2d Cir. 1962). Thus, the States cannot avoid dismissal of their claims by simply relying on the defendants' contractual language.

This Court has recognized that "only if the structure of the relationship between two entities is one of independence, rather than agency, can the conduct be labeled concerted within the meaning of [Section 1]." Ally Gargano/MCA Advertising, Ltd. v. Cooke Properties, Inc., 1989-2 Trade Cas. (CCH) ¶ 68,817 at 62,276 (S.D.N.Y.). Here, as in Ally Gargano, defendants are not

separate independent actors capable of engaging in concerted action that violates the antitrust laws. In Ally Gargano, this Court found that the requisite independence did not exist between two companies which had entered into a real estate lease. Defendant Cooke Properties, which had leased office space to MCA, attempted to block a planned sublease by MCA. MCA in turn, challenged the lease provision arguing that Cooke's actions amounted to price fixing in violation of Section 1 of the Sherman Act.

This Court dismissed MCA's Section 1 claim holding that "a true agency relationship immunizes the parties from antitrust liability." Id. at 62,276. Because the lease required MCA "to surrender to Cooke any rent derived from a sublease that exceeds its own rental obligations to Cooke," the Court held that the parties were not independent and capable of illegal concerted action:

In view of the retention of profits provision, it is difficult to characterize MCA's role with respect to subleasing as remotely that of 'entrepreneur' or 'independent businessman.'

Id. at 62,277 (emphasis added).

In their Complaint, the States similarly allege that "Caremark receives a fee from Sandoz for its services under CPMS." (Complaint ¶ 41) As in the case of Ally Gargano, an agency relationship is created by virtue of Sandoz's and Caremark's contractual relationship as alleged by the States. Sandoz retains the purchase price and the attendant profits of CPMS, and Caremark only receives a fee from Sandoz for the services Caremark pro-

vides. Thus, Caremark is Sandoz's agent and incapable of engaging in concerted conduct with its principal.^{7/}

The States have pleaded an agency relationship that is immune from antitrust liability under Section 1 of the Sherman Act. Accordingly, this Court should dismiss the States' First and Second Claims for Relief. See North American Produce v. Nick Penachio Co., 705 F. Supp. 746, 750 (E.D.N.Y. 1988).

E. The States Have Failed to Allege Facts to Support Their Vertical Price Fixing Allegations

It is a well-established that a distributor is free to conform to a manufacturer's suggested price. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984). Thus, to establish vertical price fixing, the States must demonstrate that Caremark "communicated its acquiescence or agreement, and that this was sought" by Sandoz. Id. at 764 n.9. Ignoring the teachings of Monsanto Co., the States have failed to plead any facts that evidence such an agreement.^{8/} They merely conclude that "Sandoz sets the resale price." (Response at 25)

^{7/} The States also fail to distinguish Loom Crafters, Inc. v. New Central Jute Mills Co., supra, 1971 Trade Cas. at 91,073, which holds that a "contract [that] provides for payment to [the distributor] in the form of commission and payment to [the manufacturer] on the formula of [the distributor's] receipts less commission [is] consistent with a principal-agent relationship, rather than that of principal-principal."

^{8/} The States' reference to paragraph 61 of the Complaint does nothing for their case. (Response at 25) That paragraph contains only conclusions which are entitled to no presumption of validity on a motion to dismiss. See Swanson v. Bixler, supra, 750 F.2d at 813.

The States also have made no attempt to distinguish Cayman Exploration Corp. v. United Gas Pipe Line Corp., supra, 873 F.2d at 1360, which holds that "to adequately state a vertical price fixing violation ('resale price maintenance'), plaintiff must allege at least some facts which would support an inference that the parties have agreed that one will set the price at which the other will resell the product or service to third parties." (emphasis added in part) The Complaint contains no such facts. The States' Second Claim for Relief should be dismissed.^{9/}

II

THE STATES HAVE NOT PLEADED A MONOPOLIZATION CLAIM AGAINST CAREMARK

Despite the States' claims to the contrary, the States' monopolization claim is against Sandoz and Sandoz alone:

Sandoz's monopolization consists of (1) leveraging its monopoly power over clozapine to gain competitive advantage in the markets for blood drawing, case administration, data base, dispensing, and laboratory services, and (2) extending and maintaining its monopoly power over clozapine beyond its current five year exclusive marketing period.

^{9/} The States also allege that "the allegation of a vertical distribution arrangement is completed when the States declare that 'Caremark resells Clozaril and CPMS.'" (Response at 23) Yet, the States fail to allege any facts demonstrating that Caremark resells anything. Moreover, this allegation ignores the States' other allegation that "Caremark receives a fee from Sandoz for its services under CPMS." (Complaint ¶ 41) Given the fact that the States admit that Sandoz reimburses Caremark for its CPMS services, it follows that Caremark does not retain the purchase price for, and cannot be a reseller of, CLOZARIL® or CPMS. Because Caremark is not a reseller of anything, the States cannot establish a vertical arrangement that would be susceptible to a charge of price fixing. See Medical Arts Pharmacy, Inc. v. Blue Cross & Blue Shield, Inc., 518 F. Supp. 1100, 1107 (D. Conn. 1981), aff'd, 675 F.2d 502 (2d Cir. 1982).

(Complaint ¶ 67; emphasis added) The Complaint fails to name Caremark as a monopolist and does not allege that Caremark engaged in any monopolistic conduct.^{10/} Because the States' Third Claim for Relief lacks "a statement of the pleader's entitlement to relief against" Caremark, it should be dismissed. New York v. Dairylea Cooperative, Inc., 570 F. Supp. 1213, 1217 (S.D.N.Y. 1983).^{11/}

Confronted with this obvious deficiency, the States concoct an entirely new claim against Caremark. For the first time, they contend in their Response that "Caremark has conspired with Sandoz to monopolize the market for clozapine." (Response at 25) This newly-fashioned "conspiracy to monopolize claim," like their original monopolization claim, should be dismissed. This Court has recognized that "[i]t is a basic principle that a complaint may not be amended by the plaintiff's brief filed in opposition to a motion to dismiss." Telsat v. Entertainment & Sports Program-

^{10/} To support their new argument that "Caremark has conspired with Sandoz to monopolize the market for clozapine therapy" (Response at 25), the States rely on their allegation that "defendant Sandoz and others acting in concert with it have . . . monopolized the relevant market for the drug clozapine." (Complaint ¶ 66) This is a deficient pleading. "[F]ailure to identify the parties with whom [Sandoz] allegedly conspired renders these allegations insufficient to state a claim under [the Sherman Act]." Petroleum for Contractors, Inc. v. Mobil Oil Corp., 1978-2 Trade Cas. (CCH) ¶ 62,151 at 75,080 (S.D.N.Y.).

^{11/} The States try to distinguish Mathews v. Kilroe, 170 F. Supp. 416 (S.D.N.Y. 1959), by arguing that "[t]hat case involved a 'strange, rambling document' drawn by a plaintiff pro se[" This distinction is meaningless. (Response at 27) Even a pro se plaintiff must "indicate clearly the defendants against whom relief is sought and the basis upon which the relief is sought against the particular defendants." Id. at 417. The States have not met even this minimal pleading standard.

ming Network, 753 F. Supp. 109, 113 n.4 (S.D.N.Y. 1990). The States' Third Claim for Relief clearly does not state a basis for relief against Caremark under Section 2 of the Sherman Act, and it should be dismissed.^{12/}

III

THE STATES LACK STANDING TO BRING THESE ACTIONS

A. The States Have No Standing as Parentes Patriarum

To maintain standing as parentes patriarum, the States must allege that at least one resident in each state has suffered

^{12/} The States also contend that their "general restraint of trade claim (Fourth Claim for Relief) is well-pleaded" and should not be dismissed. (Response at 27) Yet they fail to cite a single case which has recognized an independent claim for a "general restraint of trade." The cases cited by the States, Trans World Airlines, Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964), Radovich v. National Football League, 352 U.S. 445 (1957), and Federated Department Stores, Inc. v. Grinnell Corp., 287 F. Supp. 744 (S.D.N.Y. 1968), are not general restraint of trade cases. Moreover, Federated Department Stores, Inc. v. Grinnell Corp., was decided on a motion to strike which allows the court to strike only immaterial, impertinent or scandalous matter. See Fed. R. Civ. P. 12(f). Recognizing the infirmities of their other claims, the States also contend that the general restraint of trade claim "allows the States to maintain an alternative antitrust cause of action grounded upon the rule of reason." (Response at 28) However, to survive a motion to dismiss under the rule of reason, the States "must allege facts establishing that the conduct of defendants resulted in harm to general competition in the market." Petroleum for Contractors, Inc., v. Mobil Oil Corp., supra, 1978-2 Trade Cas. (CCH) at 75,083; see also Alliance Shippers, Inc. v. Southern Pacific Transportation, 858 F.2d 567, 570 (9th Cir. 1988) ("essential element of a Section 1 violation under the rule of reason is injury to competition in the relevant market" citing National Society of Professional Engineers v. United States, 435 U.S. 679, 690-91 (1978)). The States' failure to allege such harm requires dismissal of this count. Moreover, as with their other Section 1 claims, the States' failure to plead concerted action condemns their general restraint of trade allegations. Telsat v. Entertainment & Sports Programming Network, supra, 753 F. Supp. at 115.

injury to his or her property. 15 U.S.C. § 15c(a)(1). They have not done so. The Complaint contains no facts establishing that a single individual in any state directly purchased CLOZARIL® therapy. The non-purchaser standing case relied upon by plaintiffs, Ware v. Trailer Mart, Inc., 623 F.2d 1150 (6th Cir. 1980), is inapposite. Unlike the present case, the plaintiff in Ware was allowed to sue because he suffered a direct monetary loss related to the tied product, i.e., the rent he paid on his mobile home space.^{13/} In addition, Ware was decided before both of the Supreme Court's definitive standing cases, Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982), and Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983), relied upon by Caremark.

Failing to allege that state residents actually have suffered direct monetary losses, the States have no standing as parentes patriarium.^{14/}

B. The States Fail to Allege the Elements Necessary for Antitrust Standing

The States also have failed to allege that any state is a direct purchaser of CLOZARIL® therapy. The States' allegation

^{13/} The States also have ignored other authority relied upon by Caremark, including Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 867-68 (10th Cir. 1981), which explicitly holds that non-purchasers lack standing to raise antitrust claims.

^{14/} The plaintiff in the related private class action case, Newell v. Sandoz Pharmaceuticals, 90 Civ. 7724 (JFK) (filed December 3, 1990), has recognized his inability to represent a class including non-purchasers of CLOZARIL® therapy, and has indicated his intention to delete non-purchasers from his class allegations. (Newell's Response to Caremark Inc.'s Motion to Dismiss at 4)

that they "purchase health care goods and services" neither establishes that they purchased CLOZARIL® therapy directly, nor that these purchases caused them antitrust injury. (Response at 9)

The only other allegation that the States can point to states that "the purchasers of Clozaril, including plaintiff and persons represented by plaintiff, are always charged the same price" (Response at 9, citing Complaint ¶ 5) This allegation is equally infirm and does not remedy the States' failure to allege facts establishing that they are in fact direct purchasers of CLOZARIL® therapy.^{15/} The States simply conclude that they are "direct purchasers of CLOZARIL®" (Response at 10) and assume that this unsupported assertion remedies the deficiencies in their Complaint and otherwise satisfies the standing factors enunciated by the Supreme Court in Blue Shield of Virginia v. McCready, supra, and Associated General Contractors v. California State Council of Carpenters, supra.^{16/}

Because the necessary components of standing are not plainly and clearly discernible from plaintiffs' allegations, the States' Complaint should be dismissed.

^{15/} One cannot possibly determine from this single vague reference whether the States are direct or indirect purchasers of CLOZARIL® therapy. In addition, the States' indefinite reference to the possibility of states competing with Caremark also fails to identify a single entity in any state that stands ready and able to compete with Caremark in any market. (See Response at 10, citing Complaint ¶ 45)

^{16/} The States' reliance on Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290 (2d Cir. 1983), also is misplaced because the plaintiff's status as a direct purchaser was not at issue.

C. Complaints on Behalf of Unnamed State Agencies Must Be Dismissed

In New York v. Cedar Park Concrete Corp., 665 F. Supp. 238, 242 (S.D.N.Y. 1987), this Court dismissed the state Attorney General's antitrust complaint "[i]n view of the need early in the litigation to identify State-affiliated purchasers" (emphasis added).^{17/} Despite this holding, the States have not identified a single state agency in their Complaint that has purchased CLOZARIL® therapy or anything else for that matter from Caremark. (See Response at 9; Complaint ¶ 38)

Moreover, the States' Response fails to distinguish New York v. Cedar Park Concrete Corp., and only muddies the waters by arguing that certain attorneys general have the "authority to sue" on behalf of state agencies without their prior authorization. However, the issue raised by Caremark is not the general authority of an attorney general to bring suit on behalf of state agencies, but the right of an attorney general in this case to represent unidentified state agencies which either (i) did not purchase or (ii) did not directly purchase CLOZARIL® therapy. The decisions cited by the States merely provide that, based on specific constitutional and statutory provisions in their respective states, certain attorneys general may bring actions on behalf of their respective state agencies without specific authorization. See, e.g., Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir.), cert. denied, 429 U.S. 829 (1976); Ohio v. United Transp.

^{17/} Cf. Studefin v. New York City Taxi & Limousine Comm'n, 516 N.Y.S.2d 1012 (Sup. Ct. 1987) (recognizing due process right of civil defendant to know the identity of accuser).

Inc., 506 F. Supp. 1278 (S.D. Ohio 1981). These cases are irrelevant and fail to address the standing issue. Because the States' Complaint fails to allege whether unidentified state agencies are direct purchasers of CLOZARIL®, the States lack standing to pursue their purported claims.

CONCLUSION

For all these reasons, and those set forth in its opening memorandum, Caremark respectfully moves this Court for an order dismissing all actions brought against it and for such other relief as the Court deems just and proper.

Dated this 5th day of April, 1991.

Respectfully submitted,

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SCHEDULE OF ACTIONS

<u>STATE</u>	<u>NAME OF CASE</u>	<u>DOCKET NUMBER</u>
Alabama	State of Alabama James H. Evans Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	91 CIV 1813
Arizona	State of Arizona Grant Woods, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	91 CIV 0921
California	State of California John K. Van de Kamp, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8060
Colorado	State of Colorado Duane Woodard, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8079
Connecticut	State of Connecticut Clarine Nardi Riddle, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8062
Delaware	State of Delaware Charles M. Oberly, III Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	91 CIV 1219
District of Columbia	District of Columbia John Payton, Acting Corporation Counsel v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	91 CIV 1220

<u>STATE</u>	<u>NAME OF CASE</u>	<u>DOCKET NUMBER</u>
Florida	State of Florida Robert A. Butterworth, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8063
Idaho	State of Idaho Larry Echohawk, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	91 CIV 1043
Iowa	State of Iowa Thomas Miller, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8064
Kansas	State of Kansas Robert T. Stephan, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	91 CIV 1165
Maine	State of Maine James E. Tierney, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8065
Maryland	State of Maryland J. Joseph Curran, Jr., Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8067
Massachusetts	Commonwealth of Massachusetts James M. Shannon, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8069

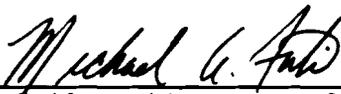
<u>STATE</u>	<u>NAME OF CASE</u>	<u>DOCKET NUMBER</u>
Minnesota	State of Minnesota Hubert H. Humphrey, III, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8055
Missouri	State of Missouri William L. Webster, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	91 CIV 1392
New Hampshire	State of New Hampshire John P. Arnold, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8071
New Jersey	State of New Jersey Robert J. Del Tufo, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8073
New York	State of New York Robert Abrams, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8074
North Carolina	State of North Carolina Lacy H. Thornburg, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8092
Ohio	State of Ohio Anthony J. Celebrezze, Jr. Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8075

<u>STATE</u>	<u>NAME OF CASE</u>	<u>DOCKET NUMBER</u>
Oklahoma	State of Oklahoma Robert H. Henry Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	91 CIV 1673
Oregon	State of Oregon Dave Frohnmayer, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8076
Pennsylvania	Commonwealth of Pennsylvania Ernest D. Preate, Jr., Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8077
South Carolina	State of South Carolina T. Travis Medlock Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	91 CIV 1814
South Dakota	State of South Dakota Mark Barnett, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	91 CIV 0244
Tennessee	State of Tennessee Charles W. Burson, Attorney General & Reporter v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8080
Texas	State of Texas Jim Mattox, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8081

<u>STATE</u>	<u>NAME OF CASE</u>	<u>DOCKET NUMBER</u>
Utah	State of Utah Paul Van Dam, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8082
Virginia	Commonwealth of Virginia Mary Sue Terry, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8084
Washington	State of Washington Kenneth O. Eikenberry, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8086
West Virginia	State of West Virginia Roger W. Tompkins, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8087
Wisconsin	State of Wisconsin Don Hanaway, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8089

CERTIFICATE OF SERVICE

I, Michael A. Forti, hereby certify that a true and correct copy of Defendant Caremark Inc.'s Reply Memorandum In Support Of Its Motion To Dismiss has been served upon all parties on the attached service list by United States Mail, first class postage prepaid, this 5th day of April, 1991.



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