UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
Southern Division

IN RE CARDIZEM CD ANTITRUST LITIGATION	MASTER FILE NO. 99-MD-1278 MDL DOCKET NO. 1278
THIS DOCUMENT RELATES TO: *New York et al v. Aventis, S.A., et al,* Case N0. 01-CV-71835	Hon. Nancy G. Edmunds

STATE ATTORNEYS GENERAL BRIEF IN OPPOSITION TO DEFENDANTS AVENTIS AND ANDRX'S MOTION TO DISMISS THE STATE ATTORNEYS GENERAL SECOND AMENDED COMPLAINT

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INTRODUCTION

The Attorneys General of 29 states and jurisdictions have filed suit in the Eastern District of Michigan against Defendants Aventis Pharmaceuticals Inc. ("Aventis") as successor in interest to Hoechst Marion Roussel, Inc. ("HMRI"), Carderm Capital L.P., Aventis S.A., Hoechst AG and Andrx Corporation ("Andrx") (collectively called the "Defendants"). The suit alleges that HMRI and Hoechst AG, illegally monopolized the market for Cardizem CD and its generic alternatives in violation of state and federal antitrust law, and that Aventis, Carderm and Andrx contracted in restraint of trade in violation of state and federal antitrust law. The States also allege that these acts constitute independent violations of state consumer protection statutes and/or state unfair trade practices statutes (collectively referred to as "state consumer protection laws") and unjustly enriched the Defendants under common law.

The State Attorneys General sought enforcement of federal and state law through issuance of injunctive relief (¶ 150), equitable relief including restitution and disgorgement (¶ 151), damages or multiple damages (¶ 152 through 155), civil penalties (¶ 156) and reimbursement of all consideration paid by Kansas and its citizens (¶ 157). (All paragraph references relate to the Second Amended Complaint which the State Attorneys General filed on September 24, 2001.)

All of the Defendants' purported reasons for dismissal of the Attorney Generals' claims are unsound. In spite of the U.S. Supreme Court decision in *California* v. *ARC America,* 490 U.S. 93 (1989), holding directly to the contrary, Defendants allege that *Illinois Brick Co* v. *Illinois*, 431 U.S. 720 (1977), federally preempts the applicability of state antitrust and consumer protection laws. Defendants challenge the States' *parens patriae* and law enforcement authority

trivializing the States' sovereign and quasi-sovereign interests. The Defendants raise numerous contradictory arguments that attempt to 1) distinguish the State Attorneys General lawsuit from the State Law Plaintiffs' class action lawsuit; and 2) argue that the validity of each suit should be presumed for purposes of dismissing the other.

The Defendants refuse to acknowledge the proper role of the States in a federalist system in two significant respects: a) the role of the States in creating substantive protections for its people from unfair, unconscionable and deceptive practices under state common law, state antitrust law, and state consumer protection law *as distinct from whatever protections exist under federal law*; and b) the role of State Attorneys General to *independently*, and in this case, collectively, enforce state law and *dually* enforce federal antitrust law *as distinct from* what federal enforcement authorities, such as the Federal Trade Commission ("FTC") elect to do solely under federal law. In spite of admonitions from the FTC regarding the appropriate use of FTC statements on the issue, the Defendants (Andrx in particular) attempt to recharacterize non-binding FTC press comments as "findings" to which some ostensible deference is owed.[1]

The state Attorneys General of Alaska, Arizona, Arkansas, California, Connecticut, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Puerto Rico, Rhode Island, South Carolina, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming, respectfully submit that it is appropriate for them to bring suit whenever the physical and economic health and well being of their respective citizenries is jeopardized by the avarice of pharmaceutical companies bent on delaying the public's access to affordable generic products.

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[1]See the attached letter from Richard Feinstein, Assistant Director, Bureau of Competition, FTC, to Plaintiffs counsel dated April 20, 2001, with copies to Defendants' counsel. The letter states "Let me set the record straight. First, neither the Commission nor the Administrative Law Judge

The position of the Attorneys General is simple: pharmaceutical companies that break the law to elevate profits should not be rewarded for such behavior. Irrespective of whether the mechanism is assessment of damages, invocation of the equitable remedies of disgorgement and restitution, levying of hundreds of millions of dollars in civil penalties, or some combination of these mechanisms, the Attorneys General will not allow illegally obtained monies to remain in Defendants' pockets. Nor will consumers be left uncompensated. Law enforcement officers have a duty to assure that illegal behavior is remedied.

STANDARD OF REVIEW

The standard of review in assessing a motion to dismiss was set forth by this Court in *In Re: Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 618, 633 (E.D. Mich. 2000), and is incorporated by reference herein. For the reasons set out more fully in this Brief and Appendix B, the Defendants' arguments for dismissal are unsound and the Court should deny the Motions.

LEGAL ARGUMENT

Defendants cite 16 separate, but often repetitive, arguments as ostensible bases for dismissal of all, or a portion, of the State Attorneys General Second Amended Complaint (the "Complaint"). The issues have been consolidated for purposes of this response into the nine general categories discussed below, with references to more state specific authority set forth as applicable in Appendix B.

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hearing the FTC's complaint against Aventis and Andrx made any findings, determinations, or other conclusions of fact or law on this matter." (Appendix A)

I. THE STATES HAVE *PARENS PATRIAE* AUTHORITY, OR THE STATUTORY EQUIVALENT, TO SUE ON BEHALF OF THEIR CITIZENS

Andrx argues that the States lack *parens patriae* standing to seek compensation for consumers who were injured by the Defendants' illegal conduct. In Andrx's words, the States are "merely attempting to recover money for its citizens who could recover the money through private lawsuits." (Andrx Brief, p 7.) Thus, Andrx seeks dismissal of every claim pled by the States on behalf of their respective citizens.[2]

This branch of Andrx's motion trifles with the Court. The States have a vital interest in assuring that their citizens have access to quality health care at affordable prices, in implementing the legislatively articulated policy of free substitutability between brand and generic drugs, and in protecting the value of their taxpayers' dollars in making health care services available through public programs. The States also have a law enforcement interest to ensure that those who violate federal and state law do not retain the benefits of their unlawful conduct, and to deter such conduct by the Defendants and others in the industry. These interests -- all of which Andrx ignores -- manifest themselves in explicit and implicit grants of *parens patriae* authority derived from state constitutional and common law, and in grants of disgorgement, restitution and other equitable powers by state consumer protection statutes. *FTC* v. *Mylan Laboratories*, 62 F. Supp. 2d 25 (D.D.C. 1999), *on rehearing*, 99 F. Supp. 1 (D.D.C. 1999). Many state law cases similarly recognize these interests.

Accordingly, as we demonstrate below, the States have authority to prosecute this action on behalf of their citizens.

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[2]Throughout this discussion, we use the term "citizens" to include "residents" who may not, strictly speaking, meet legal requirements for citizenship, but who are nonetheless persons to whom a state owes a duty or may otherwise be empowered to confer a benefit.

A. The States Have *Parens Patriae* Authority Under Common Law

In the United States, *parens patriae* authority has devolved to each state, as the "prerogative of *parens patriae* is inherent in the supreme power of *every* state. . . ." *Late Corporation of Latter Day Saints* v. *United States*, 136 U.S. 1, 57 (1890) (emphasis added). Thus, the *parens patriae* doctrine confers standing on each State whenever one of its quasi-sovereign interests is implicated.

The United States Supreme Court held in *Snapp* v. *Puerto Rico*, 458 U.S. 592 (1982):

> In order to maintain such [a *parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development – neither an exhaustive formal definition or a definitive list of qualifying interests can be presented in the abstract – certain characteristics of such interest are so far evident. These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in *the health and well-being – both physical and economic – of its residents in general.* Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.

Id. at 607 (emphasis supplied).

The States' quasi-sovereign interest in the physical well-being of its citizens is well-recognized. *Snapp, supra; Missouri* v. *Illinois*, 180 U.S. 208 (1901). More recently, in *Texas* v. *American Tobacco Co.*, 14 F. Supp. 2d 956, (E.D. Tex. 1997), the district court held that Texas had authority to sue tobacco companies for the hazards that cigarettes present to state citizens. As the court explained:

> [I]t is without question that the State is not a nominal party to this suit. The State expends millions of dollars each year in order to provide medical care to its citizens under Medicaid. Furthermore, participating in Medicaid programs and having it operate in an

> efficient and cost-effective manner improves the health and welfare of the people of Texas. If the allegations of the complaint are found to be true, the economy of the State and the welfare of its people have suffered at the hands of the Defendants. It is clear to the Court that the State can maintain this action pursuant to its quasi-sovereign interest found at common law.

Id. at 962. As set forth below, identical quasi-sovereign interests involving the health and well-being of the citizens of the State are implicated in this case. Accordingly, the States' exercise of *parens patriae* authority here is well founded.

1. The States' Quasi-Sovereign Interests Are Manifest

Health-care is, of course, a legitimate subject of state interest, and one that commands virtually universal, ongoing legislative attention. One indicia of a quasi-sovereign interest is "whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Snapp,* 458 U.S. at 607. One recent survey estimated that "in 2001 alone, 44 states have considered legislation to address pharmaceutical cost or coverage issues."[3] State legislatures have enacted measures to facilitate – and in some instances to mandate – substituting less expensive generic products for more costly branded drugs.[4] Indeed,

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[3]As the price of prescription drugs continue to outpace inflation – and become a dominant factor in the struggle to maintain affordable health care – States have taken various steps on behalf of their citizens to combat escalating costs. *State Controls on Drug Costs: An Out Of Control Experiment In Federalism?,* 9 Health Care Policy Rep. (BNA) No. 40 (Oct. 15, 2001).

[4] For example, part of the Michigan Public Health Code, 1978 PA 368, as amended; Mich. Comp. Laws 333.1101, *et seq.*, obligates pharmacists to "dispense a lower cost . . . generically equivalent drug product" when requested by a consumer. Mich. Comp. Laws 333.17755(1). By law, the pharmacist also must "pass on the savings in cost to the purchaser. . . . Mich. Comp. Laws 333.17755(2). Pharmacies are also obligated to post conspicuous notices encouraging consumers to "ask your pharmacist if a lower-cost generic drug is available to fill your prescription." Mich. Comp. Laws 333.17757(3). Similarly, New York law directs that a prescribing physician's signature constitutes authorization to fill a brand name prescription with a generic product unless the physician includes a "dispense as written" or "d.a.w." notation. N.Y.C.L.S. § 6810.6(a). Indeed, generic substitution is *required* unless "the pharmacist agrees to dispense the brand name product for a price that will not exceed the price that would have been

The States have pled that the ability to substitute generic products frequently leads to significant reductions in price, as well as significant reductions in market share for the branded manufacturer. (Complaint, ¶ 23). This is precisely the type of cost-saving measure that Defendants sought to foil by their illegal agreement barring generic entry for Cardizem CD.

Moreover, the illegal conduct at issue in this case affects, both directly and indirectly, a "substantial segment of the population." *Snapp,* 458 U.S. at 607. Although precise prescription figures are not yet available to the States, over one million prescriptions were written for the Cardizem CD drug in 1998 alone. Using state populations, that translates into an estimated 400,000+ prescriptions attributable to individuals in Plaintiff States. This is certainly a sizeable population by *Snapp* standards.

In addition, the illegal exclusion of generic competition causes *all citizens* to bear higher health care costs.[5] These effects, cognizable under *Snapp*, are significant not only for individual consumers, but also for the many businesses that offer health care coverage to their employees. *Id.* ("The indirect effects of the injury must be considered as well.'")

In *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), Georgia alleged that the defendants violated the antitrust laws by conspiring to fix railroad rates, thereby injuring commercial activity in the State. The Supreme Court upheld Georgia's *parens patriae* authority because the complaint alleged "a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development and relegates her to an inferior economic position among her sister states." *Id.* at 451. This type of injury, the Court also noted, "runs

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charged for the generic substitute had it been available. . ." *Id. See,* also, Maine's Generic Substitution Provision, Me. Rev. Stat. Ann. § 13781; Minnesota, Minn. Stat. §151.21; West Virginia, W. VA. Code § 30-5-12b.

[5]For example, the estimated cost savings to General Motors alone attributable to introducing a generic version of the brand drug Prozac is $7 million over three years. *The Drug-Price Express Runs Into A Wall*, N.Y. Times, Dec. 23, 2001, Section 3, at 13.

beyond the claim of damage to individual shippers [via rail]." *See also Minnesota* v. *Standard Oil Co.*, 568 F. Supp. 556 (D. Minn. 1983)(State had *parens patriae* authority to sue for product overcharges that violated federal law); *New York* v. *Brown*, 721 F. Supp. 629 (D.N.J. 1989), (State had *parens patriae* authority to challenge New Jersey's regulation of price of milk, a vital state industry).

The impact of the Defendants' conspiracy to exclude generic drug competition impedes the individual States' efforts to afford their citizens a health-sustaining drug at an affordable price. That this economic restraint impacts the delivery of health care services makes it all the more odious.

Indeed, although relied on by Andrx, *Connecticut* v. *Physicians Health Services of Connecticut, Inc.*, 103 F. Supp. 2d 495 (D. Conn. 2000) *appeal docketed,* No. 00-7986, (2nd Cir., July 31, 2000), in fact supports the States' *parens patriae* standing. There, Connecticut challenged a health insurers' drug formulary, which "obstruct[ed] enrollees access to prescription medications that their physicians believe are most safe and effective." *Id.* at 497. The Court *agreed* that Connecticut had a quasi-sovereign interest in protecting the physical health of its citizens, although on the merits the Court held that ERISA pre-empted Connecticut's challenge. *Id.* at 506. Like the denial of access to appropriate prescription drugs in *Physician Health Services*, the Defendants' illegal agreement in this case obstructed access to low cost, effective prescription drugs, similarly implicating the States' quasi-sovereign interests.

2. Andrx's Case Law Authority Is Inapposite

Andrx cites several cases where the United State Supreme Court's original jurisdiction was invoked under Article III, § 2, of the Constitution, arguing that the quasi-sovereign interest

test formulated in those cases has not been satisfied.[6] But insofar as these decisions rejected state *parens patriae* authority (and not all of them did — as set forth in *Georgia* v. *Pennsylvania Railroad, supra,* and *Missouri* v. *Illinois, supra*), they still do not detract from the States' quasi-sovereign interest here for at least two reasons. First, these cases reflect the Supreme Court's understandable hesitation to exercise its original jurisdiction. *See Pennsylvania* v. *New Jersey*, 426 U.S. at 665 (1976), ("[O]ur docket would be inundated"); *Snapp* 458 U.S. at 604, n.12 ("special considerations . . . call for a limited exercise of our [original] jurisdiction, "which "may not apply to a similar suit brought in federal district court"). Second, Article III, § 2 cases also implicate Eleventh Amendment issues where a State sues another State solely as a nominal party on behalf of a private citizen. *See Hawaii* v. *Standard Oil* Co., 405 U.S. 251, 258, n.12 (1972), ("An action brought by one state against another violates the Eleventh Amendment if the Plaintiff state is actually suing to recover for injuries to designated individuals"); *New Hampshire* v. *Louisiana*, 108 U.S. at 88 (1883). Unlike these Supreme Court original jurisdiction cases, this is a straightforward district court case where Eleventh Amendment issues are not implicated.

Similarly, Andrx's reliance on certain Second Circuit cases for the notion that *parens patriae* standing "requires a finding that individuals could not obtain complete relief through a private suit" is misplaced. (Andrx Br., pp 11-12.) The injury to the state's citizenry in *Abrams* v *Seneci,* 817 F.2d 1015 (2nd Cir. 1987) did not involve the quasi-sovereign interest of the States here in promoting and maintaining access to affordable health-care. Rather, it involved the defrauding of a mere 79 consumers through business opportunity schemes in popcorn, ice cream

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[6] *See Georgia* v. *Pennsylvania R. Co*, 324 U.S. 439 (1907); *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907); *Louisiana* v. *Texas*, 176 U.S. 1 (1900); *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883); *Okalahoma* v. *Atchison, T. & S.F.R. Co.*, 220 U.S. 277 (1911); *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976).

and vending machines. Further, at the same time that the New York Attorney General sought *parens patriae* standing in federal court in that case, *he had already sought and obtained injunctive relief and restitution* in a parallel New York State Supreme Court proceeding. *Id.* at 1017.

Abrams v. *11 Cornwell Co.*, 695 F.2d 34 (2nd Cir. 1982), also relied upon by Andrx, supports the assertion of *parens patriae* authority. In that action, alleged discriminatory practices prevented a 10 person residential facility for the mentally retarded from being established. The Court found the deprivation of housing for this discrete number of residents, and others that would live in the proposed home in the future, to constitute a "sufficiently substantial segment of its population" under *Snapp*. *Id.* at 39.

Finally, Andrx cites *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. at 257 (1972), *California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1972), *cert denied*, 412 U.S. 908 (1973), and *Philadelphia Housing Authority* v. *American Radiator and Standard Sanitary Corporation*, 309 F. Supp. 1057 (E.D. Pa. 1969), for the proposition that states do not have *parens patriae* authority to seek damages on behalf of their citizens. Although the Hart-Scott-Rodino Amendments to the Clayton Act (*See* 15 U.S.C. § 15c) legislatively trump these decisions to the extent that the cases address the States' *parens* authority under federal law, Andrx nonetheless argues that the cases apply to state antitrust law. This argument is unsound.

First, *Hawaii* addressed a claim for damages "to the general economy of a state." No State makes such a claim here. Second, *Frito Lay* and *Philadelphia Housing* addressed specifically *federal parens patriae* authority under *federal* antitrust law (prior to the Hart-Scott-Rodino grant of such authority). The two cases provide no guidance on the distinct question whether the States have *parens patriae* authority under applicable *state* statutory or common law.

Finally, it is questionable whether the *Frito Lay* opinion remains good law in light of more recent opinions of the Ninth Circuit holding that the "state's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction." *In Re: Insurance Antitrust Litigation*, 938 F.2d 919, 927 (9th Cir. 1991).

In summary, Andrx trivializes the States' legitimate quasi-sovereign interests by seeking to reduce them to the sum total of the overcharges that individual Cardizem CD users paid. But the States themselves have independent quasi-sovereign interests in assuring the health and well-being of their citizens, in maintaining the integrity of their pharmaceutical markets, and in promoting the legislatively articulated goal of encouraging generic substitution – all of which are impaired by Defendants' unlawful acts. These interests transcend the economic loss suffered by the individual victims of the Defendants' conspiracy, and confer common law *parens patriae* authority on the States to sue.

B. State Constitutional And Statutory Authority Empower State Attorneys General To Represent Their Consumers

In addition to the *federal* common law authority vested in the States to represent quasi-sovereign interests in the health and well-being of their citizenry, States also have explicit and implicit grants of authority under *state* constitutional, statutory and common law. Indeed, the Fourth Circuit has held that "state laws and constitutions do not confine the authority of the states' attorneys general to the prosecution of common law *parens patriae* actions and actions to vindicate quasi-sovereign state interests." *Pennsylvania* v. *Mid-Atlantic Toyota Distributors*, 704 F. 2d 125, 129 (4th Cir. 1983). Rather, the court held that attorneys general possess implicit

statutory and constitutional powers to "remedy invasions of the public interest." *Id.* at 131. *See* also, *Texas* v. *Scott & Fetzer Co.*,709 F.2d 1024,1027(5th Cir. 1983), (statutory language authorizing the Attorney General to file suit "on behalf of the state" includes authority to file *parens patriae* action.); *FTC* v. *Mylan Laboratories, Inc.*, 99 F Supp 2d 1, 7 (D.D.C. 1999), (finding the Maine Attorney General to have broader *parens patriae* authority under state law than under general federal common law.)

Andrx does not challenge the specific grants of authority for California, the District of Columbia, Hawaii, Minnesota, Nevada, New Mexico, Oklahoma, Puerto Rico, Rhode Island, Utah and West Virginia. (None of these states are listed in the "States That Do Not Have Specific Authorization" section of Andrx's Brief, p. 16). Accordingly, the *parens patriae* authority of those states is not at issue.

In Appendix B, States that have been challenged on these grounds set forth additional state specific constitutional, statutory and case law bases for the assertion of *parens patriae* authority as well as additional legal authority empowering State Attorneys General to sue both on behalf of the public *and* to vindicate their sovereign interests in appropriate law enforcement.

II. *ILLINOIS BRICK* DOES NOT PREEMPT STATE ANTITRUST, CONSUMER PROTECTION AND COMMON LAW CLAIMS

Defendants argue that *Illinois Brick* prevents some 17 states from recovering under their state antitrust laws: *See* Aventis' Brief, p. 7-11. States challenged are Alaska, Arizona, Arkansas, Connecticut, Idaho, Indiana, Iowa, Nevada, New York, North Carolina, Oklahoma,

Puerto Rico, South Carolina, Utah, Vermont, Washington and Wyoming.[7] Further, Defendants argue that 10 states cannot recover under their consumer protection and other laws (*See* Aventis Brief, pp. 12 - 18.) States challenged are Alaska, Arkansas, Connecticut, Iowa, New York, Oklahoma, South Carolina, Utah, Vermont and Wyoming. While these arguments are couched in terms of a purported "end- around" of *Illinois Brick*, in reality they are a meritless claim of federal preemption.

This section of the States' brief refutes the Defendants preemption arguments which are common to all the challenged states. In addition, Appendix B deals in greater detail with State specific challenges raised by the Defendants.

A. *ARC America* Quashes Defendants' Argument That *Illinois Brick* Prevails Over State Law.

Aventis' position is squarely at odds with the United States Supreme Court decision in *California* v. *ARC America Corp.*, 490 U.S. 93, (1990). The Supreme Court soundly rejected precisely the types of arguments posed by Aventis. *See ARC America, Id.* at 96 ("*Illinois Brick*" policy only applies to Section 4 of the Clayton Act, and does not define or limit state antitrust law). Further, in *ARC America*, the Supreme Court spurned the Defendants' "exposure to multiple liability" arguments. *Id.* at 105 (No federal policy against the States imposing liability "over and above" that imposed under the federal antitrust law). Indeed, the *ARC America* Court held that indirect purchaser recovery under state statutes are "consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct." *Id.* at 95.

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[7] In respect of Idaho, Nevada, New York and Vermont, which have specific statutory provisions allowing for indirect purchaser recovery, the Defendants' erroneous contentions on retroactivity are addressed in Part IV of the States' Brief.

Nonetheless, Defendants rely upon inapposite case law to suggest that *Illinois Brick* precludes suit not only under state antitrust law, but also under state common law and consumer protection statutes as well.[8] As *ARC America* and other decisions make clear, this is not the law.

Defendants' disparage these statutory and common law actions as "alternative" theories that "tip-toe around antitrust principles, hoping to land on safer ground by masquerading their claims under other legal theories." (Aventis Br., p. 15). But the mere fact that Defendants' actions are illegal under federal antitrust law does not mean that other state (or for that matter federal) rights of action may not also apply to the "illegal conduct".

To suggest that *Illinois Brick* gives the Defendants immunity for conduct that would otherwise be illegal under non-antitrust state statutes is nonsense. Indeed, Defendants' arguments fly in the face of more than 50 years of case law to the contrary. The Supreme Court has consistently held that the same nucleus of facts may give rise to both a violation of the Sherman Act *and* an unfair trade practice claim. *See, FTC* v. *Cement Institute*, 333 U.S. 683 (1948) ("the fact that the same conduct may constitute a violation of both acts in no way requires us to dismiss [the FTC proceeding]"); *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 465-6 (1986) (finding that a violation of § 1 of the Sherman Act also establishes a violation of § 5 of the Federal Trade Commisson Act). *See,* also *FTC* v. *National Lead Company*, 352 U.S. 419 (1957); *Keasbe & Mattison Co.* v. *FTC*, 159 F.2d 940 (6th Cir. 1947); *U.S.* v. *Azzgrelli Construction*, 612 F.2d 292, 298 (7th Cir. 1979) (an antitrust claim does not constitute the exclusive remedy for anti-competitive conduct or preclude prosecution under the mail fraud statute).

Aventis argues that state antitrust statutes "contain specific provisions strongly encouraging courts to be guided by federal law when interpreting their provisions." (Aventis

[8] The Defendants also challenge the States' assertion of unjust enrichment claims. *See,* Aventis Br., p 12, n.14. For the reasons outlined in this Brief and in Part III, B, of the State Law Plaintiffs' Coordinated Memorandum of Law in Opposition to Defendants Motion to Dismiss the Third Amended Class Complaint, the Defendants' arguments should be rejected. In respect of the unjust enrichment claims, the States adopt the arguments presented in Part III, B of the State Law Plaintiffs' Brief.

Br., p.8). But this argument begs the question: which federal law provides comparable guidance? Multiple courts have found it appropriate to draw upon interpretations of the Federal Trade Commission Act as guidance for interpreting state "mini-FTC Acts" or consumer protection statutes. In *Mylan*, the District of Columbia Federal District Court reviewed statutory provisions of Alaska, Connecticut, Idaho, Maine, Utah, Vermont and West Virginia that all suggested, as Aventis argues, that statutory interpretation issues be "guided" by comparable statutes. But the comparable federal statute, the Mylan court held, was § 5 of the FTC Act, 15 U.S.C. § 45(a)(1) – not § 4 of the Clayton Act, upon which *Illinois Brick* is predicated. *See, also, Cel-Tech Communications, Inc.* v. *Los Angeles Cellular Telephone Col.*, 83 Cal. Reptr. 2d 548 (Cal. S. Ct. 1999) (the scope of the antitrust prohibitions contained within California's Unfair Competition Law is comparable to Section 5 of the FTC Act).

Aventis also relies heavily upon the Texas Supreme Court decision of *Abbott Labs, Inc.* v. *Segura*, 907 S.W.2d 503 (Tex. S. Ct. 1995), for the proposition that antitrust claims which are barred under *Illinois Brick* may not be alternatively pled under an unfair trade practices statute. *Segura* should not be extended to this case for multiple reasons: first, it ignores the precedent of the United States Supreme Court in *Cement Institute, supra*, and its progeny that recognize that antitrust violations may also constitute violations of unfair competition law. Secondly, it is out of step with, and superseded by, later cases. *Mylan, supra; Boos* v. *Abbott Laboratories*, 925 F. Supp. 49 (D. Mass. 1996); *Mack* v. *Bristol Myers*, 673 So.2d 100 (Fla. 1st D.C.A. 1996); *Blake* v. *Abbott Laboratories*, 1996 W.L. 134947 (Tenn. Ct. App. 1996). And lastly, it runs counter to the express language of the U.S. Supreme Court in *ARC America* that it would be "inappropriate" to rely upon *Illinois Brick* to define "what federal law allows states to do under their own antitrust law." *ARC America*, 490 U.S. at 96.

Defendants attempt to sweep away all state consumer protection law, unfair competition law and state common law with an over-ambitious extension of the holding set forth in *Illinois Brick*. This extension ignores the traditional role of the states in addressing illegal anti-competitive conduct.

The Sherman Act, in the words of Senator Sherman himself, "does not announce a new principle of law, but applies old and well recognized principles of the common law. . . ." 21 Cong. Rec. 2456 (1890). As the Supreme Court recognized, "given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States." *ARC America*, at 101. Both the Supreme Court and Senator Sherman have recognized that state common law and state statutory remedies may be applicable to conduct which is also illegal under the Sherman Act. Defendants may not use *Illinois Brick* as a basis to, using their own words, "tip-toe" around other state statutory and common law remedies.

B. Defendants' Argument That Disgorgement And Restitution Are Not Allowed Under The States' Laws Is Without Merit

Defendant Aventis argues that the States cannot seek restitution or disgorgement under state law or common law (Aventis Br. p. 35). The States have more than adequate legal authority to bring claims for damages and/or disgorgement of illegally obtained profits and restitution under both statutory and common law authority. And this court, which has broad equitable powers that may be exercised when the law is broken, certainly is within its authority to order that illegally obtained profits be disgorged from wrongdoers.

It is well-settled that federal courts have the power to order a full range of equitable remedies, including restitution and disgorgement, in order to prevent unjust enrichment and to restore the parties to their position prior to the unlawful conduct. That authority does not need to be explicitly stated in any statute. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *FTC* v. *Gem Merchandising*, 87 F.3d 466 (11th Cir. 1996); *U.S.* v. *Exxon*, 561 F. Supp. 816, 855 (U.S. Dist. 1983); *FTC* v. *H.N. Singer, Inc.*, 668 F.2d 1107, 111 (9th Cir. 1982); *SEC* v. *Texas Gulf Sulpher Co.*, 446 F.2d 1301, 1307 (2nd Cir. 1971). Instead, the unqualified grant of statutory authority to issue an injunction carries with it the full range of equitable remedies, including the power to grant redress and compel disgorgement of damages. *See, FTC* v. *Gem*

Merchandising, 87 F.3d at 468; *see also FTC* v. *World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988).

These broad powers remain intact unless there is a statute that specifically, or by necessary and inescapable inference restricts the court's jurisdiction in equity. *Porter* v. *Warner Holding Co.*, 328 U.S. at 398. The Supreme Court offered the following explanation of this principle:

> The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words or by a necessary and inescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.

Id. (emphasis added); *FTC* v. *Gem Merchandising*, 87 F.3d at 469.

In *FTC* v. *Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999), the D.C. Federal District Court recognized its inherent equitable powers under *Porter* and its progeny and held that the FTC had authority to seek disgorgement of profits against drug companies that violated Sections 1 and 2 of the Sherman Act. In a later decision, the same court held that state statutes "that explicitly reference, or are modeled after, the FTC Act; or that otherwise permit the state to pursue equitable remedies" empower those states to seek disgorgement and restitution as well. *FTC* v. *Mylan Laboratories, Inc.*, 99 F. Supp. 2d 4-5 (D.D.C. 1999).

In rejecting arguments nearly identical to those made here, the *Mylan* court specifically recognized that states had the legal authority to seek either restitution or damages, or both, on behalf of indirect purchasers. Alaska, Arkansas, California, Connecticut, District of Columbia, Idaho, Iowa, Maine, Michigan, Minnesota, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Utah, Vermont, Washington, West Virginia and Wisconsin, explicitly were held to have such authority. *Mylan*, 99 F. Supp. 2d at 11. The Attorneys General submit that similar

reasoning applies to the remaining[9] states challenged by Aventis: Arizona, Indiana, Nevada, Puerto Rico and Wyoming. Under the *Porter* and *Mylan* line of cases, the states have adequate statutory and common law bases to seek damages and/or disgorgement and restitution that is not impacted by *Illinois Brick*.

In addition to the general principles cited above, Appendix B outlines with specificity the particular state authority empowering each Attorney General to obtain damages and/or equitable relief in those states that have been challenged by Aventis. Thus, the Defendants' contentions are without foundation.

III. STATE AGENCIES' DIRECT RELATIONSHIP WITH DEFENDANTS CONFERS STANDING UNDER FEDERAL ANTITRUST LAWS.

In its Motion to Dismiss, Aventis moves to dismiss all claims for damages under federal antitrust law for "entities or individuals that *did not purchase and take delivery* of Cardizem CD directly from HMRI" (Aventis Br., p 6) (emphasis added). The Defendants do not challenge the States' standing to seek injunctive relief under federal law on behalf of indirect purchasers. The case law rejects any such argument: *See Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166, 1172 (8th Cir. 1998), (Indirect purchaser status does not bar injunctive relief under section 16 of the Clayton Act). Further, as the States do not seek damages for indirect purchasers under federal law; this part of the Defendants' argument is irrelevant.

Thus, the only issue Aventis challenges is whether governmental agencies, such as the Minnesota Multistate Contract for the Acquisition of Pharmaceuticals ("MMCAP"), and State Medicaid agencies, that have direct contractual relationships with the Defendants, can claim damages under federal antitrust laws.

The Defendants do not contest that they have numerous direct contractual relationships with various government entities for the purchase of Cardizem CD, and that the Defendants have

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[9]As observed *infra*, Aventis does not challenge the indirect purchaser recovery statutes of Hawaii, Kansas, North Dakota or Rhode Island.

contractual rights and obligations directly enforceable by, and against, those government agencies. Instead, the Defendants contrive an erroneous test for Sherman Act claims that a direct purchaser must "purchase and take delivery of" Cardizem CD. There is no judicial support for this standard, because it is simply nonsense. For example, Aventis's contracts are no less "direct" because MMCAP does not take physical delivery of goods. To import a "physical delivery" requirement in order to qualify as a "direct" plaintiff would ignore commercial reality and make the law unworkable.

Likewise, the rebate payment relationship that exists between the State Medicaid (and other State agencies) and Aventis (and Andrx), confers direct purchaser standing upon those State Medicaid and other agencies.

Typically, after the State agency reimburses the pharmacy, each state "*directly invoices the manufacturer* (in this case, Aventis) *based upon the number of units paid for by the State in each calendar quarter.*" (State Plaintiffs' Complaint, ¶ 21.) The claims paid by the State agency are aggregated, Aventis is billed by the State agency, and Aventis directs payment (frequently by simply wiring the money) to the State Medicaid agency. This direct relationship establishes privity between the state agency and Aventis sufficient to confer standing under *Illinois Brick, supra.*

In *Blue Cross Blue Shield of Wisconsin* v. *Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), Chief Judge Posner reasoned that if patients paid all doctors' fees and were reimbursed by the insurance company they would be the direct purchasers and the insurance company would not have standing. *Id.* at 1414. However, *if the insurer paid patient fees directly to the medical care providers they could establish standing as a direct purchaser. Id.* "[A]lthough the two entities were not linked by any overarching contract, each payment and acceptance was a separate completed contract." *Id.*

Like the reimburser in *Marshfield Clinic*, State Medicaid and other agencies have contractual privity for the pharmaceutical claims in this case. Rebate agreements are established under Title 42 of the Social Security Act requiring rebate payment from manufacturers to States

with plans approved under this subchapter within 30 days of receiving a state's utilization report. 42 U.S.C.A. § 1396r-8. *See, also, Pharmaceutical Research and Manufacturers of America* v. *United States*, 135 F. Supp 2d 1 (D.D.C. 2001) (Discussing Medicaid's interactions with pharmaceutical companies – holding not relevant).[10] Far from being passive in these interactions, state agencies, such as Medicaid, deal directly with pharmaceutical companies on rebate issues.

Thus State agencies' relationship to the Defendants is not "downstream" from wholesalers/retailers. Rather, State agencies, like Medicaid, have a direct relationship with the Defendants. None of the cases cited by Aventis concern the situation in this case; where there is a direct agreement between the parties as to the price for the "price fixed" commodity.[11]

Although this factual scenario is not the typical situation dealing with *Illinois Brick*, the federal courts have demonstrated flexibility in conferring federal antitrust standing upon plaintiffs under similar circumstances. *See, National Bancard Corp.* v. *VISA*, 596 F. Supp. 1231 (S.D. Fla. 1984), *aff'd*, 779 F.2d 592 (11th Cir. 1986), *reh'g denied en banc*, 785 F.2d 1037 (11th Cir. 1986), *cert. denied,* 479 U.S. 923 (1986)

In *National Bancard*, VISA argued that NaBanco was not a direct purchaser and lacked antitrust standing. *Id.* at 1245. VISA claimed that only merchant banks had privity with VISA – not NaBanco. *Id.* The court disagreed on the grounds that this "ignore[d] the economic reality"

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[10]Although HHS and the pharmaceutical manufacturers signed the contract governing this relationship, Medicaid is in privity due to its status as intended third party beneficiary. HHS as an authorized and open agent is not a responsible party to the contract under agency law. *See, Federal Deposit Ins. Corp.* v. *Tennesseans for Tyree*, 886 F.2d 771, 775 (6th cir. 1989) (holding that an instrument executed by agent in a representative capacity obligates principal and not agent if agent signs in representative capacity on behalf of disclosed principal). *See also,* UCC Article 3.

[11]*See, Illinois Brick Co* v. *Illinois*, 431 U.S. 720 (1977), (no privity between plaintiff and antitrust violator), *Kansas* v. *Utilicorp United Inc.*, 497 U.S. 199 (1990), (no privity between plaintiff and antitrust violator); *Ford Motor Co* v. *Lane*, 86 F. Supp. 2d 711 (E.D. Mich. 2000), (no privity between plaintiff and antitrust violator), *Campos* v. *Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998), (consumer transaction was derivative of requirement of venues to buy Ticketmaster services at monopoly prices), *In re Brand Name Prescription Drugs*, 123 F.3d 599 (7th Cir. 1997), (no privity between plaintiffs and manufacturer defendants).

that in certain cases where merchant banks, in privity with VISA, chose not to process transactional paper generated by VISA card purchases, NaBanco held *primary liability* for payment of a Issuer's Reimbursement Fee ("IFR") directly to VISA. *Id.* The court held that "VISA member banks are hardly in a position to say that they are more directly affected by the IRF than NaBanco." *Id.*

In moving to dismiss State agencies claims under the *Illinois Brick* doctrine, Aventis attempts to "pound square pegs into round holes." While not denying the existence of these direct contractual relationships and payments, the Defendants conveniently ignore them and try to pass off their relationship with government entities as being a traditional manufacturer to wholesaler to retailer to reimburser relationship. This characterization is incomplete, ignores the well-pled facts set forth in the Complaint (¶¶ 21-22), and disregards the case law which confers federal antitrust standing upon injured parties situated similarly to State agencies. *See, Marshfield Clinic, supra,* and *National Bancard, supra.*

IV. THE STATE ATTORNEYS GENERAL'S REQUEST FOR INJUNCTIVE RELIEF IS NOT MOOT

Defendants argue that the States' request for injunctive relief is moot for two reasons. First, they argue that the conduct complained of has ended and they conclusorily assert that there is no likelihood that it will recur. Second, they argue that the Consent Agreement (characterized as an "injunction" in their motion) entered between them and the FTC is conclusive of the issue and effectively preempts the states from seeking independent injunctive relief in this court. Both arguments are unsound. Further, arguments regarding the appropriateness of injunctive relief are not properly resolved at a motion to dismiss stage where discovery regarding the Defendants' likelihood of engaging in similar conduct has not been completed and where the States' ability to independently enforce a Consent Agreement is questionable.

A. This Court Has Broad Power To Enjoin Future Acts Fairly Anticipated From Past Conduct

The Defendants' propensity to renew the kinds of acts underlying this action is not susceptible of resolution on a motion to dismiss. The Second Amended Complaint, seeks to:

> 150. Enjoin and restrain, pursuant to federal and state law, the Defendants, their affiliates, assignees, subsidiaries, successors and transferees, and the officers, directors, partners, agents and employees, and all other persons acting or claiming to act on their behalf or in concert with them, from engaging in any conduct, contract, combination or conspiracy, and from adopting or following any practice, plan, program or device having a similar purpose or effect to the anti-competitive actions set forth above.

This request for relief is not limited to the specific acts giving rise to this action. Rather, it is forward looking and seeks to prevent recurrence of the conduct that has given rise to this action. "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *N.L.R.B.* v. *Express Pub. Co.*, 312 U.S. 426, 436 (1941).

B. The FTC Consent Agreement Does Not Moot The Issues Before This Court

Defendants argue that an FTC Consent Agreement moots the injunctive relief requested by the States. This curious argument is unsupported by either authority or reasoned analysis and should be rejected. The respondents to the FTC Consent Agreement are HMRI, Andrx, and Carderm Capital. None of the sovereign states who are parties to *In Re: Cardizem Antitrust Litigation* were parties in the FTC's administrative action. The Consent Agreement is enforceable only by the FTC in its sole discretion. The Agreement contains provisions that allow

the FTC to monitor and investigate compliance[12]. For example, certain provisions require the respondents to provide the FTC with notifications and reports. There is no requirement that the respondents or the FTC provide any of these materials to the states. Indeed, at this point, Aventis has refused to provide relevant discovery documents relating to its recent agreement selling the Cardizem CD line to one of its generic Diltiazem competitors. No state has any standing to obtain such documents under the FTC Agreement or to monitor compliance with the FTC Agreement.

The FTC has the sole authority to enforce the Agreement. *United States* v. *St. Regis Paper Company*, 355 F.2d 688 (2nd Cir. 1966). There is no provision in the FTCA permitting the FTC to certify its orders for enforcement to the states. *See, also, Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 986 (DC Cir 1973).[13]

Defendants rely primarily on the case of *Abrams* v. *Seneci*, 817 F.2d 1015 (2nd Cir. 1987) in support of the proposition that no further injunctive relief is required. The sharp differences between the facts of that case and the instant case highlight the weakness of the curious argument put forth by the Defendants. In *Seneci*, the Attorney General of New York had already obtained an injunction against the same parties in state court. The prior injunction covered the same conduct he sought to enjoin in the subsequent federal action. Since the parties and the orders sought were identical, the New York Attorney General was able to monitor compliance and

[12]For example, paragraph VIII of the Agreement requires each respondent to provide "Access, during office hours and in the presence of counsel, to all facilities, and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in is possession or under its control relating to compliance with this order". There is no right by any state to the same materials apart from the authority granted by state investigative statutes or by the federal discovery rules. Even if the states were to issue investigative subpoena or civil investigative demands to obtain documents necessary to monitor compliance with the Agreement, they still would not have any standing to enforce violations.

enforce the state court injunction, rendering a duplicate federal court injunction moot. This is in sharp contrast to the Consent Agreement that has not been entered by a court, in which *none* of the states is party, and where *none* of the states has standing or authority to either monitor compliance or enforce the Agreement.

Defendants cite *Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988) for the for the proposition that "[If] the court can still act to remedy such harm by limiting its future adverse effects, the parties clearly retain a legally cognizable interest in the outcome." In the instant case, there is a serious risk that the Defendants will engage in future conduct similar to that which led to both the FTC investigation and this litigation. At no time have the Defendants acknowledged any wrongdoing. The fact that the most recent known incident lies in the past offers no assurance that there will be no future instances of similar conduct with similar consequences. "The fact that the alleged violation has itself ceased is not sufficient to render a case moot. As long as effective relief may still be available to counteract the effects of the violation, the controversy remains live and present." *Northwest Environmental Defense Center v. Gordon* at 1245.

The lengths to which pharmaceutical companies have gone to exploit perceived loopholes in the Hatch-Waxman Act are virtually a national scandal. The apparent willingness of defendants to abuse the statute counsels strongly against any motion to dismiss ruling that could disable the court from ordering effective relief after all the facts are presented.
This is neither the first nor the only instance of the sort of abuse of the Hatch-Waxman provisions involved here. HMRI, predecessor in interest to Aventis, engaged in similar actions with Biovail and its drug Tiazac. *See* Second Amended Complaint ¶. 32-41. The practice is not

[13] In *Holloway*, the court held that there is no private right of action under the FTCA. By extension, and consistent with the earlier ruling of *St. Regis Paper*, there is no jurisdiction for

limited only to these parties. *See, e.g. Terazosin Hydrochlor, et al v. Abbott Laboratories*, 99-MDL-1317 (S.D. Fla. 1999) (pending case involving similar abuses of Hatch-Waxman exclusivity provisions).

For these reasons, Defendants arguments that the state claims for injunctive relief are moot should be rejected.

V. DEFENDANTS PROPOSED DISMISSAL OF KANSAS, WEST VIRGINIA AND SOUTH CAROLINA CLAIMS BASED UPON A DISTINCTION BETWEEN INTERSTATE AND INTRASTATE COMMERCE IS MERITLESS AND HAS ALREADY BEEN REJECTED BY THIS COURT

Defendants' argument that Kansas, South Carolina and West Virginia state laws apply only to in-state activities is based upon a misconstruction of the relevant statutes, as well as a selective omission of relevant facts that preclude the claims from being dismissed.

Even if Defendants' narrow view of the application of state antitrust law to Defendants' activities is considered, Defendants' argument still must fail because the complaint alleges anticompetitive activities of Defendants were aimed at and reached every state, including Kansas, South Carolina, and West Virginia. *In Re: Cardizem CD Antitrust Litigation,* 105 F. supp. 2d 618, 665-668 (E.D. Mich. 2000). Indeed, even without a showing that any of the conduct about which the Plaintiff States complain occurred within the territorial limits of the States, the Complaint alleges that the Defendants' anticompetitive conspiracy affected consumers in Kansas, South Carolina and West Virginia by denying them the advantage of generic diltiazem sold in a freely competitive marketplace.

Defendants also refuse to accept the teachings of this Court in its Order No. 12. *Id.* There this Court disposed of "intrastate v. interstate" arguments raised in regard to Wisconsin

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private plaintiffs to enforce an FTC order.

and Tennessee antitrust statutes. Defendants now attack Kansas, South Carolina and West Virginia statutes as being limited only or primarily to intrastate activities.

Defendants not only fail to accept the Court's prior order, but also fail to read the Complaint. South Carolina is enforcing its unfair trade practices act against the Defendants, not its antitrust statutes.[14] Thus arguments regarding South Carolina are pointless and should be wholly disregarded.

Kansas and West Virginia's antitrust laws are similar, though not identical, to Wisconsin's and Tennessee's. Therefore, Defendants' "intrastate" arguments should be similarly disposed of.

Kansas has full authority under the Restraint of Trade Act to bring suit against antitrust violators engaged in interstate commerce. Kan. Stat. Ann. 50-112 (2000 Supp.) bans "[a]ll arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state. . . ." On its face, the statute clearly contemplates enforcement in the interstate context. *In re Wyoming Tight Sands Antitrust Cases*, 1990 WL 136788, *4 (D.Kan. 1990).

Defendants rely on two antiquated cases, *State v. Phipps*, 50 Kan. 609 (1893) and *State* v. *Jack*, 89 Kan. 387 (1904), to argue against ability of the Attorney General to attack interstate antitrust violations under the Restraint of Trade Act. However, the court in *Wyoming Tight Sands* clearly holds that neither of these cases, or any subsequent ones, limit the Restraint of

[14]Oddly enough, Aventis recognizes that South Carolina is using its unfair trade practices act to sue the Defendants, not its antitrust act. *See* Aventis Brief, p. 15 n.20, yet wastes the Court's time with its "intrastate" argument against South Carolina with reference to its antitrust laws. Also, *see, Cheshire* v. *Coco-Cola Bottling Company*, 758 F. Supp. 1098 (D.S.C., 1990), where the court stated that the South Carolina UTPA is "not limited to in-state conduct by its own terms nor does it contain on its face any undue burdens of interstate commerce." 758 F. Supp. at 1101.

Trade Act to intrastate violations. Thus, this ruling and the clear language of Kan Stat. Ann. 50-112 indicate that Kansas antitrust laws apply to interstate violations.

Similarly, Defendants claim that West Virginia antitrust law only prohibits conspiracies in restraint of trade or commerce in West Virginia. Defendants are simply wrong. The West Virginia Supreme Court of Appeals has not ruled on the scope of effectiveness of West Virginia's Antitrust Act, W.Va. Code § 47-18-1 *et seq.* ("Antitrust Act"), but has indicated the Antitrust Act reaches beyond West Virginia's borders. *State ex rel. Palumbo* v. *Graley's Body Shop, Inc.*, 425 S.E.2d 177 (W. Va. 1992).

Defendants fail to discuss *State ex rel. Palumbo* v. *Graley's Body Shop, Inc.*, because it supports West Virginia's position, not the Defendants. In *Graley's*, the court was confronted with the question of whether West Virginia's Antitrust Act was quasi-criminal in nature. Targets in an investigation claimed that the penalties under the Antitrust Act constituted criminal penalties and therefore they should have been granted rights in accordance with criminal investigations and prosecutions. *Id.* at 180.

In its discussion of the issues, the court compared the Antitrust Act with the Sherman Act, noting the differences. The court held the Antitrust Act was not criminal in nature since it did not carry the same criminal penalties as the Sherman Act. *Graley's*, 425 S.E.2d at 182-83. In a footnote to this discussion, the court recognized that conduct of a wholly intrastate nature may not necessarily be a violation of the Sherman Act. The footnote reads:

> The United States District Court for the Southern District of West Virginia pointed out in *Anziulewicz* v. *Bluefield Community Hospital, Inc.*, 531 F. Supp. 49, 53 (S.D.W.Va. 1981): "Federal antitrust law is obviously directed toward *interstate* commerce. West Virginia's antitrust law is directed towards *intrastate* commerce." (emphasis in original).

> Thus, we note that a violation of West Virginia's Antitrust Act may not necessarily give rise to a violation of the federal antitrust laws.[15]

Id. at 183, n.11. Thus, contrary to what Defendants assert, the West Virginia Supreme Court of Appeals recognized that the Antitrust Act could reach interstate activity.

This interpretation is consistent with the Antitrust Act. The section of the Antitrust Act which Defendants attack, is set forth in pertinent part:

> (a) Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this State shall be unlawful.

W.Va. Code § 47-18-3(a). As a plain reading of the statute shows, there must be some "restraint of trade or commerce" in West Virginia before there is violation of the Antitrust Act. This is a reasonable interpretation since West Virginia would have no interest or jurisdiction to prevent restraints of trade or commerce outside of West Virginia that do not affect trade or commerce in West Virginia. Once the restraint of trade or commerce is established in West Virginia, the statute makes the conduct unlawful, regardless of the restraints outside of West Virginia. This is the only logical interpretation of the Antitrust Act.

Furthermore, another section of the Antitrust Act also at issue in the Complaint, makes monopolistic conduct unlawful in West Virginia when any part of the conduct occurs in West Virginia. Thus if monopolistic conduct is occurring outside West Virginia, the conduct is unlawful when it affects trade or commerce in West Virginia. Section 4 of the Antitrust Act provides:

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[15] *Anziulewicz* involved a complaint alleging violations of the Antitrust Act that had been removed to federal court. The defendants claimed that even though only violations of the Antitrust Act were alleged, it was really a case arising under the Sherman Act. The court noted the differences between the statutes and remanded the case to state court since no federal causes of action had been alleged.

> The establishment, maintenance or use of a monopoly or an attempt to establish a monopoly of trade or commerce, any part of which is within this State, by any persons for the purpose of excluding competition or controlling, fixing or maintaining prices is unlawful.

W.Va. Code § 47-18-4. It is inconceivable that the West Virginia Legislature would have enacted a body of statutes designed to prevent anticompetitive behavior that limits one type of unlawful conduct to solely intrastate activity, while permitting another part of the statute to reach interstate activity.

An *in pari materia* reading should be given to the Antitrust Act to fully understand the intent of the Legislature in passing the Antitrust Act.

> "It is well established in West Virginia that statutes which are not inconsistent with one another, and which relate to the same subject matter, are *in pari materia*. Statutes *in pari materia* should be read and construed together, the primary purpose being to ascertain the intention of the legislature." (Citation omitted.)

State ex rel. Miller v. *Locke*, 253 S.E.2d 540, 542 (W. Va. 1979); *Application of Metheney*, 391 S.E.2d 635 (W. Va. 1990). Thus, it is clear from an *in pari materia* reading of the Antitrust Act that it reaches outside the borders of West Virginia to make conduct unlawful when that conduct restrains trade or commerce in West Virginia. West Virginians have been denied the benefits of free and open competition.

Therefore, the States' claims were properly pled and the Court must deny Defendants' motion with respect to Defendants' "intrastate v. interstate" argument against Kansas, South Carolina and West Virginia.

VI. KANSAS, INDIANA, OKLAHOMA AND SOUTH CAROLINA'S CLAIMS ARE NOT BARRED BY STATUTES OF LIMITATIONS

The defendants assertions that the claims of Kansas, Indiana, Oklahoma and South Carolina are barred by their states' applicable statutes of limitation are wrong and must be rejected for the reasons set forth herein. Further, each state submits that, to the extent that the injury attributable to the Defendants' illegal conduct is continuing, any limitation found applicable would not bar recovery for subsequent periods.

A. Indiana

Indiana has a two year statute of limitations for antitrust violations. In this action, the States have pled that the Defendants' illegal agreement, entered in September of 1997, resulted in the suppression of generic alternatives to Cardizem CD from July of 1998 through June of 1999, when HMRI made a final payment to Andrx of $50,700,000 (Complaint, ¶ 53-56). This illegal agreement excluded some generic competitors from coming to market until December of 1999 (Complaint ¶ 61). Both federal law and Indiana law state that the cause of action did not accrue, for statute of limitations purposes, until this final June 1999 payment. "[T]he statute of limitations in anti-trust cases commences with the last overt act in furtherance of the conspiracy." *Citizen National Bank of Grant County* v. *First National Bank In Marion*, 331 N.E. 2d 471, 483 (Ind. Ct. App. 1975); *Northern Ky Bell Telephone Co* v. *Southern Bell Telephone & Teletgraph Co.*, 73 F.2d 333 (6th Cir. 1934).

Further, the illegal conduct was not apparent by June of 1999. As pled in the Complaint, Defendants' agreement required them to keep it a secret and not file it in any court proceeding.

(Complaint ¶56). Under Indiana law, "If a person liable to an action conceals the fact from the knowledge of the person entitled to bring the action, the action may be brought at any time within the period of limitation after the discovery of the cause of action." Ind. Code § 34-11-5-1. In this instance, the initial Complaint was filed by the State Attorneys General on May 14, 2001. Since illegal conduct occurred through June of 1999, when the last payment occurred, the Indiana Attorney General could not have been aware of the actions before May 14, 1999.

Indiana's claim is not barred. For similar reasons, neither are the claims of Kansas, Couth Carolina or Oklahoma, which have statute of limitations that are longer in duration. Those states set forth alternative positions below.

B. South Carolina

Defendant contends that South Carolina's claim is timed barred in that its claim was brought "more than three years after discovery of the unlawful conduct which is the subject of the suit." Defendant's contention is not supported by the relevant statute[16] or case law[17] and should be dismissed. No facts are pled by Defendants suggesting that South Carolina should have discovered the Defendants' illegal conduct three years prior to July 2, 2001 (the date of the First Amended Complaint adding South Carolina as plaintiff). And given that illegal conduct

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[16]S.C. Code Ann. 39-5-150 entitled "Limitation of actions" of the South Carolina Unfair Trade Practices Act (UTPA) states as follows:

> No action may be brought under this article more than three years *after discovery* of the unlawful conduct which is the subject of the suit. (emphasis added).

[17]In *Prestwick Golf Club, Inc.* v. *Prestwick, LTD Partnership*, 503 S.E.2d 184 (S.C. Ct. App.,1998) the South Carolina Court of Appeals analogized the "after discovery" provision of Section 39-5-150 of the UTPA as to when the Plaintiff became "aware" of the alleged unlawful conduct. *Id.* at 393, 503 S.E.2d at 188.

was continuing through 1999, South Carolina's participation in the Complaint was well within the three years statute of limitations restriction.[18]

C. Kansas.

The State of Kansas alleges violations of the Kansas Restraint of Trade Act, Kan. Stat. Ann. § 50-101 *et seq.*, and "its predecessor", and the Kansas Consumer Protection Act, Kan. Stat. Ann. § Chapter 50, Article 6 (Compl. ¶ 115). Andrx contends that all of Kansas' claims are time-barred by virtue of Kan. Stat. Ann. § 60-512(2) which provides that: "[a]n action upon a liability created by a statute other than a penalty or forfeiture" "shall be brought within three (3) years." Andrx's contention is wrong for the following reasons: a) Andrx overlooked the fact that both the Kansas Restraint of Trade Act and its predecessor as well as the Consumer Protection Act provide for penalties and forfeitures[19] which are excluded by Kan .Stat. Ann. 60-512(2). Penalties and forfeitures are not specifically covered by any other provision of the Kansas statutes of limitation and therefore fall under the five (5) year provisions of Kan. Stat. Ann. 60-511 which provides that: "[a]n action for relief, other than the recovery of real property not provided for in this article shall be brought within five (5) years."; b) fraud or concealment toll the statues of limitation in Kansas. *Yoh* v. *Hoffman,* 27 P.3d 927 (Kan. App. 2001); *State* v. *Wilkins,* 985 P.2d 690, (Kan. 1999). Kansas adopts and incorporates by reference the arguments made by Indiana and South Carolina concerning the discovery of Defendant's conduct; and three private claims against the defendant were made within the three year time frame alleged by defendant which effectively toll the statute.

[18]Also *see*, *True* v. *Monteith*, 489 S.E.2d 615 (S.C. 1997), where the State Supreme Court stated in a medical malpractice case that "[u]nder the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." Id. at 616.

D. Oklahoma

Andrx argues in its Motion to Dismiss that Oklahoma's claims under the Consumer Protection Act are time barred pursuant to 12 Okla. Stat. tit. 10, §95. This argument is incorrect. The Oklahoma Supreme Court has held that §95 does not apply to the State under the doctrine of sovereign immunity "where the state is acting in its sovereign capacity to protect or enforce a public right as distinguished from a private right." *See Wooten* v. *State ex rel. Commissioners of Land Office*, 129 P.2d 584, 585 (Okla. 1942). In the present case, the Oklahoma Attorney General seeks to enforce the public rights of the State of Oklahoma by seeking both monetary and equitable relief for its citizenry and state agencies under the Oklahoma Consumer Protection Act.

In the alternative, other jurisdictions, interpreting consumer protection statutes similar to Oklahoma's have held that the accrual date for such causes of action "is determined by the same principles dispositive of the accrual dates of general tort actions." *International Mobile Homes Corp.* v. *Corroon & Black /Fairfield & Ellis, Inc.*, 560 N.E. 2d 122, 125 (Mass. App. 1990). Under such an analysis, a cause of action accrues from the time of injury, or when the plaintiff knew or should have known of the injury. *See Schwartz* v. *Travelers Indemnity Company,* 740 N.E.2d 1039, 1044 (Mass. App. 2001); *Stark* v. *Advanced Magnetics, Inc.,* 736 N.E.2d 434, 441 (Mass. App. 2000).

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[19]Kan. State. Ann. 50-145; 50-160; 50-161; 50-636; and 50-677.

In this case, Oklahoma has alleged that Defendants' conduct constituted an unfair and/or deceptive trade practice in violation of 15 Okla. Stat. tit.. § 753(20) (West 2000).[20] A review of these definitions indicates that Oklahoma's *consumer protection* claims are torturous in nature. Therefore, Oklahoma's claims under the Consumer Protection Act did not accrue until the State of Oklahoma and its citizens suffered injury or should know of the injury. *See Williams* v. *Borden, Inc.*, 637 F.2d 731, 735 (10th Cir. 1981). Injury was not suffered under the illegal agreement in this case until July 8, 1998, the date Andrx could have begun marketing its generic version of Cardizem CD, but for Andrx's agreement with HMRI. The Complaint was filed in this matter May 14, 2001, well within the three year limitations period. And, as stated in the previous argument set forth by Indiana and South Carolina, Defendnats have alleged no facts suggesting that the injury was discoverable until much later.

[20]Unfair and deceptive trade practices are defined at 15 Okla. Stat. tit. §752 (11)(12) (West 2000):

> 11. "Deceptive trade practice" means a misrepresentation, omission or other practice that has deceived or could reasonably be expected to deceive or mislead a person to the detriment of that person. Such a practice may occur before, during or after a consumer transaction is entered into and may be written or oral;
>
> 12. "Unfair trade practice" means any practice which offends established public policy or if the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

VII. ANDRX'S GENERALIZED COMMENTS REGARDING DUPLICATE RECOVERY ARE NOT A SUFFICIENT BASIS TO DISMISS THE STATE ATTORNEYS GENERAL CLAIMS

Andrx cites three pages worth of inapposite cases that ostensibly support the proposition that duplicative recoveries are prohibited. On this basis, Andrx asserts the "State Attorney Generals *parens patriae* claims should be dismissed because they add a layer of complexity and a danger of double recovery and anyone whose rights are covered by these suits has an alternative remedy, namely, to join the private lawsuits." (Andrx Br., p 26). The hypocritical quality of this argument is obvious from the fact that Andrx has moved to dismiss or strike portions of these private lawsuits as well. According to Andrx, the *potential* of duplicative recovery requires this Court to dismiss *both* the State Attorneys General and the State Law Plaintiffs actions.

Andrx's arguments are absurd. Potential duplicative recovery is not a recognized basis to dismiss a case under Rule 12(b)(6). First, the disgorgement remedy sought by the State Attorneys General would not subject the Defendants to multiple liability. Indeed, rather than complicating the case, as Andrx suggests, a disgorgement order would simplify it. Disgorgement may be sought by the State Attorneys General in their law enforcement capacity to prevent a wrongdoer from benefiting from their illegal conduct. Rather than relying upon the more complex damage calculation and allocation issues, disgorgement is simple: it merely requires the defendants to give back the proceeds that they illegally obtained. The Court may order disgorgement now, and address issues of equitable distribution later in its continuing exercise of equitable jurisdiction. *See, e.g., Sec* v. *Wang*, 944 F.2d 80, 81 (2d Cir. 1991) (holding that "disgorgement" order is not focused on those who have been duped out of their money").

Additionally, Andrx's suggestion that "substantial overlap" exists between the State Attorneys General claim and the State Law Plaintiffs' claim is fallacious. Andrx's argument suggests that the simultaneous litigation of *parens patriae* and class action litigation is somehow an aberration. It is not. Numerous courts have recognized and allowed *parens patriae* and class cases to proceed at the same time. See, for example, *In Re: Disposable Contact Lens Antitrust Litig.*, 2001 U.S. Dist. Lexis 5499, 2001-1 Trade Cas. (C.C.H.), p. 73, 150 (C.D. Fla. 2001); *In Re: Toys "R" Us Antitrust* Litigation, 191 F.R.D. 347 (E.D.N.Y. 2000); *In Re:* Sclater, 40 B.R. 594, 596 (Bkrtcy. Mich. 1984). Furthermore, the State Law Plaintiffs have expressly excluded from their proposed class consumers in states where the Attorneys General authority to obtain a recovery on their behalf has been recognized. *See,* State Law Plaintiffs' Motion For Class Certification, at 5-8. In Michigan, where a class has already been certified and the Attorney General has brought a *parens patriae* claim, but class counsel and the Michigan Attorney General have already agreed to prosecute these claims jointly and cooperatively. And remedies sought by the Michigan Attorney General are expressly cumulative to the remedies sought by the class (*See,* Mich. Comp. Laws 445.782). It would be inappropriate for the Court to dismiss either the Michigan Attorney General's *parens patriae* claim or the Michigan consumer class claim while Andrx continues to reserve its rights to challenge this Court's class certification order, oppose the private plaintiffs' attempts to amend the class definition, and challenge the *parens* authority of the Michigan Attorney General.

VIII. DEFENDANTS' ARGUMENTS ON RETROACTIVITY OF THE ANTITRUST LAWS OF IDAHO, NEVADA, NEW YORK AND VERMONT ARE UNSOUND

The Defendants argue indirect purchaser claims cannot be brought under the antitrust laws of Idaho, Nevada, New York, and Vermont because the Defendants' illegal conduct commenced prior to the effective date of the amendments to these statutes. These amendments expressly acknowledge indirect purchaser recovery. Defendants make this argument even though each State's amendment predates the filing of the States' lawsuits by at least a year and, in the case of New York, three years.

This section of the States' Brief refutes the Defendants' arguments with respect to the retroactivity of the Idaho, Nevada and New York amendments. The Vermont Attorney General asserts that his authority to seek relief on behalf of indirect purchasers under the Vermont Consumer Fraud Act does not rely on the 2000 amendment to the Vermont Consumer Fraud Act, as discussed in Vermont's section of Appendix B.

A. In The Case Of The New York Donnelly Act, Retroactivity Is A "Red Herring," As Applying § 340(6) Does Not Amount To "Retroactive" Application Of The Statute

The question presented to the Court is whether an action brought under the New York Donnelly Act, which seeks damages in part on behalf of indirect purchasers, as the Donnelly Act now permits, must be dismissed whenever the conduct constituting the violation began prior to the effective date of the indirect purchaser amendment. While no New York appellate court has

resolved this question, the plain language of the statute establishes that Defendants' motion to dismiss should be denied.

The primary consideration of the Court in construing a statute "is to ascertain and give effect to the intention of the Legislature." *See,* generally *Tompkins* v. *Hunter*, 43 N.E. 532 (N.Y. Sup. Ct. 1894). In order to ascertain the legislature's intent and, hence, a statute's true meaning, all the parts of a statute should be read as a whole. N.Y. Statute Law § 97. When the relevant Donnelly Act provisions here –§§ 340(5) and 340(6) – are read as a whole and construed together, the legislature's intent becomes clear: the legislature sought to remove any bar to indirect purchaser recovery in any action commenced after the statutory amendment became effective, irrespective of when the acts giving rise to the Donnelly Act violation arose.

N.Y. Gen. Bus. Law § 340(5), enacted in 1975, creates a treble damage cause of action for violation of the Donnelly Act. This provision further requires that "An action to recover damages caused by violation of this section must be commenced within four years after the cause of action has accrued." Section 340(6), enacted on and effective December 23, 1998, defines the nature of the action that may be brought under the treble damage provision. The 1998 amendment thus provides that "In *any action* pursuant to this section, the fact that . . . any person who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery . . . ." The 1998 amendment further provides that it shall "take effect immediately." As further discussed below, the legislature enacted Section 340(6) after a New York state trial level court held that indirect purchasers lacked standing to sue under the Donnelly Act.

Significantly, §340(6) makes no reference to the time that the cause of action accrued (*i.e.*, when the acts constituting the violation itself occurred); nothing turns on that point in time.

Instead, what matters — under the plain language of the statute — is when the Donnelly Act "action" itself was brought. Thus, the 1998 amendment, by its express terms, applies "[i]n *any* action pursuant to this section . . . ." If the "action" authorized by § 340(5) is brought *after* §340(6) took effect (and is otherwise timely for statute of limitations purposes), then that "action" is governed by § 340(6). No issue of "retroactive" application of the statute arises. By contrast, if the "action" was brought before § 340(6) became effective, the statute applies only if it is given retroactive effect.

Thus, no issue of "retroactive" application is presented in this case. New York commenced its Donnelly Act action *after* § 340(6)'s effective date. Accordingly, the action is governed by the 1998 statutory amendment, which authorizes suit whether or not the plaintiff purchased directly from the defendant. Indeed, as Andrx's counsel stated to the United States District Court for the District of Columbia (then on behalf of another client): "allowing indirect purchasers to assert claims for purchases that predate the enactment of § 340(6) *does not* require 'retroactive' application of §340(6)." (Emphasis added.)[21]

This construction is further confirmed by that part of § 340(6) providing that "[i]n any action pursuant to this section, the fact that . . .any person who *has sustained* damages . . .has not dealt directly with the defendant shall not bar or otherwise limit recovery." The amendment is directed to all persons who have *already* suffered damages from a violation of § 340, not just to those who suffer damage *after* the statute's enactment. To drive home the point, the legislature directed that the new amendment "take effect immediately."

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[21]See Memorandum of Law in Support of Bristol-Myers Squibb Company's Motion to Reconsider that Portion of the Court's May 9, 2000, Opinion Relating to the Donnelly Act, filed May 31, 2000, *In re Vitamins Antitrust Litigation* Misc. No 99-CV-0197 at page 2.

If the legislature had intended the law to apply only to persons whose claim arose after §340(6) became effective, it would have used language such as any person who "*sustains*" or "*hereafter sustains*" damage shall not be barred from recovery. Or, the legislature could have limited Section 340(6) to "any action pursuant to this section *where the cause of action accrues* after the effective date provided for herein." The legislature did not use words of this import, and the Court should not so construe the amendment as to do so would be contrary to the legislature's intent to afford the opportunity for recovery to "any person who has sustained damages."

Defendants misread *Majewski* v. *Broadlambin-Perth Central School District* 696 N.E.2d 978 (N.Y. 1998) in arguing that the decision supports dismissal of New York's claim. In that case, an injured worker sued the owner of the school where he was working. The school owner pleaded a third party claim against the worker's employer for contribution or indemnity. Thereafter, the legislature amended the worker's compensation law to provide, in pertinent part, that "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee . . . ." Workers' Comp Law.1996, ch. 635, § 2. As with § 340(6), the legislature also provided that the amendment take effect immediately. The employer then sought to dismiss the pending claim pleaded by the school owner.

The New York Court of Appeals held that the statutory amendment did not apply:

> We conclude that, *irrespective of the date of the accident*, a prospective application of the subject legislation to actions by employees for on-the-job injuries against third parties *filed after the effective date* of the relevant provisions is eminently consistent with the overall and specific legislative goals behind passage of the Act.

Majewski, 696 N.E.2d at 984 (emphasis added).

In other words, the statutory amendment applied to actions brought *after* the law took effect, "irrespective of the date of the accident." The statute did not, however, apply to pending actions, and that was the reason that the Court of Appeals refused to dismiss the claim pleaded against the employer under the subsequently enacting law abolishing the liability exposure.

Similarly, in our case § 340(6) applies to "any action pursuant to this section" – § 340 – commenced *after* the law took effect, irrespective of when defendants' unlawful acts occurred. New York indisputedly began its action after § 340(6) became effective. As in *Majewski*, there is no basis for dismissal where the statutory amendment, fully applicable to this action, abolishes a potential standing to sue *defense* against indirect purchaser claims. Indeed, although the statute involved in *Majewski* was framed in terms of abolishing a claim, whereas § 340(6) is drafted in terms of abolishing a defense, the language similarities in the two statutes is striking:

Majewski	**Section 340(6)**
"an employer *shall not be* liable...	indirect purchaser status *"shall not be a bar"*
based upon injuries *sustained* by an employee."	as to any person "who has *sustained* damages."

Thus, contrary to Defendants' argument, *Majewski* supports denial of the motion to dismiss, and not a granting of relief.

In sum, the plain meaning of the words of § 340(6) demonstrates that the purpose of the amendment is to assure an immediate remedy for indirect purchasers who commenced "any action pursuant to this section" after the 1998 amendment took effect. As in *Majewski*, the prospective application of § 340(6) to actions filed after December 23, 1998 — irrespective of the date the cause of action accrued — advances the legislature's intent to provide a remedy,

while also affording defendants protection against double recovery in any such action from that date onwards.

On the other hand, Defendants' alternative construction of Section 340(6) would undermine the legislature's intent. On Defendants' reading of the law, two companies who signed a written agreement fixing prices at 11:59 pm on December 22, 1998 would be exempt from liability to indirect purchasers for all the later sales that they made under the unlawful agreement, no matter how long the agreement lasted. That is absurd. That cannot be what the legislature of the State of New York intended.

B. The Laws Of The States Of Idaho, Nevada, And New York Are Properly Applied Retroactively

1. Idaho

a. Idaho Law Does Not Prohibit Applying its Provisions Relating to Indirect Purchaser Claims

In 2000, the Idaho Legislature repealed the Idaho Antitrust Act and replaced it with the Idaho Competition Act, codified at Idaho Code §§ 48-101 *et seq*. Aventis objects to application of Idaho Code § 48-108(2), which, in part, provides that the Attorney General may bring an action in the name of the State of Idaho, as *parens patriae*, on behalf of Idaho persons directly or indirectly injured because of violations of the Competition Act.[22]

[22]Only the Attorney General may bring actions on behalf of persons indirectly injured by violations of the Competition Act; private parties are limited to bringing claims for violations that directly harmed the private party. *Compare* Idaho Code §§ 48-108(2) and 48-113.

The law of Idaho mandates that remedial and procedural statutes[23] are applied retroactively: *Tuttle* v. *Wayment Farms*, 952 P.2d 1241, 1244 (Idaho 1998) ("remedial and procedural amendments should be applied retroactively") (emphasis added); see also, *Floyd v. Board of Commissioners of Bonneville County*, 953 P.2d 984, 988 (Idaho 1998) (a remedial or procedural statute is not a retroactive statute, even though it was enacted subsequent to the events to which it applies). Section 48-102(2) makes it abundantly clear that Section 48-108(2) is both procedural and remedial. It states that the purposes of Idaho's Competition Act are, in part, "to establish efficient and economical procedures" to effectuate the Act's competition policies. The substantive provisions of the Idaho Competition Act—Idaho Code §§ 48-104 and 48-105—did not change from that contained in the Idaho Antitrust Act. The new act did not "transform a legal act into an illegal act . . . ." *Hastings v. Earth Satellite Corporation*, 628 F.2d 85, 93 (D.C.C. 1980), *cert. denied 449 U.S. 905*. All Section 48-108(2) does is set forth how the harm caused by violations of Sections 48-104 and 48-105 are to be remedied. Indeed Section 48-108(2) is precisely the type of remedial legislation that, under Idaho law, "should be applied retroactively." *Tuttle*, 952 P.2d at 1244.[24] Accordingly, there is no legal impediment in applying it to the present case.

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[23]A procedural statute is one which "pertain[s] to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *Floyd*, 953 P.2d at 988 (*quoting State v. Carrington*, 700 P.2d 942, 944 (Idaho 1985)). Remedial statutes are, by definition, statutes that address remedies.

[24]Aventis makes much ado about the absence of a legislative statement that Idaho Code § 48-108(2) should be applied retrospectively. The simple answer is none was needed. Given that remedial legislation "should be applied retroactively," *Tuttle*, 952 P.2d at 1244, and that the Legislature enacts a statute with full knowledge of judicial decisions and case law, *State v. Martinez*, 891 P.2d 1061, 1063 (Idaho Ct. App. 1995), the Legislature did not need to say that which Idaho law already provides: that the remedial provisions of Section 48-108(2) should be applied retroactively.

b. Retroactive Application Of Idaho's Amendment Does Not Change Defendants' Liability

Aventis argues that allowing indirect purchaser recovery imposes additional liability on the Defendants. This is incorrect.

The Idaho antitrust law prohibits duplicative awards.[25] Indeed, the Idaho statute requires the Court, in pertinent part, to exclude the amount of relief awarded under Idaho law to a private plaintiff by an amount that is allocable to "potential claims by the attorney general on behalf of indirect purchasers for the same conduct or injury." Idaho Code § 48-113(1). Thus, under Idaho law, the Defendants will not be liable for any additional damages, but the damages awarded may be apportioned between direct and indirect purchasers.

c. Idaho Law Did Not Deny Indirect Purchasers A Recovery

Aventis cites no relevant Idaho law, statutory or jurisprudential, to support its position that Idaho antitrust provisions, prior to amendment, denied recovery for harm suffered by indirect purchasers.[26] Prior to amendment, Idaho's Antitrust Act, formerly codified at Idaho

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[25]Idaho has two relevant provisions. The first states: "The court shall exclude from the amount of monetary relief awarded in such action any amount which duplicates amounts which have been awarded for the same injury already . . . ." Idaho Code § 48-108(2)(a). The second relevant provision is Idaho Code § 48-113. This section deals with private causes of action and it states: "The court shall exclude from the amount of monetary relief awarded to a plaintiff under this section any amount which duplicates amounts allocable to any other actual or potential plaintiff including, without limitation, potential claims by the attorney general on behalf of indirect purchasers for the same conduct or injury."

[26] The only Idaho statutory citation Aventis makes is to amended Idaho Code § 48-102, which was adopted at the same time Idaho's provisions dealing with indirect purchasers was enacted. Apparently, when it suits its purpose, Aventis has no problem applying statutes retroactively.

Code § 48-101, et seq., allowed for relief that included damages sustained by indirect purchasers.[27]

Under the Idaho Antitrust Act, old Idaho Code § 48-103, stated that "[a]ny property owned under any contract or by any combination, or pursuant to any conspiracy, and being the subject thereof, mentioned in the foregoing sections of this chapter, shall be forfeited to the state."[28] (Emphasis added.) The statute does not state that only the property improperly obtained from direct purchasers is subject to forfeiture; rather, it states that "any" property obtained pursuant to a violation of old Idaho Code §§ 48-101 and 48-102 is subject to forfeiture. "Any" property means any property. *Webster's Ninth Collegiate Dictionary*, 93 (1987) ("any" means, in part, "every, used to indicate one selected without restriction").

The fact that Idaho courts find federal court decisions interpreting federal antitrust law persuasive does not provide a different result. Federal precedent interpreting Federal antitrust law, while persuasive, cannot or should not be used to judicially repeal, ignore, or otherwise override the clear language of other applicable state antitrust provisions, such as old Idaho Code § 48-103.

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) interprets Section 4 of the Clayton Act, codified at 15 U.S.C. § 15. Yet, section 4 of the Clayton Act bears no semblance to old Idaho

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[27]Just as Idaho's Competition Act prohibits unreasonable restraints in trade or commerce, as well as monopolizing or attempting to monopolize any part of trade or commerce, Idaho's Antitrust Act did too. *See* old Idaho Code §§ 48-101 and 48-102.

[28]The "foregoing sections of this chapter" being referenced are old Idaho Code §§ 48-101 and 48-102. Section 48-101 was patterned after Section 1 of the Sherman Antitrust Act. It makes unlawful contracts, combinations, or conspiracies in restraint of trade or commerce. Present Idaho Code § 48-104 governs the same conduct as old Section 48-101 did. Section 48-102 was patterned after Section 2 of the Sherman Antitrust Act. It prohibits people from monopolizing, or attempting to monopolize, or combining or conspiring with others to monopolize any part of

Code § 48-103. The federal law that does bear the closest resemblance to old Idaho Code § 48-103 is Section 6 of the Sherman Act, codified at 15 U.S.C. § 6. No federal decision has limited Section 6 to direct purchaser damages. In short, there is no support in federal or state law to conclude that Idaho law precludes the State of Idaho from recovering all damages suffered as a result of Aventis' illegal conduct, including damages suffered by indirect purchasers.

2. Nevada

a. Nevada Law Does Not Prohibit Applying Its Amended Provisions Relating To Indirect Purchaser Claims

The legislative history of the 1999 amendment to the Nevada antitrust statute makes it unambiguously clear that the amendment merely clarified the scope of the Attorney General's authority. In particular, Nev. Rev. Stat. 598A.160 was amended effective October 1, 1999, to add the language "direct and indirect" purchasers.[29]

In Nevada, statutes which are remedial in nature may be read to operate retrospectively. See *Castillo v. State*, 874 P.2d 1252, 1257 (Nevada 1994), overruled on other grounds in *Wood v. State,* 892 P.2d 944 (Nevada 1995) ([A]n amendment is considered remedial only if it clarifies or technically corrects an ambiguous statute (citation omitted) .

There is no Nevada Supreme Court opinion construing the Nevada Antitrust statute to apply only direct purchasers. Thus, there is no contrary Nevada Supreme Court Authority

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trade or commerce. Present Idaho Code § 48-105 governs the same conduct as old Section 48-102 did.

[29]In the legislative history to Nev. Rev. Stat. 598A.160, a legislative staff member stated the amendment was necessary to clarify that the Attorney General had the right to seek damages on behalf of direct and indirect purchasers as a result of a violation of Nevada's Unfair Trade Practices Act (hereinafter, "UTPA") (emphasis added). *Hearing on A.B. 108 Before the*

prohibiting recovery by indirect purchases under the Nevada antitrust statute, even prior to its amendment.

Defendants' use of Nevada district court cases[30] in their Motions to Dismiss is unhelpful to their argument. Pursuant to Nevada Supreme Court Rule 123, defendants are prohibited from citing to unpublished opinions. An opinion of a state district court is an unpublished opinion. *State of Nevada* v. *Weber,* 676 P.2d 1318, 1319 (Nevada 1984).

In any event, even if the two cases referred to by the Defendants could be cited, they would not be instructive because their respective rulings are contradictory. The *Pooler* case stated that indirect purchasers had standing to sue for conduct occurring prior to the October 1, 1999 amendment. Judge Adams said the statute, prior to the amendments, "unambiguously" allowed an injured person to sue whether the injury was direct or indirect. However, the *Krotz* case found there was no cause of action for an indirect purchaser until Nev. Rev. Stat. 587A.160 was amended in 1999. Since the Nevada Supreme Court does not recognize state district court opinions as valid authority, these two case cited by defendants must be disregarded.

b. Retroactive Application Does Not Increase The Defendants Liability

The fact that the damages caused by Aventis may require apportionment does not increase Aventis's liability. Under Nevada law, Aventis's conduct was illegal before the amendment and was illegal after the amendment. Thus, the amendment created no new offense or liability. In Nevada, where a law merely changed the manner of collection of taxes, but did not impose any new taxes, application of the law was not found to be impermissibly retroactive

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Assembly Committee on Commerce and Labor, 1999 Legislative Session (February 22, 1999), p. 5.

[30]*Pooler v. R.J. Reynolds Tobacco Co.,* Nevada Second Judicial District Court, County of Washoe. Case No. CV00-02674 (Filed April 4, 2001); *Krotz v. Microsoft Corp.,* Nevada Eighth

and was not held to be unconstitutional. *State of Nevada v. The Manhattan Silver Mining Co.*, 1868 WL 1982; Nev. Lexis 42, *17-18 (Nevada 1868) ("...even though the act...[is]... to some extent retroactive....[it] does not come within the class of acts commonly called retroactive. It was an act to affect the mode of collecting taxes for the year within which it was passed. It undid nothing. It annulled no former act except the county assessment. It only required that the assessments thereafter to be made should be made in a different manner from what they had heretofore been made....")

c. Nevada Law Did Not Deny Indirect Purchasers A Recovery Prior To Its Amendment

Defendants had no valid indirect purchaser defense to antitrust actions in Nevada prior to October 1, 1999. They cannot now expect the amendment to afford them a valid defense. In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the United States Supreme Court ruled that where a statute, "contains no express command [regarding events occurring prior to enactment], the court must determine whether the new statute would have retroactive effect, i.e. whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Id.* at 262.

The Nevada Supreme Court echoed this viewpoint in *County of Clark v. Roosevelt Title Ins. Co.*, 396 P.2d 844, 846 (Nevada 1964). In that case, the court stated that retroactive application is allowed where to do so would not impair or destroy contracts, disturb vested rights or create new obligations. In Nevada, the Attorney General has had the authority to sue for antitrust violations on behalf of the public at large since 1975 pursuant to Nev. Rev. Stat.

Judicial District Court, County of Clark, Case No. A416361 (Filed June 23, 2000).

598A.160, and since 1989 pursuant to Nev. Rev. Stat. 598A.070. During the time period 1975 to October 1, 1999, it was illegal for defendants to price-fix in Nevada, and the Attorney General could have sued them on the behalf of the public at large for this. Because Defendants were open to suit by the Attorney General for their conduct both before and after October 1, 1999, their liability for past conduct was not increased and no new duties were imposed on them. Further, because Defendants did not have the right to price-fix in Nevada prior to October 1, 1999, the clarifying amendment did not take any rights away from them.

3. New York

To the extent that retroactivity is an issue, §340 (6) may properly be so applied. Under New York Law, remedial legislation or statutes governing procedural matters should be applied retroactively to the extent that they do not impair vested rights. *See*, N.Y. Statues Law § 54 (McKinney). Further, remedial amendments should be liberally construed. See, *Asman v Amback* 478 N.E. 2d 182, 184 (N.Y. 1985), ("where the amended law is procedural and remedial in nature it should be liberally construed to spread its beneficial effects as widely as possible").

Section 340(6) is remedial in nature, enacted to remedy what was perceived to be a "technical defect" in the Donnelly Act and to overcome decision in *Levine* v. *Abbott Laboratories et al.*, No 117320/95 (N.Y. Sup. St. 1996), which denied indirect purchasers a remedy under the Donnelly Act.[31] Following the decision in *Levine*, the Legislature moved to

[31] *See*, Assembly Debate Transcripts, 1998 Chapter 653, at 35 - 37.

clarify that indirect purchasers were entitled to damages under the Donnelly Act.[32] Significantly, § 340(6) provides that indirect purchasers, or sellers, status "shall not bar or otherwise limit recovery." The statute does not expressly authorize indirect purchasers (or sellers) to sue because, in the Legislatures' view, they already had a right of action, which *Levine* erroneously blocked.

Equally important, in deciding whether the legislature intended a statute to be applied retroactively, an over-arching consideration is fairness. *See* 2 Norman J. Singer, *Statutes and Statutory Construction* §§ 41:2 at 375-78, 41:4 at 396-97, 41:5 at 412 (6th ed. 2001). Thus, if a law changes settled expectations or justifiable reliance, these conditions militate against retroactive application. *Id.* at § 41:5 at 416-23. By contrast, "in the absence of prejudicial change of position in reliance on the old law there is nothing unfair about applying the new law." *Id.* at § 41:5 at 418; S*ee Id.* at 417-18 (retroactive application was appropriate where change in law had no adverse economic impact on litigant).

In our case, retroactive application of § 340(6) does not prejudice defendants. Their damage exposure for violation of the Donnelly Act is no different after enactment of the indirect purchaser amendment than it was before the law was passed. All that the law does is *re-apportion* that liability exposure between direct and indirect purchasers. Whereas before §340(6) was passed, defendants were liable (on their theory) only to persons who purchased directly from them, upon enactment of the 1998 amendment the liability otherwise owed to direct purchasers may be spread among all those injured by defendants' anticompetitive conduct.

[32]It is the view of the Attorney General that the enactment of section 340(6) clarified the existing right of indirect purchasers to recover under the Donnelly Act, and that the decision in Levine was incorrectly decided.

The amendment itself spreads defendants' pre-existing liability exposure by directing the court to apportion damages between direct and indirect purchasers to avoid imposing multiple liability.

Although no appellate decision has ruled on the retroactive application of § 340(6) of the Donnelly Act, the Defendants rely on two trial court decisions (both private actions in which the Attorney General was not a party) to support their argument. *In Re Vitamins Antitrust Litigation,* cited by defendant Andrx (indeed parts of Andrx's brief are copied directly from that decision) is not on point, however, because the actions there were commenced in March 1998 - many months *before* § 340(6) was enacted. In *Lennon* v. *Phillip Morris,* No. 102396/2000, slip op at 13-14 (N.Y. Sup Ct. Oct 9, 2001) the court, in a cryptic passage of obiter dicta, stated that "plaintiffs allegations are limited to those events which occurred within the four-year statute of limitation under GBL 340(5)." The Court also cited *Majewski* for the proposition that "a remedial statute, for statute of limitations purposes, is one that creates no new right of action or increases a defendant's exposure to liability." The court then concluded that "the statute of limitations cannot be retroactively applied." This confusing decision incorrectly states the holding in *Majewski,* and should not be read as deciding that § 340(6) applies only to cases where the claim accrues after the statute took effect. In any event, neither decision binds this Court. For the reasons set forth above, Defendants' retroactivity argument is unsound and should be rejected.

C. Even If The Amendment Were Not Applied Retroactively, It Should Apply From The Amendments Effective Dates

Contrary to Defendants' assertions, they did not commit just one unlawful act, frozen in time, but rather, a series of unlawful acts pursuant to their unlawful contract, combination and conspiracy, some of which occurred after the statutory effective dates of the amendments. A

conspiracy that is a continuing offense is renewed each day of its continuance. *United States* v. *New York Great Atlantic & Pacific Teac Co., Inc.*, 137 F.2d 459, 463 (5th Cir. 1943), *cert. denied* 320 U.S. 783 (*quoting United States* v. *Borden Co.*, 308 U.S. 188, (1939)). Indeed, Federal Courts have held that the statute of limitations commences with the last overt act in furtherance of the illegal conduct. *See, Northern Ky. Bell Telephone Co* v. *Southern Bell Telephone & Telegraph Co.*, 73 F.2d. 333 (6th Cir. 1934). Pursuant to Defendants' September 24, 1997 agreement, the purpose of which was to forestall Andrx's entry into the generic market, Aventis made a number of payments to Andrx beginning on July 8, 1998 and continuing until the unlawful agreement was terminated in June 1999. (*See* Second Amended Complaint ¶¶ 3, 53-56.) In July 1999, Purepac, another competitor, entered into an agreement with Aventis so that it could sell its generic alternative. See Complaint ¶ 62. During October of 1999, Biovail, another competitor, was prevented from selling its generic alternative due to Andrx. (*See*, Complaint ¶ 63.) Finally, Andrx's exclusivity period did not end until December 1999, causing the cost of generic alternatives to Cardizem CD to be artificially inflated through that time and thereafter. (*See* Complaint ¶61.) Only since all three generics entered the market did the price of generic alternatives begin to fall to a post-illegal action equilibrium price.

The combination and conspiracy to artificially inflate prices existed until at least the end of 1999. Each time a sale was made subject to artificially inflated prices, a new antitrust violation occurred. A new cause of action arises each time a defendant commits an act injuring plaintiffs *Imperial Point Colonnades Condominium Inc.* v. *Mangurian,* 549 F.2d 1029, 1043 (5th Cir. 1977), *cert. denied sub. nom., Mangurian* v. *Thompson*, 434 U.S. 859. Because each day of the existence of this combination and conspiracy between the Defendants brought about a renewal of the offense, a renewal of States' right to sue the Defendants arose each day that the

combination and conspiracy existed. Therefore, each State's right to sue for this conduct under their respective laws existed both before and after the dates the statutory amendments took effect. Where a defendant can arbitrarily and unilaterally continue to engage in acts under a contract violating the antitrust law, the acts following execution amount to overt acts in furtherance of an antitrust conspiracy, even if execution of the contract occurred in a pre-limitations period. See, *Mangurian*, 549 F.2d at 1042.

If, as the Defendants contend, the amendments were not applied to damages incurred after their effective dates, where the cause of action accrued prior to those dates, that would have the perverse effect of shielding Defendants from indirect purchaser actions indefinitely simply because, fortuitously, their anti-competitive behavior began before the date of amendment[21]. No sound reason exists for such a result. Defendants' illegal conduct extended from 1997 through 1999 - operative acts, including Aventis' payment of monies pursuant to the illegal agreement - took place after the effective dates of the statutory amendments, in furtherance of the illegal arrangement and in continuing violation of the statutes. Accordingly, defendants' post-effective date conduct is not insulated from liability.

IX. UNILATERAL CONDUCT

Defendant Aventis argues that the State law claims in New York, California, Nevada and Kansas should be dismissed because unilateral conduct is not prohibited under these statutes. Aventis' arguments are unsound and unsupported by legal authority or the facts of the case

[2] *In Re Vitamins*, *supra*, the court dismissed claims for damages for indirect purchases prior to December 23, 1998, but the court did not rule that claims relating to sales after December 23, 1998 should be dismissed. In *Lennon, supra,* the court indicated that acts in furtherance of the conspiracy which postdated the amendment *would* be actionable and damages recoverable.

A. New York

Aventis's acts of monopolization were not unilateral. Aventis's long running campaign to extend its monopoly involved arrangements and agreements, or attempted arrangements or agreements, between numerous parties. *See,* Complaint § IV.

Aventis's conduct clearly falls within the purview of the Donnelly Act, which declares unlawful "[e]very contract, agreement, arrangement, or combination whereby a *monopoly* may be established or maintained, or whereby competition or the free exercise of any activity is or may be restrained." Donnelly Act § 340 (emphasis added).

Claims for monopolization and attempted monopolization have been upheld in actions under the Donnelly Act. *See, Columbia Gas of New York* v *New York State Electric & Gas Corporation,* 268 N.E. 2d 790 (N.Y. 1971), (the Court of Appeals upheld a claim that the defendant abused its "monopolistic position" in the relevant market by, among other means, a tying agreement).

Aventis's reliance on *State v. Mobil Oil Corp.,* 344 N.E.2d 357 (1976) is misplaced. There, the court held only that the Donnelly Act did not apply to unilateral price discrimination because such single-firm conduct is not covered by the Sherman Act, on which the Donnelly Act is modeled. *Id.* at 463.

Aventis' unlawful attempt to maintain and extend its monopoly of Cardizem CD involved a series of agreements or arrangements, or attempted agreements or arrangements, on the part of Aventis and other parties. This is precisely the type of conduct that the Donnelly Act renders unlawful.

B. California

Aventis attempts to dismiss California's unilateral conduct claims by rather frivolously asserting that California antitrust law simply does not address unilateral conduct. Aventis erroneously suggests that California's claims should be dismissed because what Aventis terms "the" State's antitrust statute -- the Cartwright Act -- contains no provision "comparable or analogous to Section 2 of the Sherman Act."

On the contrary, the Cartwright Act, in fact, is one of the state's antitrust statutes. But as States' complaint and its Andrx interrogatory answers explain, California has brought suit under both the Cartwright Act *and* the Unfair Competition Law. See Cal. Bus. & Prof. Code §§16720 *et seq.* (the Cartwright Act); Cal. Bus. & Prof. Code §§17200 *et seq.* (the Unfair Competition Law). As the California Supreme Court made abundantly clear in its 1999 *Cel-Tech* decision, the scope of the antitrust prohibitions contained within the State's Unfair Competition Law is comparable to that of Section 5 of the Clayton Act (15 U.S.C. §45(a)), whose coverage is actually broader than that of Sherman Act section 2). *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 973 P.2d 527 (Cal. 1999); *See, also Fashion Originators' Guild of Am.* v. *FTC*, 312 U.S. 457, 467 (1941).

Section 17200 of the Unfair Competition Law prohibits "unfair competition," which includes "any unlawful, unfair or fraudulent business act or practice." This "sweeping" statute governs "anti-competitive business practices" as well as injuries to consumers, and one of its major purposes is "the preservation of fair business competition." *Barquis v. Merchants Collection Assn*, 496 P.2d 817, 828, 830-31 (Cal. 1972). At one time, the statute did not prohibit restraints of trade that were limited to only a "single act," such as the Texaco-Getty merger challenged in 1988. *State of California v. Texaco, Inc.*, 762 P.2d 385 (Cal. 1988). In 1992,

however, the Legislature eliminated that loophole by broadening the scope of prohibited conduct from "practice" to "business *act* or practice," thereby conforming the antitrust scope of the statute to that of the "parallel" section 5 of the Clayton Act. *See Barquis*, 7 Cal.3d 94 at 110; *Cel-Tech*, 20 Cal.4th 163, 185; *Cel-Tech*, 20 Cal.4th 163 at 195 (Kennard, J., concurring and dissenting).

Any remaining doubt that Section 17200 prohibits unilateral anticompetitive conduct was eliminated by the state Supreme Court's decision in *Cel-Tech, supra*. To provide a more precise and predictable standard, the Court broadly ruled there that the jurisprudence governing section 5 of the FTC Act, which encompasses sections 1 and 2 of the Sherman Act, was also "relevant" to section 17200. *Cel-Tech*, 20 Cal.4th at 186. In particular, the Supreme Court ruled as actionable plaintiff's claim -- which it described as "an action by a competitor alleging anticompetitive practices" -- that the defendant unfairly competed by "cross-subsidizing" its telephone below-cost sales with profits from its cellular operations. *Cel-Tech*, 20 Cal.4th at 187 n.12. And, consistent with its general directive, the Court cited *Atlantic Richfield Co. v. USA Petroleum Co*, 495 U.S. 328 (1990), a leading section 2 predatory pricing case, to help the trial court determine whether, in fact, the "below-cost sales of this case are unfair." Cel-Tech, 20 Cal.4th 189.

That Aventis would bring this motion is remarkable, given that its position is completely undercut by the *Terazosin* decision upon which it relies so heavily in other parts of its brief. *See In re Terazosin Hydrochloride Antitrust Litig.*, 160 F. Supp. 2d 1365 (S.D.Fla. 2001). Not surprisingly, Aventis fails to discuss or even cite *Terazosin* in its discussion of California's unilateral conduct claim. In *Terazosin*, as here, the plaintiffs' complaint included a claim for monopolization of a prescription drug market, which the defendant argued was insufficient because the Cartwright Act does not proscribe unilateral conduct. Citing *Cel-Tech*, the court

properly denied the motion to dismiss because the broad scope of section 17200 includes acts of monopolization. The same result is warranted here.

C. Nevada

As described in New York's section above, Aventis' monopolistic conduct involved a series of unlawful contracts, conspiracies and combinations. Thus, Defendants' argument that Nevada's statute does not prohibit unilateral unlawful conduct is irrelevant and merely an attempt at obfuscation of the issues.

In any event, Nevada's antitrust law bars unilateral conduct during the time period of defendants' illegal acts. Nev. Rev. Stat. 598A.060 defines what types of conduct are unlawful contracts, combinations or conspiracies. This statute differs significantly from the Sherman Antitrust Act. Prior to 2001, Nevada's state law barred illegal "contracts, combinations or conspiracies in restraint of trade," including under this heading "any part of such activity," and listing types of illegal activity. Some of these enumerated actions could be conducted by one entity acting alone.[33] The definition of unlawful contract, combination or conspiracy was further distinguished from the Sherman Act in 2001 when this list was amended adding monopolization of trade[34] and mergers to monopoly.[35] Both of these acts can be performed unilaterally, as reflected in the legislative history of the 2001 amendment.[36] Finally, by barring "any part" of an

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[33]Nev. Rev. Stat. 598A.060 stated that every activity enumerated in that section constituted a contract, combination or conspiracy in restraint of trade. The enumerated acts lists ten types of "agreements" and four types of conduct which can be conducted unilaterally, including establishment of uniform cost surveys, establishment of minimum markup percentages, establishment of single or multiple basing point systems for determining the delivered price of commodities, and bid rigging. Nev. Rev. Stat. 598A.060(g)-(i) and (l).

[34] Nev. Rev. Stat. 598A.060(e)

[35] Nev. Rev. Stat. 598A.060(f).

[36]The 2001 amendments to Nev. Rev. Stat. 598A.160 clarified state law concerning the provisions paralleling the Clayton and Sherman Act. Also, the discussions indicated that

illegal contract, combination or conspiracy, not only did the Nevada statute bar illegal concerted action, but it also barred illegal unilateral actions.

Aventis's citation to *Carlton v. Manuel*, 187 P.2d 558 (Nev. 1947) to support their argument is not persuasive. Rather than stating that unilateral conduct is not actionable in Nevada, *Carlton* states that an action for price-fixing of labor could not be brought at common law. *Id.* at 579. However *Carlton* implies that actions for unilateral acts including unlawful monopolies or restraints of trade involving goods were *illegal* in Nevada at common law. Therefore, defendants' citation to this case to show that their conduct was *legal* is misplaced.

D. Kansas

In attacking the ability of the Kansas Attorney General to pursue unilateral actions against Aventis and its subsidiaries, Defendant Aventis misconstrues the facts of the case presented by the States. As outlined in New York's section above, Aventis engaged in a series of agreements, combinations and arrangements in breach of the antitrust laws. This conduct showed the intent of HMRI (either alone or through its parent company) to maintain its monopoly of this market through illegal means in violation of Kansas' Restraint of Trade Act.

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unilateral actions of a single airline to manipulate price were covered by the bill. *Hearing on A.B. 152, Before the Senate Committee on Commerce and Labor*, 2001 Legislative Session (May 2, 2001).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
CASE NO. 99-MD-1278

CORRECTED PROOF OF SERVICE

Elwood S. Simon, Esq.
Elwood S. Simon & Associates
355 South Old Woodward Ave., Suite 250
Birmingham, MI 48009

Stephen Lowey, Esq.
Lowey Dannenberg Bemporad & Selinger
The Gateway, 11th Floor
One North Lexington Avenue
White Plains, NY 10601-1714

Joseph T. Tabacco, Jr., Esq.
Berman Devalerio Pease & Tabacco
425 California Street, Suite 2025
San Francisco, CA 94104

Douglas H. Patton, Esq.
Dewsnup King & Olsen
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, UT 84111

Bruce E. Gerstein, Esq.
Garwin Bronzaft Gerstein & Fisher, LLP
1501 Broadway
New York, NY 10036

Louis M. Solomon, Esq.
Solomon Zauderer Ellenhorn
Frischer & Sharp
45 Rockefeller Plaza
New York, NY 10111

Stuart E. Des Roches, Esq.
Odom & Des Roches, LLP
650 Poydras St., Suite 2020
New Orleans, LA 70130

Richard B. Drubel, Esq.
Boies, Schiller & Flexner, L.L.P.
26 South Main Street
Hanover, NH 03755

Steve D. Shadowen, Esq.
Schnader Harrison Segal & Lewis LLP
30 North Third Street, Suite 700
Harrisburg, PA 17101-1713

Kathleen Harris
Bureau Chief, Antitrust Bureau
Office of the New York Attorney General
120 Broadway
New York, NY 10271-0332

Heather Stewart, Esq.
Porter Wright Morris & Arthur
1919 Pennsylvania Avenue, N.W.
Washington, DC 20006-3434

Scott E. Perwin, Esq.
Kenny Nachwalter Seymour Arnold
Critchlow & Spector PA
1100 Miami Center
201 South Biscayne Blvd.
Miami, FL 33131-4327

Norman C. Ankers, Esq.
Honigman Miller Schwartz & Cohn LLP
32270 Telegraph Road, Suite 200
Bingham Farms, MI 48025

Joseph Rebein, Esq.
Shook, Hardy & Bacon, LLP
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

CONCLUSION

For all of the foregoing reasons, the State Attorneys General respectfully submit that the Defendants' Motions to Dismiss should be denied in their entirety.

DATED this 25th day of January, 2002.

Respectfully Submitted,

JENNIFER M. GRANHOLM
ATTORNEY GENERAL
STATE OF MICHIGAN

Paul F. Novak

Paul F. Novak (P39524)
Michelle M. Rick (P45170)
Assistant Attorney General
Michigan Department of Attorney General
Consumer Protection Division
Antitrust Section
6520 Mercantile Way, Suite 3
P.O. Box 30213
Lansing, Michigan 48910
Telephone: (517) 241-2060
Facsimile: (517) 335-1935

CONCLUSION

For all of the foregoing reasons, the State Attorneys General respectfully submit that the Defendants' Motions to Dismiss should be denied in their entirety.

DATED this 25th day of January, 2002.

Respectfully Submitted,

JENNIFER M. GRANHOLM
ATTORNEY GENERAL
STATE OF MICHIGAN

Paul F. Novak (P39524)
Michelle M. Rick (P45170)
Assistant Attorney General
Michigan Department of Attorney General
Consumer Protection Division
Antitrust Section
6520 Mercantile Way, Suite 3
P.O. Box 30213
Lansing, Michigan 48910
Telephone: (517) 241-2060
Facsimile: (517) 335-1935

UNITED STATES DISTRICT COURT
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CASE NO. 99-MD-1278

CORRECTED PROOF OF SERVICE

Elwood S. Simon, Esq.
Elwood S. Simon & Associates
355 South Old Woodward Ave., Suite 250
Birmingham, MI 48009

Stephen Lowey, Esq.
Lowey Dannenberg Bemporad & Selinger
The Gateway, 11th Floor
One North Lexington Avenue
White Plains, NY 10601-1714

Joseph T. Tabacco, Jr., Esq.
Berman Devalerio Pease & Tabacco
425 California Street, Suite 2025
San Francisco, CA 94104

Douglas H. Patton, Esq.
Dewsnup King & Olsen
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, UT 84111

Bruce E. Gerstein, Esq.
Garwin Bronzaft Gerstein & Fisher, LLP
1501 Broadway
New York, NY 10036

Louis M. Solomon, Esq.
Solomon Zauderer Ellenhorn
Frischer & Sharp
45 Rockefeller Plaza
New York, NY 10111

Stuart E. Des Roches, Esq.
Odom & Des Roches, LLP
650 Poydras St., Suite 2020
New Orleans, LA 70130

Richard B. Drubel, Esq.
Boies, Schiller & Flexner, L.L.P.
26 South Main Street
Hanover, NH 03755

Steve D. Shadowen, Esq.
Schnader Harrison Segal & Lewis LLP
30 North Third Street, Suite 700
Harrisburg, PA 17101-1713

Kathleen Harris
Bureau Chief, Antitrust Bureau
Office of the New York Attorney General
120 Broadway
New York, NY 10271-0332

Heather Stewart, Esq.
Porter Wright Morris & Arthur
1919 Pennsylvania Avenue, N.W.
Washington, DC 20006-3434

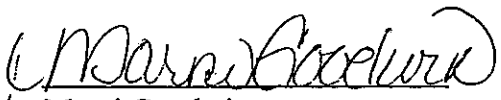
Scott E. Perwin, Esq.
Kenny Nachwalter Seymour Arnold
Critchlow & Spector PA
1100 Miami Center
201 South Biscayne Blvd.
Miami, FL 33131-4327

Norman C. Ankers, Esq.
Honigman Miller Schwartz & Cohn LLP
32270 Telegraph Road, Suite 200
Bingham Farms, MI 48025

Joseph Rebein, Esq.
Shook, Hardy & Bacon, LLP
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

CORRECTED PROOF OF SERVICE

The undersigned certifies that a copy of the State Attorneys General Brief In Opposition To Defendants Aventis And Andrx's Motion To Dismiss The State Attorneys General Second Amended Complaint was served upon the United States District Court, Louis Solomon and Joseph Rebein via UPS Overnight mail on January 25, 2002, and via first class regular mail to the remainder of counsel listed on the Proof of Service at their respective addresses with first class postage fully prepaid thereon, on January 27, 2002.



Marni Goodwin

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

April 20, 2001

Via Facsimile and First Class Mail

Richard Drubel, Esq.
Boies, Schiller & Flexner LLP
26 South Main Street
Hanover, New Hampshire 03755

Stephen Lowey, Esq.
Lowey, Dannenberg, Bemporad & Selinger, PC
The Gateway, 11th Floor
One North Lexington Avenue
White Plains, New York 10601-1714

Douglas H. Patton, Esq.
Dewsnup, King & Olsen
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Dear Messrs. Drubel, Lowey, and Patton:

You have sent us a number of court filings in *In re Cardizem CD Antitrust Litigation* in which counsel for Aventis Pharmaceuticals, Inc., Andrx Corporation, and various *amicus curiae*, cite to the Federal Trade Commission's recent proposed settlement with Aventis and Andrx generally – and the Commission's Analysis to Aid Public Comment in particular – and represent, among other things, that:

- the FTC has "determined" that the agreement between Aventis and Andrx "had no actual anticompetitive effects";
- the FTC's order "does not prohibit the conduct challenged in [*In re Cardizem CD Antitrust Litigation*]"; and
- "the FTC itself has stated that a Rule of Reason approach is appropriate . . . specifically in the context of the [Aventis/Andrx agreement] at issue here."

Let me set the record straight. First, neither the Commission nor the administrative law judge hearing the FTC's complaint against Aventis and Andrx made any findings, determinations, or

Jan-25-2002 02:57pm From-Lowey Dannenberg 914 997 0208 T-870 P.002/003 F-602

other conclusions of fact or law in this matter. The proposed settlement was entered into prior to trial and the taking of evidence, and the Commission's Analysis to Aid Public Comment must be understood in this context. Moreover, as is set forth in the last paragraph of the Analysis to Aid Public Comment:

> The purpose of this analysis is to facilitate public comment on the agreement. It is not intended to constitute an official interpretation of the agreement, the complaint, or the proposed consent order, or to modify their terms in any way.

Second, while the Commission's order only prohibits future conduct by Aventis and Andrx (because the agreement challenged in the complaint had been terminated), as the Analysis to Aid Public Comment also states: "By accepting the proposed order subject to final approval, the Commission anticipates that the competitive issues alleged in the complaint will be addressed."

Third, the Commission has never stated one way or the other whether a *per se* analysis or a rule of reason approach is appropriate in the context of the agreement between Aventis and Andrx. I would, however, note that complaint counsel prosecuting the matter before the administrative law judge at the FTC alleged in their Statement of the Case, filed on September 13, 2000, that:

> Complaint counsel could well rely solely on the facts presented to, and the law found by, the federal district court [in *In re Cardizem Antitrust Litigation*, 105 F. Supp. 2d 682, 685 (E.D. Mich. 2000)], but we intend to prove not only that the agreement between [Aventis] and Andrx to collusively decide when to start competing is illegal *per se*, but that it also constitutes: (1) an unreasonable restraint of trade under the rule of reason; (2) a conspiracy to monopolize; (3) an attempt to monopolize; and (4) an unfair method of competition.

Should you have any questions about this letter, I can be reached at (202) 326-3688.

Sincerely,

Richard A. Feinstein
Assistant Director

cc: Louis M. Solomon, Esq.
James M. Spears, Esq.

B

APPENDIX B

STATE SPECIFIC CITATIONS AND DISCUSSION OF RELEVANT CASES

In Sections I and II of the Attorneys General Brief, the States have addressed, in general terms, the merits of Defendants' *parens patriae* and *Illinois Brick* arguments. Set forth below are more state specific responses to address these, and other, issues raised by the Defendants as to certain states.

1. Alaska.
2. Arkansas.
3. Arizona.
4. Connecticut.
5. District of Columbia.
6. Idaho.
7. Indiana.
8. Iowa.
9. Kansas.
10. Maine.
11. Michigan.
12. Minnesota.
13. Nevada.
14. New Mexico.
15. New York.
16. North Carolina.
17. North Dakota.
18. Oklahoma.
19. Puerto Rico.
20. Rhode Island.
21. South Carolina.
22. Utah.
23. Vermont.
24. Washington.
25. West Virginia.
26. Wisconsin.
27. Wyoming.

1. Alaska

The Alaska Attorney General is empowered to bring this action in a *parens patriae* capacity based on Alaska Stat. 45.50.501(a). That statute provides "[w]hen the attorney general has reason to believe that a person has used 'an act or practice declared unlawful in Alaska Stat. 45.50.471 the attorney general may bring an action in the name of the state against the person to restrain the act or practice." In addition, the Alaska Supreme Court recognizes the State may bring suit even in the absence of express statutory authority. *State of Alaska* v. *First National Bank of Anchorage,* 660 P.2d 406, 421 (Alaska 1982).

Authority for an action seeking restitution in Alaska is found in two statutes: Alaska Stat. 45.50.580(b) (Alaska's Restraint of Trade Act), and Alaska Stat. 45.50.501(b) (Alaska's Unfair Trade Practices and Consumer Protection Act.). Both statutes provide that "[t]he court may make additional orders or judgments as may be necessary to restore to a person in interest any money or property...that may have been acquired by an act prohibited by [Alaska Stat. 45.50.562 through 45.50.596 and Alaska Stat. 45.50.471]." These statutes places no restrictions on the type of recovery a court can award to remedy the effects of the wrongful conduct.

The state of Alaska may also seek restitution based on common law authority. Looking to *Porter* v. *Warner Holding Co.,* 328 U.S. 395 (1946), the Alaska Supreme Court held a trial court has the inherent power to order restitution in actions brought by the State under a designated statutory authority, emphasizing that nothing in the Act or

legislative history suggest the legislature intended to restrict the court's traditional equity powers when properly invoked. *First Nat. Bank of Anchorage, supra at* 416.

2. Arkansas

The state of Arkansas' *parens patriae* authority has long been recognized in the case law, "based on the theory that the public has an interest to be protected." *State of Arkansas ex rel.* v. *Snow*, 324 S.W.2d 532, 534 (1959).

Arkansas does not seek recovery pursuant to the terms of its state antitrust laws. It has alleged that the Defendants' conduct violates the provisions of its Deceptive Trade Practices Act, Ark. Code Ann. §4-88-101 *et seq*. Accordingly, *Illinois Brick* is inapplicable to Arkansas.

Defendants argue that the provisions of the Arkansas Deceptive Trade Practices Act should not be interpreted to apply to the conduct at issue because the claims pled are "classic antitrust violations." This position contradicts the most recent state court interpretation of the Arkansas Deceptive Trade Practices Act. See *State* v. *R&A Investment Co, Inc.*, 985 S.W.2d 299 (1999). In that case, the Arkansas Supreme Court upheld the use of the Act to prohibit usurious contract transactions. The Court recognized the purpose of the legislation as that of protecting the interests of both the consumer public and the legitimate business community. It also acknowledged that the Arkansas Deceptive Trade Practices Act is remedial legislation and as such, should be given liberal construction. In response to the argument that the provision of the Act prohibiting "any other unconscionable, false, deceptive act or practice" was too vague for enforcement, the Court stated, "This catch-all provision was, no doubt, included because the General Assembly could not be expected to envision every conceivable violation under the DTPA [Deceptive Trade Practices Act]." *Id.* Applying the terms of the statute in accordance with the intent of the legislature and the interpretation of the Arkansas

Supreme Court, the instant Defendants' actions constitute unconscionable trade practices in violation of the Arkansas Deceptive Trade Practices Act.

3. Arizona

Arizona law specifically authorizes the Arizona Attorney General to bring an action in the name of the State whenever there has been a violation of the Arizona Uniform State Antitrust Act, Ariz. Rev. Stat. § 44-1401 *et seq.* (the "AUSAA"):

> "The attorney general . . . may bring an action for appropriate injunctive or other equitable relief and civil penalties and as determined by the court, taxable costs, such other fees and expenses reasonably incurred and reasonable attorneys fees, in the name of the state for a violation of this article. The court may assess for the benefit of the state a civil penalty of not more than one hundred fifty thousand dollars for each violation of this article."

Ariz. Rev. Stat. § 44-1407. Thus, regardless of whether the claimed purchases were direct or indirect, and wholly independent of all common law doctrines, the Arizona Attorney General is statutorily authorized to pursue this action for violations of the AUSAA, and specifically may seek, among other things, "injunctive" relief, "other equitable relief," "civil penalties" of up to $150,000 per violation, "taxable costs," "other fees and expenses reasonably incurred" and "reasonable attorneys fees." *Id.* In addition, the State is separately authorized to bring suit under the AUSAA for injunctive and equitable relief, and its own damages, costs and attorneys' fees whenever the state or its political subdivisions, such as the Arizona Health Care Cost Containment System, have been injured by violations of the AUSAA. Ariz. Rev. Stat. § 44-1408(A).

The State of Arizona also has common law *parens patriae* authority to act for the benefit of its citizens. *See In Re Maricopa Co.* Cause No. MH-90-00566, 840 P.2d 1042, 1047 (Ariz. Ct. App. 1992) ("state is vested with *parens patriae* power" and "[t]he state clearly has a legitimate interest in protecting its citizens from harm")-(citation omitted).

As such, courts have long recognized the Arizona Attorney General's specific right to bring antitrust actions as *parens patriae* for Arizona consumers. *See In re Insurance Antitrust Litigation*, 938 F.2d 919, 927 (9th Cir. 1991) (reversing the dismissal of Arizona's and other states' claims and holding that "the state's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction"); *Standard Oil Co. of California* v. *Arizona, et al.*, 738 F.2d 1021, 1022, 1030-31 (9th Cir. 1984). Thus, even to the extent Arizona is suing under its *parens patriae* authority (as opposed to its explicit statutory authority), its action in this case is plainly allowed by law.

With respect to indirect purchaser recovery, although Arizona Superior Courts have recently split on this issue and it is pending before the Arizona Court of Appeals,[1] a unique clause in the Arizona constitution appears to favor indirect purchaser claims. Ariz. Const. art. XIV, § 15 specifically prohibits any company or association of persons from "directly or indirectly" combining or contracting to engage in a variety of anticompetitive activities, including price-fixing. The Clause instructs the legislature to "enact laws for the enforcement of this Section by adequate penalties," including a forfeiture of a corporate franchise if necessary. *Id.* At a minimum, this explicit

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[1] *Compare Microsoft Corp.* v. *Charles Friedman, P.C.*, CV 2000 000722 (Super. Ct. Maricopa Co. November 14, 2000) (denying defendants' motion to dismiss on *Illinois Brick* grounds), and *McLaughlin* v. *Abbott Labs*, CV95-0628 (Super. Ct. Yavapai Co.1996) (same), *with Grey* v. *Philip Morris*, CV2000 0781 (Super. Ct. Pima Co. February 28, 2001) (granting such a motion), and *Bunker's Glass Co.* v. *Pilkington, et al.*, CV2000-02282 (Super. Ct. Maricopa Co. November 8, 2000) (same). The issue is currently before the Arizona Court of Appeals in *Bunker's Glass Company* v. *Pilkington, et al.*, 1 CA-CV 01-0046, with the parties having completed both briefing and oral argument. The Arizona Attorney General (the primary state authority charged with enforcing the AUSAA) has filed an amicus curiae brief in that case in support of indirect purchaser recovery.

prohibition on both direct and indirect anticompetitive behavior is more consistent with allowing indirect purchaser recovery than disallowing it. Indeed, it would be incongruous for the law to explicitly prohibit indirect anticompetitive behavior, require that statutes articulating the prohibition be enforced by adequate penalties, but then allow those statutes to be interpreted so as to bar recovery by the victims of indirect anticompetitive conduct.[2]

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[2]This is particularly true because there is nothing in the AUSAA that explicitly prohibits indirect purchaser recovery and nothing in its legislative history to suggest that the legislature intended to disturb the then-existing federal law in the Ninth Circuit (where Arizona sits) that allowed indirect purchaser recovery prior to *Illinois Brick*. *See In Rre Western Liquid Asphalt Cases*, 784 F.2d 191 (9th Cir. 1973) (allowing indirect purchaser recovery just one year prior to the enactment of the AUSAA).

4. Connecticut

Defendants Andrx and Aventis have raised a number of grounds to dismiss Connecticut's claims. As discussed herein, all are without merit.

Andrx has claimed that the Attorney General is not authorized by statute to bring an action for damages as *parens patriae* under the Connecticut Unfair Trade Practices Act (CUTPA), Conn. Gen. Stat. §42-110a *et seq.* The short answer to Andrx's claim is that an action by the State under Conn. Gen. Stat. §42-110m, although similar, is not a *parens patriae* action. Neither is such action one for damages.[3] An action under Conn. Gen. Stat. §42-110m is an action brought by the state in its sovereign capacity. *State* v. *Mobilia, Inc.* 1983 WL 14950 (Conn. Super. Ct. 1983). The monetary relief authorized is not damages, but rather the equitable relief of restitution and disgorgement.[4]

Andrx asserts that Connecticut's claim for damages under Conn. Gen. Stat. §42-110m should be dismissed because such relief is not authorized by statute. Initially as discussed above, Conn. Gen. Stat. §42-110m does not authorize damages. Rather, it authorizes, *inter-alia*, orders "temporarily or permanently restraining and enjoining" a

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[3]Conn. Gen. Stat. § 42-110m(a) provides: "Whenever the commissioner has reason to believe that any person has been engaged or is engaged in an alleged violation of any provision of this chapter said commissioner may proceed as provided in sections 42-110d and 42-110e or may request the Attorney General to apply in the name of the state of Connecticut to the Superior Court for an order temporarily or permanently restraining and enjoining the continuance of such act or acts or for an order directing restitution and the appointment of a receiver in appropriate instances, or both. Proof of public interest or public injury shall not be required in any action brought pursuant to section 42-110d, section 42-110e or this section. The court may award the relief applied for or so much as it may deem proper including reasonable attorney's fees, accounting and such other relief as may be granted in equity. In such action the commissioner shall be responsible for all necessary investigative support."

[4]Under Conn. Gen. Stat. §42-110m, Connecticut is seeking restitution for natural person consumers and its Medicaid agency and disgorgement. It is noted that Connecticut is also seeking injunctive relief under this statutory section.

defendant's misconduct, "an order directing restitution," and "such other relief as may be granted in equity." The broad equitable authority granted includes disgorgement. *See e.g. Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *FTC* v. *Febre*, 128 F.3d 530, 537 (7th Cir. 1997); *FTC* v. *Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25, 36-37 (D.D.C. 1999). Thus, under Conn. Gen. Stat. § 42-110m, the state may seek, *inter alia*, injunctive relief, restitution, and disgorgement.

Andrx claims that Connecticut may not bring an action under Conn. Gen. Stat. §42-110g because such an action is available to "persons."[5] Conn. Gen. Stat. §42-110g(a) provides in applicable part: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action .... to recover actual damages ...." Conn. Gen. Stat. §42-110a (3) broadly defines "person" as follows: "'Person' means a natural person, corporation, limited liability company, trust, partnership, incorporated or unincorporated association, and *any other legal entity*." (Emphasis added) The phrase "any other legal entity" encompasses the state. *See FTC* v. *Mylan Laboratories, Inc.*, 62 F. Supp. 2d at 51 (construing similar language of South

[5]Connecticut is seeking damages pursuant to Conn. Gen. Stat. §42-110g as an additional basis of monetary recovery for its Medicaid program under CUTPA. Conn. Gen. Stat. §42-110g(a) provides: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper." It is noted that Connecticut is also seeking injunctive relief under Conn. Gen. Stat. §42-110g.

Carolina's Unfair Trade Practices Act). Accordingly, Connecticut may invoke the provisions of Conn. Gen. Stat. § 42-110g.

Demonstrating its fundamental misunderstanding of Connecticut law, Andrx erroneously argues that Connecticut may not bring an action for damages under the Connecticut Antitrust Act, Conn. Gen. Stat. §35-24 *et seq.*, claiming the Act authorizes only "proceedings to prevent and restrain".[6] Connecticut is seeking Medicaid damages in its proprietary capacity pursuant to Conn. Gen. Stat. §35-35. That statutory section unambiguously authorizes an action for damages: "The state, or any person, including, but not limited to, a consumer, injured in its business or property by any violation of the provisions of this chapter shall recover treble damages, together with a reasonable attorney's fee and costs." *See also Westport Taxi Service, Inc.* v. *Westport Transit District*, 664 A.2d 719 (1995) (an action for treble damages under Conn. Gen. Stat. §35-35). Connecticut clearly has statutory authority to seek treble damages. Statutory remedies under the Connecticut Antitrust Act are not limited to injunctive relief.

Defendant Aventis has argued that Connecticut cannot seek damages on behalf of indirect purchasers under the Connecticut Antitrust Act. The short answer to defendant's argument is that Connecticut is not seeking damages for indirect purchasers under the Connecticut Antitrust Act. As previously stated, pursuant to Conn. Gen. Stat. §35-35, the state is seeking damages for its Medicaid program. As argued in the State Attorneys General Brief, a Medicaid agency is not an indirect purchaser, but rather a direct purchaser.

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[6]It is noted that Connecticut is seeking injunctive relief under its Antitrust Act pursuant to Conn. Gen. Stat. §35-32(a) and Conn. Gen. Stat. §35-34.

Aventis has also argued that Connecticut cannot seek monetary relief under CUTPA. As stated, Connecticut is seeking, *inter-alia*, monetary relief under Conn. Gen. Stat. §42-110m for natural person consumers and its Medicaid agency and under Conn. Gen. Stat. §42-110g for its Medicaid agency. Aventis does not argue that these statutes do not provide for monetary relief for direct purchasers.

In *Federal Trade Com'n* v. *Mylan Laboratories, Inc.*, 99 F. Supp. 2d 1, 5, 6 (D.D.C. 1999), Judge Thomas F. Hogan correctly held that Conn. Gen. Stat. §42-110m authorized the state to seek restitution on behalf of indirect purchasers. Thus, even if this court were to determine that Medicaid programs are indirect purchasers, the state would be authorized under Conn. Gen. Stat. §42-110m to seek restitution under Conn. Gen. Stat. §42-110m for its Medicaid agency and for natural person consumers.

Judge Hogan's decision is supported by his reasoning that CUTPA prompts the courts to look at the FTC Act when interpreting it. *Federal Trade Com'n* v. *Mylan Laboratories, Inc.*, 99 F. Supp. 2d at 5, 6. Moreover, the issue in *Illinois Brick* was strictly a question of statutory construction of §4 of the Clayton Act, 15 U.S.C. §15. *California* v. *ARC America Corp.*, 490 U.S. 93, 102-03 (1989). Conn. Gen. Stat. §42-110m is not limited as is §4 of the Clayton Act to the party "injured in his business or property." "Courts cannot, by construction, read into statutes provisions which are not clearly stated." *Houston* v. *Warden*, 363 A.2d 121, 123 (Conn. 1975).

Aventis's reliance upon *Vacco* v. *Microsoft Corp.*, 2000 WL 1683386 (Conn. Super Ct.), appeal docketed 21362 (Conn. 2001) and *Mead* v. *Burns*, 509 A.2d 11 (Conn. 1986) is misplaced. *Vacco* dealt solely with a private action for damages under Conn. Gen. Stat. §42-110g and did not involve an action by the state seeking, *inter alia*,

equitable monetary relief under Conn. Gen. Stat. §42-110m. Moreover, *Vacco*, which is on an appeal to the Connecticut Supreme Court, was incorrectly decided, as will be discussed *infra*.[7] *Mead* has no application to Conn. Gen. Stat. §42-110m.[8] The court in *Mead* held that no CUTPA claim arose from allegations which fell short of making out a substantive violation of the Connecticut Unfair Insurance Practices Act. In this case, Aventis has not argued that a substantive violation of law has not been alleged.

As stated, as an additional basis of monetary relief for its Medicaid agency, Connecticut is seeking damages pursuant to Conn. Gen. Stat. §42-110g. Assuming *arguendo* that Medicaid programs were viewed by this court as indirect purchasers, the state could still seek damages under Conn. Gen. Stat. §42-110g which contains no direct purchaser requirement. While Conn. Gen. Stat. §42-110g as originally drafted, required a direct purchaser relationship, that impediment was removed by the legislature in 1979, Public Acts 1979 No. 79-210, Sec. 1.[9] The trial court's decision in *Vacco* ignored the statutory language and legislative history.

All of the grounds argued by Defendants to dismiss Connecticut's claims are without merit.

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[7] *Vacco* was orally argued before the Connecticut Supreme Court on November 1, 2001.

[8] *Mead* also has no application to Conn. Gen. Stat. §42-110g for the reasons discussed herein.

[9] Initially, Section 42-110g of CUTPA limited activities to "any person who purchases or leases goods or services from a seller or lessor" to maintain an action against "such seller or lessor" for violation of the Act. Public Acts 1973, No. 73-615. Indirect purchasers, therefore, lacked authority to maintain suit. In 1975, the legislature eliminated the requirement that a person "purchase or lease goods or services from a seller or lessor," Public Acts 1975 No. 75-618, Sec. 5, and in 1979 the legislature abolished the necessity that such suit be brought against "such seller or lessor," Public Acts 1979 No. 79-210, Sec. 1.

5. District of Columbia

Andrx states that the District of Columbia has made a claim for "punitive damages" that should be dismissed because such a claim "is not authorized by statute" except when the District of Columbia is proceeding "in its *parens patriae* capacity." But the District of Columbia *is* proceeding here in its *parens patriae* capacity, and, therefore, has express statutory authority to recover *treble* damages on behalf of its residents. D.C. Code, § 28-4507(b)(2001). To the extent that the District of Columbia is also seeking to recover damages for injury to the District of Columbia *government* pursuant to District of Columbia law, such recovery is limited to *single* damages. *Id.* § 28-4507(a). In this case, the entire damages recovery sought by the District of Columbia pursuant to District of Columbia law– including *treble* damages for injury to residents and *single* damages for injury to the government itself – is expressly authorized by statute.

6. Idaho

Andrx asserts that the Idaho Attorney General does not have common law *parens patriae* authority, relying upon the proposition that the Attorney General only exercises such authority as has been delegated by the Legislature. The fact is that the Idaho Legislature has expressly authorized the Attorney General to "exercise all the common law power and authority usually appertaining to the office and to discharge the other duties prescribed by law." Idaho Code § 67-1401(11). Thus, the Idaho Attorney General does have common law *parens patriae* authority.

Andrx contends that Idaho lacks specific statutory *parens* authority. Idaho law expressly authorizes the Idaho Attorney General to "bring a civil action in the name of the state, as *parens patriae* on behalf of person residing in this state, to secure monetary relief as provided under this chapter [the Idaho Competition Act, Title 48, Chapter 1, Idaho Code]." Idaho Code § 48-108(2). Thus, Idaho does have specific statutory *parens* authority.

Andrx claims that Idaho cannot seek damages or restitution in this case. Idaho Code § 48-108(1)(c) expressly authorizes the Idaho Attorney General to recover on behalf of the state and its agencies actual damages or restitution. Section § 48-108(2) also authorizes the Attorney General to "bring a civil action in the name of the state, as *parens patriae* on behalf of persons residing in this state, to secure monetary relief as provided under" the Idaho Competition Act.[10] Thus, Idaho can seek claims for damages and restitution.

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[10]Section 48-108(2)(a) requires the Court to treble any damages awarded under section 48-108(2) if the Court "finds that the violation at issue constituted a per se violation of section 48-104, Idaho Code, or an intentional violation of section 48-105, Idaho Code."

Aventis asserts that *Illinois Brick* precludes an Idaho recovery for indirect purchasers. Idaho Code § 48-108(2) expressly authorizes the Attorney General to bring a claim on behalf of Idaho residents for injuries directly or indirectly sustained by those persons because of violations of Idaho Code §§ 48-104 or 48-105. Thus, Idaho is an *Illinois Brick* repealer state.

Idaho Code § 48-108(1)(d) further authorizes the Attorney General to recover civil penalties of up to $50,000 per violation of Idaho Code §§ 48-104 and 48-105.

7. Indiana

Indiana's authority is inferred from Ind. Code 24-1-2-5, which imposes upon the Attorney General the duty to prevent and restrain antitrust violations. The statute further empowers the Attorney General with the discretion to institute civil proceedings in the name of the State or to file those proceedings upon the relation of a proper party. *Id.*

While the statute speaks only of injunctive relief, Ind. Code 24-1-2-7 allows private persons who suffer injuries in their business or property, as a result of antitrust violations, to file suit and seek treble damages, attorney's fees, and costs. Indiana law further allows the Attorney General to file antitrust cases based on complaints from consumers, while under Ind. Code 4-6-2-1, the Attorney General is required to attend to the interests of the state in all suits, actions, or claims.

The Indiana Supreme Court has recognized that, "a state may act as *parens patriae* on behalf of its citizens." *Board of Commissioners of Howard County* v. *Kokomo City Plan Commission*, 330 N.E.2d 92, 101(Ind. 1975) (citations omitted). Furthermore, the Indiana Supreme Court has previously found that the Attorney General is, "the representative of the people, who in the aggregate, constitute the state." *Parker* v. *State ex rel. Powell*, 31 N.E.1114, (Ind. 1892). It can be inferred from prior case law, that the Attorney General, as the representative of Indiana's citizens, may not only represent its citizens in civil actions, but also seek all available remedies and penalties available to those citizens in antitrust actions.

Illinois Brick does not preclude recovery by the Indiana Attorney General. First, Indiana's claim is not a duplicative action. The Attorney General has the statutory duty under Ind. Code 4-6-3-2(a) to prosecute antitrust violations on behalf of Indiana agencies

and is fulfilling his statutory mandate by prosecuting this case on behalf of Indiana's state agencies, as well as state consumers wronged by Defendants' illegal acts.

Secondly, Indiana is allowed to pursue damages on behalf of "indirect purchasers", based on Indiana law. Ind. Code 24-1-2-5 specifically authorizes the Attorney General to prevent and restrain antitrust violations. "The attorney general may file such proceedings upon his own relation or that of any private person . . . when he shall deem it his duty to do so." *Id.* Indiana law, therefore, allows the Attorney General to file suit on behalf of all persons of Indiana, including indirect purchasers.

For purposes of calculating damages, the Indiana Court of Appeals stated, "Plaintiffs must prove antitrust injury [of] 'the type of loss that the claimed violations . . . would be likely to cause.'" *City of Auburn* v. *Mavis*, 468 N.E. 2d 584, (Ind. App. 1984) (citing *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 97 S.Ct. 690, (1977) (citations omitted)). Damages in this case, including increased prices and restrained competition, are the very "type of injury which the antitrust laws intend to prevent and the type of injury which naturally flows from what makes the defendant's acts unlawful." *Auburn* v. *Mavis*, 468 N.E. 2d at 586. Indiana was ultimately injured by Defendant's conduct, therefore, Indiana, as the injured party, has legal authority to pursue these claims.

The Indiana Attorney General is allowed to seek restitution and disgorgement as appropriate remedies for Defendants' violations by inference. Indiana's Deceptive Consumer Sales Act, Ind. Code 24-5-0.5-4(c), expressly provides that the Attorney General can seek both injunctive relief and an order requiring the wrongful party (usually a supplier) to pay back all money unlawfully received from the aggrieved consumers. Additionally, under Ind. Code 24-5-0.5-4(d), the court may void or limit the application

of contracts or clauses resulting from deceptive acts and order restitution to be paid to aggrieved consumers. Under Indiana's antitrust statutes, the Attorney General may seek injunctive relief. However, restitution and disgorgement are inferred, as they are appropriate remedies in other types of cases brought by the Attorney General under the Deceptive Consumer Sales Act, Ind. Code 24-5-0.5-4(c)(2), Ind. Code 24-5-0.5-4(d).

8. Iowa

Defendants' point that *Illinois Brick* requires dismissal of Iowa's state claims is addressed in the States' Brief in Opposition to the Motions to Dismiss. Defendants' further point that the Iowa Attorney General does not have *parens patriae* authority is irrelevant, because he is proceeding in this action under statutory grants of authority in the Iowa Competition Act, Iowa Code §§ 553.7 and 553.12 and Consumer Fraud Act, Iowa Code § 714.16, subsection 7.

Iowa's claim under its consumer protection act is well pled. Aventis's final point that two elements of the cause of action are missing, i.e., (1) a transaction between a defendant and an individual purchasing goods for consumption and (2) a false representation, is incorrect. The Act specifies no particular relationship between a defendant and an injured consumer as a predicate for a violation, and a false representation is simply one of several ways the Act can be violated.

The conduct declared by the Iowa Act to be unlawful is as follows:

> "The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation ...in connection with the lease, sale, or advertisement of any merchandise ...is an unlawful practice."

Iowa Code § 714.16, subsection 2, paragraph a.

Nothing in that provision requires any particular relationship between a defendant and an injured party for the conduct to be unlawful. The requirement is that the unlawful practice take place "in connection with the sale of merchandise." In that regard, Plaintiffs have alleged that Defendants pursued their unlawful conduct for the purpose of enabling

merchandise to be sold at a price higher than it would otherwise have been sold. The agreement between Defendants was entered to increase profits by artificially raising prices, thus making the unlawful practice "in connection with" the sale of merchandise.

In further confirmation that no direct relationship is required between defendant and an injured consumer is the Act's remedial provision which gives Courts the power to

> "make orders necessary to restore to *any person in interest* any moneys or property ... which have been acquired by means of [an unlawful practice]"

Iowa Code§714.16, subsection 7. (Emphasis added)

This provision makes clear that the Act contemplates no particular relationship between injured consumers and Defendants, aside from the fact that the loss results from the conduct.

Neither does the Iowa Act require a "false or misleading representation". The quotation above describing the conduct made unlawful by the Act lists unfair practice and other forms of conduct separately from and in distinction to misrepresentation. For example, the term "unfair practice" is specifically defined in Iowa Code §714.16, subsection 1, paragraph n as "... an act ... which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces." Paragraphs 27 through 65 of the Second Amended Complaint allege a course of conduct in which one of the primary purposes is the deception of federal agencies, courts, competitors and the public for the purpose of increasing the sales price of a product, facts which closely match the definition of unfair practice recited above. Thus, such conduct is within the scope of subsection 2, paragraph a of the Iowa Act.

9. Kansas

Defendant Andrx admits in its Motion to Dismiss, that the Kansas Attorney General has specific statutory authority to "bring an action on behalf of Kansas consumers... under the Restraint of Trade Act. . . ." Andrx Motion to Dismiss § III.D. Kan. Stat Ann. § 50-103 (a)(8) (2000) specifically empowers the Attorney General "to recover actual damages on behalf of any person or persons by reason of violations of this act." The sole objection raised by Andrx to the exercise of *parens patriae* authority by Kansas under the Restraint of Trade Act is that "the statute must be merely procedural or remedial in nature" to apply retroactively to the alleged illegal conduct. If the statute is procedural, "the general rule is that all actions will be subject to the new procedure whether they accrued before or after the change in the law and whether or not a suit had been instituted." *In Re Kaul*, 4 P. 3d 1170, 1173 (Kan. 2000).

The Kansas Court of Appeals has described procedure for these purposes

> [a]s the machinery for carrying on the suit, including pleading, process, evidence, and practice, and the mode or proceeding by which a legal right is enforced, that which regulates the formal steps in an action. Substance, on the other hand, has been described as the law which gives or defines the right, the law which gives the right or denounces the wrong, and the law creating any liability against the defendant.....

Gardner v. *Gardner*, 916 P.2d 43, 46 (Kan. App. 1999) (internal quotations omitted).

The Kansas Legislature and the Governor, who proposed the Restraint of Trade Act, espoused a clear intent to make this legislation procedural, rather than substantive. In his testimony before the House Judiciary Committee, Derek Schmidt, then-legislative liaison to the Governor, stated that the Restraint of Trade Act "retains the *standards* established in current law but comprehensively rewrites, updates and modernizes other

provisions of the law now on the books." *Testimony on the Restraint of Trade Act before the Kansas House Judiciary Committee* 3 (2000) (statement of Derek Schmidt, then-legislative liaison for Kansas Governor Graves). He noted correctly that none of the substantive antitrust law was altered in any manner by the Restraint of Trade Act. Instead, these amendments to the Kansas antitrust laws provided new procedures to the Attorney General that would "make [the Kansas] 19th Century antitrust laws relevant and useful in the 21st Century economy." *Id.*

The Restraint of Trade Act, as applied in this case, merely creates new mechanisms, enabling the Attorney General to pursue preexisting causes of action on behalf of aggrieved Kansas residents. No new legal liabilities were placed upon Andrx or Aventis by virtue of this amendment. Prior to the 2000 reform of Kansas antitrust laws, Defendants Andrx and Aventis were liable for "the full consideration or sum paid by [a] person for any goods, wares, merchandise and articles included in or advanced or controlled in price" by any illegal action under this Act. Kan, Stat. Ann. § 50-115 (1994). This liability remains unaltered under the Restraint of Trade Act. *See* Kan. Stat. Ann. § 50-115 (Supp. 2000). Since the Kansas Supreme Court has determined that the creation of a new "mode of proceeding to enforce legal rights" through statutory amendment is procedural in nature, the Restrain of Trade Act, as applied in this case, should be deemed procedural as well. *In Re Kaul*, 4 P. 3d at 173 (2000).

Finally, it must be noted that Kansas has properly pled its claim under the Kansas Consumer Protection Act, since the illegal conduct in question occurred in relation to a consumer transaction as required by the statute. A consumer, for the purposes of the Act includes "an individual or sole proprietor who seeks or acquires property, or services for

personal, family, household, business or agricultural purposes." Kan. Stat. Ann. § 50-624(b) (2000). The aggrieved persons in Kansas meet this consumer standard as individuals who sought to acquire Cardizem CD or its generic equivalent for personal or business purposes. Likewise, the purchase of Cardizem CD by these persons was a consumer transaction under the terms of Kan. Stat. Ann. § 50-624(c) (2000) in that it constituted "a sale, lease assignment or other disposition for value of property or services within this state... to a consumer...." Since the Kansas Legislature desired these provisions to be construed broadly, with "the only requirement [being] that the transaction involve a 'consumer,'" (Kan. Stat. Ann. § 50-624(c) (2000) (Comment)) the sale of Cardizem CD, or its generic equivalent, to consumers by the defendants would constitute a consumer transaction under the Kansas Consumer Protection Act.

The Second Amended Complaint alleges that the defendants conspired to prevent a generic alternative to Cardizem CD from entering the market. Through these actions, the defendants illegally altered a consumer transaction, forcing those in the market for a diltiazem product to purchase Cardizem CD rather than its generic alternative. Accordingly, this illegal and unconscionable conspiracy occurred "in connection with a consumer transaction" as required to create a cause of action under the Kansas Consumer Protection Act. Kan. Stat. Ann. § 50-627(a) (2000).

10. Maine

The Maine Attorney General is fully authorized to seek monetary relief both under the Maine Unfair Trade Practices Act ("UTPA") 5 Me. Rev. Stat. Ann. § 205-A *et seq.* and under Maine's antitrust law, 10 Me. Rev. Stat. Ann. §1101 *et seq.*

First, in addition to injunctive relief and civil penalties, the Maine Unfair Trade Practices Act specifically authorizes the Attorney General to seek an order of restitution:

> [The Attorney General] may bring an action in the name of the State. . . [in which] the court may make such . . . orders or judgments as may be necessary to restore to any person . . . any moneys or property.

5 Me. Rev. Stat. Ann. § 209. Accordingly, Maine courts routinely order restitution in actions brought by the Attorney General under § 209. *See, e.g., State* v. *Bob Chambers Ford, Inc.*, 522 A.2d 362 (Me. 1987); S*ee also Mylan*, 99 F. Supp. 2d at 7 (affirming Maine Attorney General's claims for restitution under the UTPA on behalf of both direct and indirect purchasers).

Second, the Maine Attorney General has authority to seek treble damages for violations of Maine antitrust law, in addition to injunctive relief and civil penalties. Although the antitrust statute does not specifically mention monetary relief, the Maine Supreme Judicial Court has repeatedly held that the authority of the Attorney General is *not* limited to the powers set forth in statute. *In Re Maine Central R.R.*, 183 A. 844 (Me. 1936) (the Attorney General, as chief law officer represents the whole body politic and is clothed with common law powers in addition to duties specified by statute); *see also Superintendent of Insurance* v. *Attorney General*, 558 A.2d 1197, 1200, 1202 (Me. 1989) (the powers of the Attorney General "are not exhaustively defined by either constitution or statute"). Rather, the Maine Attorney General is a Constitutional officer endowed with

broad powers and may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time require, and may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights. *Lund ex rel. Wilbur* v. *Pratt*, 308 A.2d 554, 558 (Me. 1973); S*ee also Superintendent of Insurance, supra,* 558 A.2d at 1200, 1202 (the Attorney General is "the legal representative of the people of the State in pursuing the public interest"); *Withee* v. *Lane & Libby Fisheries Co.*, 113 A. 22 (Me. 1921) (the Attorney General "may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state"). Moreover, there is no doubt that this action seeks to protect "public rights." *See State, ex rel. Tierney* v. *Ford Motor Co.*, 436 A.2d 866 (Me. 1981) (enforcement action is not rendered "private" by the mere fact that the Attorney General seeks restitution for particular individuals). Here, the Attorney General seeks treble damages as a retributive deterrent in furtherance of quintessential "quasi-sovereign" interests and has *parens patriae* standing to seek such damages. *See also, Mylan*, 99 F. Supp. 2d at 7.

11. Michigan

The Michigan Attorney General relies upon the following case law and statutory authority in support of the Michigan Attorney General's *parens patriae* authority:

1) **Mich. Comp. Laws 14.28.** (authorizes the Attorney General to "intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of the state may be a party or interested.") The statute authorizes both intervention and original actions by the Attorney General. *Kelley* v. *CR Equipment Sales, Inc.*, 898 F. Supp 509 (W.D. Mich. 1995), *In Re: Lewis' Estate*, 283 N.W. 21, 22-3 (Mich. 1938). It has been relied upon, in conjunction with the Michigan Attorney General's common law and constitutional authority, as the basis for assertion of *parens patriae* authority in both consumer protection matters *Kelley* v. *Carr*, 442 F. Supp 346 (W.D. Mich. 1977); *In Re: Sclater*, 40 B.R. 594, 596-600 (E.D. Mich. 1984), and antitrust cases. *Michigan* v. *Detroit Lumberman's Assoc.*, 1979 W.L. 18703 (Wayne County Cir. Ct. 1979);

2) ***Michigan State Chiropractic Ass'n* v. *Kelley***, 262 N.W. 2d 676, 677-78 (Mich. Ct. App. 1977). The Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter. . . .";and

3) **Mich. Comp. Laws 445.777 and 445.778** authorize the Michigan Attorney General, among other things to "bring an action for appropriate injunctive or other equitable relief. . . ."

12. Minnesota

The Attorney General of Minnesota's *parens patriae* authority was recognized by the United States District Court for the District of Minnesota in *State of Minnesota* v. *Standard Oil Co.*, 568 F. Supp. 556, 563 (D. Minn. 1983), and by the Minnesota Court of Appeals in *State by Humphrey* v. *Ri-MEL, Inc.*, 417 N.W.2d 102, 112 (Minn. Ct. App. 1988) *See also State by Humphrey* v. *Alpine Air Products, Inc.*, 490 N.W.2d 888, 898 (Minn. Ct. App. 1992), *aff'd*, 500 N.W.2d 788 (Minn. 1993).

Andrx's argument that Minnesota's action should be dismissed based on Minn. Stat. § 325D.57 is misguided.[11] The statute's plain language makes clear that its last sentence is applicable only where there is an action "subsequent" to a previous recovery against the same defendant. Here, there has been no previous recovery and there is no "subsequent action" triggering the provision. The parties are, therefore, able to sort through damage apportionment issues, including the avoidance of duplicative recovery, within the context of this proceeding. Furthermore, the statute is meant to "avoid duplicative recovery," not serve as a basis for dismissal simply because both direct and indirect purchasers make claims against a defendant. Minn. Stat. §325D.57's express

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[11] Minn. Stat. §325D.57 was enacted in 1984 to explicitly allow indirect purchaser recovery. *See Keating* v. *Phillip Morris, Inc.*, 417 N.W.2d 132, 136 (Minn. Ct. App. 1987). Its enactment was a "direct response to the *Illinois Brick* decision." *Id.* At the same time the Minnesota legislature codified indirect purchaser recovery, it added the last sentence of Minn. Stat. § 325D.57, recognizing the court's discretionary authority to sort through damage apportionment issues. *Id.* Minn. Stat. § 325D.57 states, "Any person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies, injured directly or indirectly by a violation of [Minnesota's Antitrust Law], shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees. *In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.*" (emphasis supplied).

purpose was to allow indirect purchaser claims. Defendant's argument that it should now be used to dismiss just such a claim turns the statute on its head. *See Gordon* v. *Microsoft Corp.*, 2001 WL 366432, *3 (D. Minn. March 30, 2001) ("In enforcing various trade regulation statutes, Minnesota courts have construed remedial statutes broadly and rejected arguments based on complexity alone.").

Finally, Aventis' assertion that the states do not have authority to pursue equitable remedies such as disgorgement and restitution is expressly rejected by Minnesota Statutes, and must fail. See, Minn. Stat. § 325D.59 (allowing Attorney General to seek "appropriate relief"); and Minn. Stat. § 8.31, subd. 3a (allowing recovery of damages and "other equitable relief as determined by the court").

13. Nevada

During the relevant time period, Nevada's antitrust statute allowed for restitution and disgorgement. Nev. Rev. Stat. 598A.160 allows the Attorney General to recover "the aggregate damages sustained by the persons on whose behalf the state sues," when bringing suit on the behalf of the citizens of the state. This description of damages does not exclude restitution and disgorgement. The purpose of the chapter is to prohibit acts in restraint of trade and penalize all persons engaged in anticompetitive practices in the state.[12] To reward Defendants by narrowly defining the damages available to the state would be contrary to this policy. For these reasons, it is incorrect for Defendants to assert that the Nevada Attorney General may not pursue restitution and disgorgement for the injured consumers in this state.

Moreover, during the relevant time period Nevada's consumer protection statutes barred both concerted action and unilateral conduct. Specifically, Nev. Rev. Stat. 598.0963 allows the Attorney General to bring suit to obtain "appropriate relief" if she believes that a person is engaging in deceptive trade practices in Nevada. Nev. Rev. Stat. 598.0915(2) makes it a deceptive trade practice to knowingly make a false representation as to the approval or certification of goods. Nev. Rev. Stat. 598.0915(8) makes it a deceptive trade practice to disparage the goods of another by false or misleading representations of fact. Nev. Rev. Stat. 598.0915(12) makes it a deceptive trade practice to make false or misleading statements of fact concerning the price of goods. By unlawfully manipulating the patent laws and FDA approval process, both Aventis and Andrx have violated all three of these subsections of Nevada's consumer protection law,

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[12] Nev. Rev. Stat. 598A.030(2).

and all appropriate relief under Nev. Rev. Stat. 598.0963, including the equitable remedies of restitution and disgorgement, should be granted to the injured consumers of the State of Nevada.

14. New Mexico

N.M. Stat. Ann. § 57-1-3.A (Michie 1978) authorizes an award of damages up to three times the actual damages for antitrust violations. Under the New Mexico Unfair Practices Act, N.M. Stat. Ann § 57-12-1 (Michie) *et seq.*, damages are not made statutorily available for actions brought by the Attorney General. However, restitution is specifically set forth as an equitable remedy available to the Attorney General at § 57-12-8. Punitive damages might not be available under the Antitrust Act in the judgment of the court due to that act's provision for treble damages, *Cf. Ashlock* v. *Sunwest Bank*, 753 P.2d 346 (N.M. 1988), *overruled on other grounds*, *Gonzales* v. *Surgidev Corporation*, 899 P.2d 576 (N.M. 1995), (for willful conduct court may award up to treble damages under New Mexico Unfair Practices Act); but punitive damages are available under the common law of New Mexico for judgments in law, *Colbert* v. *Journal Pub. Co.*, 142 P. 146 (N.M. 1914), and in equity, *Madrid* v. *Marquez* 33 P.3d 683 (N.M. 2001). Therefore, the Attorney General is entitled to an award of punitive damages in this action under the equitable remedies of the New Mexico Unfair Practices Act.

Aventis asserts that New Mexico has failed to properly plead its Unfair Practices Act, N.M. Stat. Ann. § 57-12-1 *et seq.*, by failing to plead that the Defendant knowingly made a false or misleading statement or representation, as required by Sec. 57-12-2, *Definitions, subsection D, "unfair or deceptive trade practice."* Sec. 57-12-2.E, defines an "unconscionable trade practice" as:

> (A)ny act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including

> services provided by licensed professionals, or in the extension of credit or in the collection of debts which to a person's detriment:
>
> . . . .
>
> (2) results in a gross disparity between the value received by a person and the value paid.

The allegations of vastly lower prices for generics (States' Second Amended Complaint, ¶ 23.), establish an overpricing up to five-fold and serve to plead properly the violation of the New Mexico Unfair Practices Act, which in Sec. 57-12-3 makes unconscionable trade practices unlawful.

New Mexico law permits the pleading of separate theories based upon the same conduct of the defendant, each theory having its own measure of damages. "[T]he court may make an award under each theory. In that event the prevailing party must elect between awards that have duplicative elements of damages." *Hale* v. *Basin Motor Company*, 795 P.2d 1006, 1012 (N.M. 1990), *citing Hood* v. *Fulkerson,* 699 F.2d 608, 611 (N.M. 1985). This is contrary to Defendants' assertion that only one cause may be pleaded on a defendant's conduct.

15. New York

A. The New York Attorney General Has Statutory Authority To Recover On Behalf Of Its Citizens

In addition to the ability of the New York Attorney General to bring a common law *parens patriae* action, there are two other statutory bases under which the New York Attorney General may sue here.

1. Under Executive Law § 63(1), The Attorney General May Bring An Action, *Parens Patriae,* To Recover Damages For A Violation Of The Donnelly Act

New York Exec. Law §63(1) authorizes the Attorney General to "prosecute and defend all actions in which the State is interested." The Courts have construed similar statutory provisions to permit Attorneys General to bring *parens patriae* actions on behalf of consumers. See, *Texas* v. *Scott & Fetzer & Co.*, 709 F.2d 1024 (5th Cir. 1983) and *Pennsylvania* v. *Mid-Atlantic Distributors, Inc.*, 704 F.2d 125 (4th Cir. 1983).

In *Mid-Atlantic Distributors*, the Court addressed the *parens patriae* authority of Maryland, and the District of Columbia both of whom relied on statutory provisions similar to §63(1).[13] The Court concluded that these statutes established the States' authority to seek damages on behalf of consumers in antitrust actions. Similarly, in *Scott & Fetzer*, the Fifth Circuit found that the Texas Attorney General had authority to bring *parens patriae* actions under a statute authorizing it to sue on behalf of "the state or of

[13] The Maryland State Constitution declared that the State's Attorney General "shall commence, and prosecute . . . any civil . . . action . . . on the part of the State or in which the State may be interested." The D.C. Code stated that its corporation counsel shall "have charge and conduct of all law business." 704 F.2d at 130 (citations omitted).

any of its political subdivisions . . . ." 709 F.2d at 1026 (citing Texas Business and Commerce Code § 15.40). See also, *Louisiana* v. *Borden* 1995 U.S. Dist. LEXIS 1921, (E.D. Louisiana, 1995) (Louisiana State Constitution authorizing the Attorney General "to institute, prosecute, or intervene in any civil action or proceedings" held to confirm *parens* authority).

There is no substantial difference between Exec. Law 63(1) and the statutes in these cases. Thus, the New York statute authorizes a *parens* suit by the Attorney General.

The Donnelly Act, when read as a whole,[14] makes it clear that action taken by the Attorney General is for the benefit of the people of New York State. § 342 (actions taken by the Attorney General to enforce the Donnelly Act are taken "in the name and in behalf of the people of the State"). The important role played by the Attorney General as a public advocate and antitrust enforcer is highlighted in the requirements that before any private citizen begins an action under Section 340(5) of the Donnelly Act, the private citizen is required to give notice of the commencement of such an action to the Attorney General.

In December 1998, the Donnelly Act was amended by adding § 340(6) to allow recovery for indirect purchasers. This subsection provides, in pertinent part, that: "In any action, pursuant to this section, the fact that the state, or any political subdivision or public authority of the state, or any person who has sustained damages by reason of

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[14]See McKinney's Consolidated Laws of New York Annotated Statutes ("McKinney's Statutes) § 97,("A statute or legislative act is to construed as a whole, and all parts of an act are to read and construed together to determine the legislative intent").

2. Section 349 Is Not Limited To Consumer Transactions

The Defendants contend that § 349 "applies only to transactions between a defendant and an individual consumer in which deceptive or misleading conduct is alleged." See, Appendix B to Aventis Brief. However, § 349 is not confined to actions by consumers; nor is the statute confined to an individual transaction. See, *Karlin* v. *IVF America,* 712 N.E. 2d 662 (N. Y. 1999) ("These statutes [section 349 & section 350 GBL] on their face apply to virtually all economic activity and their application has been correspondingly broad"); *Hart* v. *Moore* 155 Misc. 2d 203, 205 -206 (Sup.Ct. Westchester Cty. 1992) ("The very words of the statute indicate that section 349 was intended to have a broad application. Had the legislature intended the statute to apply strictly to consumers, the word "consumer" could have been used.")

Section 349 requires only that the conduct of the defendant be consumer orientated. That is, the act or practice needs to affect consumers generally; it cannot be simply a private contractual dispute. See, *Securitron Magnalock Corp* v. *Schnabolk,* 65 F. 3d 256, 264 (2nd. Cir, 1995) ("The critical question is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer or a competitor"); *Oswego Laborers' Local 214 Pension Fund* v. *Marine Midland Bank,* 647 N.E. 2d 741 (N.Y. 1995) ("Plaintiff, thus, need not show that the defendant committed the complained-of acts repeatedly - either to the same plaintiff or to other consumers - but instead must demonstrate that the acts or practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute").

amend or repeal any other law of this state under with the attorney general is authorized to take any action or conduct any inquiry"). See also *Karline* v. *IVF America., Inc,* 712 N.E. 2d 662 (N.Y. 1999) (§ 349 claims do not foreclose additional claims under other laws).

Defendants cite no decision where the Court held that *Illinois Brick* bars recovery by indirect purchasers suing under § 349.[17] A plaintiff suing under § 349 need not establish a direct relationship to the defendant. See, *Blue Cross and Blue Shield of New Jersey* v. *Philip Morris.*, 2001 U.S. Dist. Lexis 17354, *71 (S.D.N.Y. Oct 19, 2001) (Weinstein J.), (there is no requirement for privity, and the victims of indirect injuries may sue under § 349). Moreover, in 1980, § 349 was amended to allow for a private right of action for both direct and indirect purchasers of products. The Legislature did not carve out an exception for deceptive and misleading claims based on antitrust violations from the general principles applicable to other breaches of section 349. See, *People* v. *National Ass'n of Realtors*, 120 Cal. App. 3d 459, 174 Cal. Rptr 728 (Cal. Ct. App. 1981) (in construing the California unfair and deceptive trade practices legislation, the Court held that if the legislature intended to exclude an antitrust violation from the act's provisions it would have expressly done so).

To the extent that Defendants base this argument on the contention that indirect purchasers lack statutory authority to sue, the argument is incorrect for the reasons set forth in the retroactivity section of this brief.

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[17]Defendants cite *In re Terazosin Hydrochloride Antitrust Litigation,* 160 F. Supp. 2d 1365 (S.D. Fla. 2001) in support of their argument. However, there was no holding in that case concerning *any* New York statute. As noted in the Court's decision, all New York claims were voluntarily discontinued and therefore did not form part of the case for decision.

§63(12) to sue for federal and state antitrust violations. Instead, they simply assert that the Attorney General lacks specific statutory *parens* authority. See, Andrx Brief at page 16. That assertion disregards the Attorney General's authority to sue on behalf of consumers and other victims under § 63(12).

B. An Action For Damages under Section 349 Of The New York General Business Law Is Not Preempted By *Illinois Brick* Nor Is A Direct Transaction Between The Consumer And Defendant Required

1. Defendants' "*Illinois Brick* Preemption" Argument Is Unsound

Defendant Aventis argues that the use of § 349 of the New York General Business Law is prohibited because it is an "end run" around *Illinois Brick*. This is nonsense. The fact that *Illinois Brick* bars indirect purchaser claims under federal antitrust law does not mean that defendants are entitled to violate non-antitrust state laws with impunity.

As discussed in the main body of the brief, numerous legal theories premised upon the same conduct may overlap, and the legislature may create a number of remedies for that conduct without conflict. Thus, the Attorney General is not required to seek relief under only one statute, but may pursue alternative claims.

Indeed § 349(g) itself expressly states that the remedy provided in § 349 is not an exclusive remedy and reserves the Attorney General's powers to take action under other laws, such as the Attorney General's powers to bring actions under the Donnelly Act. See, § 349 (g) ("This section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state, and shall not supersede,

Further, § 63(12) provides the Attorney General with a right of collective recovery, regardless of whether a private right of enforcement is available to the aggrieved party. See, *State* v *Maiorano*, 189 A.D. 2d 766, 767 (2d Dep't. N.Y.1993). ("That a consumer, who has been defrauded, may have other available enforcement remedies, should not preclude him or her from obtaining restitution in the instant [§ 63(12)] proceedings"); *People by Abrams* v. *Hamilton*, 125 A.D. 2d 1000 (4th Dep't. N.Y. 1986), (holding the Attorney General had the power to recover penalties on behalf of the injured parties under the Civil Rights Act).[16]

New York has expressly pleaded a claim under Section 63(12): *See*, Complaint at ¶91, S*ee* also, Plaintiff States Response to Defendant Andrx's First Set of Interrogatories, with specific reference to answers given by the State of New York to Interrogatory 2C, at page 17. This Court has already held that the Defendants agreement was a *per se* violation of federal antitrust laws, and, as noted above, that holding supports the Attorney General's right of action under § 63(12). Despite their voluminous submissions, Defendants ignore completely the Attorney General's authority under Executive Law

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Association 52 A.D. 2d 528 (1st Dept 1976) (violations of Federal Aviation Act and Civil Aeronautics Broad Regulations); *State of New York* v. *Hamilton* 125 A.D. 2d 1000 (4th Dept 1986) (violations of civil rights laws).

[16]In the present case, the New York Attorney General is representing natural person consumers residing in the State of New York, together with governmental agencies. See generally answers to interrogatories. However, the New York Attorney General is not limited, under Exec. Law § 63(12), to bringing action only for the benefit of residents of the State of New York or natural persons. *See*, *State of NY* v. *Camera Warehouse Inc* 130 Misc. 2d 498; (1985) (under §63(12) the Attorney General has the power to obtain restitution for all persons injured by the illegal practices of a business *carried on* in New York, including non-residents located in another state) see also, *New York* v. *Lipsitz*, 174 Misc.2d 571 (Sup.Ct., N.Y. County 1997) and *In re DeFelice*, 777 B.R. 376, 377 (Bankr.D. Conn. 1987) (interpreting New York law).

2. New York Executive Law § 63(12) Provides An Express Statutory Basis For Recovery On Behalf Of Consumers

New York Exec. Law § 63(12) provides that:

> "Whenever any person shall engage in repeated fraudulent or illegal acts, or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, *in the name of the people of the state of New York*, to the Supreme Court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages, .. and the court may award the relief applied for or so much thereof as it may deem proper."

This statute establishes a statutory right of action under which the New York Attorney General may seek restitution or damages on behalf of injured parties, including citizens of New York.

Under § 63(12) the Attorney General of New York may seek relief based on violations of either Federal, State, or Municipal laws, including the antitrust laws. See, *New York* v. *Asiatic Petroleum Corporation*, 45 A.D. 2d 835; (1st Dep't. N.Y. 1974) (violation of New York State Antitrust Laws arising out of a conspiracy to restrict the supply of oil and to raise prices); *People* v. *Calogero Corporation*, 358 N.Y.S. 2d 671 (Sup. Ct., N.Y. County 1974), *aff'd*, 47 A.D. 2d 741, (1st Dep't. N.Y. 1975) (illegal tying arrangement); *In the Matter of Am. Dental Cooperative, Inc.* v. *Attorney General for the State of New York*, 127 A.D. 2d 274, 279 (1st Dep't. N.Y. 1987) (upholding authority of Attorney General to investigate antitrust violations under Donnelly Act and §63(12)).[15]

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[15] See generally, *State of New York* v. *Ford Motor Company*,; 548 N.E. 2d 906 (Ct of App. 1989), (violations of state consumer laws), *State of New York* v. *Scottish-American*

violation of this section has not dealt directly with the defendant shall not bar or otherwise limited recovery."

The clear intent of the Legislature in enacting §340(6) was to enable ordinary consumers to recover for Donnelly Act violations even though, generally they were indirect purchasers. See Memorandum in Support of the Amendment 340(6) ("One of the great ironies of the business law is that although a consumer is the individual most directly affected by unwarranted restrains of trade or monopolies, the consumer is without recourse against these activities in cases where s/he has purchased goods through a retail establishment. This legislation would allow the ordinary consumer to sue and collect damages from parties whose trade practices have injured them").

Although the Attorney General contends that the Defendants' argument to preclude private persons bringing class actions under the Donnelly Act is unsound, if the Court is of a contrary view, consumers in New York would effectively be without an antitrust damages remedy, absent authorization of a collective action by the Attorney General. The Court should not adopt a construction that would render § 340(6) ineffectual, as that clearly could not be the intent of the Legislature. Instead, the Court should construe §340(6) to authorize suit by the Attorney General on behalf of the consumers whom the Legislature intended to benefit from the law. This is fully consistent with the statute, which does not require that the plaintiff in the action be the person who "sustained damages by reason of [the Donnelly Act] violation."

Unlawfully preventing competition in the nationwide market for prescription drugs is a matter affecting all consumers - not a small group of unique consumers. See, *Karlin* supra, at 666, ("[section 349] have long been powerful tools aiding the Attorney General's efforts to combat fraud in the health care and medical services areas"). Indeed, drug companies themselves spend million of dollars each year on marketing their products through various mass media directly to consumers. [18] Accordingly, the test of "consumer-orientation" has clearly been met in the current case. There is no basis for dismissal.[19]

3. The States' Complaint Adequately Alleges Illegal Conduct Giving Rise To Misrepresentation

The Defendants argue that the State's complaint fails to plead sufficient facts to support each element of a § 349 action. Yet, throughout the complaint, facts are pled that amount to misrepresentation and deceptive conduct, which injured the State and its consumers. See, for example, sections IV and VII of the States' Complaint.

Defendants again misconstrue what is required by the law. Section 349(g) provides "this section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state...." To state a § 349 claim,

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[18]Indeed consumers who are interested in Cardizem CD may subscribe directly to its monthly newsletter "Cardisense" which is found at http://www.cardisense.com/about_cardizem.html

[19]Defendant Andrx argues that the Attorney General cannot recover false damages under § 349(h), *See,* Andrx Br., p 26. Section 349 confers rights of action in (b) and (h). Andrx does not dispute that the Attorney General has the authority to sue under § 349(b). Their only argument is that the AG cannot recover treble damages under § 349(h). However, this is purely a damages issue. This issue is premature and not properly a basis for dismissing any claims pleaded.

the plaintiff need only plead that the practice complained of was deceptive or misleading in a material way, and that the plaintiffs were injured. See, *Oswego Laborers, supra* at 744. It is not necessary for the plaintiff to plead that defendant's practices or acts were intentional, fraudulent, or even reckless, and it is not necessary to prove reliance on the deceptive practices. See, *Oxman* v. *Amoroso* 172 Misc. 2d 773 (N.Y. City Ct. 1997).

The Defendants' conduct clearly falls within § 349. Indeed, there is evidence of specific misrepresentations made by Aventis to the State of New York. The State of New York is a member of the Minnesota Multistate Contract for the Acquisition of Pharmaceuticals ("MMCAP"), which procures pharmaceuticals on behalf of member states. The MMCAP contracts signed by Aventis with MMCAP member states for the provision of Cardizem CD requires an affidavit of non-collusion. Such an affidavit was sworn by Mike Haverty, Director of Contract Management for Hoechst on 20 January 1998 - after the unlawful agreement with Andrx was entered into. In his affidavit, Mr Haverty swears, in part: "That the attached response covering the Contract for Pharmaceuticals has been arrived at by the responder (Aventis) independently and has been submitted without collusion with, and without *any agreement, understanding or planned common course of action with, any other vendor of materials, supplied equipment or services described in the Request for Proposal, designed to limit independent quoting or competition."* (Emphasis added). Further, Mr Haverty affirmed that he had fully informed himself regarding the accuracy of the statements made in the affidavit. At the time of the affidavit, Hoechst and Andrx had entered into their illegal and anti-competitive agreement, which was designed to limit competition for Cardizem CD. Thus, Aventis, through Mr Haverty, affirmatively misrepresented the facts to New

York and to the other MMCAP members. Moreover, Defendants sought to mask their illegal and private contract in the guise of a private "preliminary injunction" purporting to deal with patent litigation. This disguised arrangement deprived consumers of genuine competition.

Accordingly, there are sufficient allegations of deceptive conduct by the parties, see Part VI of the Complaint, and the resultant injury to consumers and the State, see Part VII of the Complaint. No more is required.

C. The Issue Of The Availability Of Class Actions To Private Persons For Donnelly Act Violations Has No Bearing On The Attorney General's Authority To Sue

Defendant Andrx argues that there are no class actions available to private persons for violation of the Donnelly Act. *See*, Andrx Brief at page 40. However, this argument is irrelevant to the New York Attorney General's claims. The Attorney General is not seeking to certify a class in this matter; nor do any of the cases cited by the Defendants question the New York Attorney General's authority to bring an action on behalf of consumers based on violations of the Donnelly Act. The Attorney General relies upon his authority to bring an action *parens patriae* and for his authority to represent government purchasers. Indeed, if the Court were persuaded that New York law precludes class actions brought by private person direct *or* indirect purchasers to recover under the Donnelly Act, that would effectively means no private right of recovery is available. This would serve to strengthen the Attorney General's authority to bring a collective action, *parens patriae*, on behalf of consumers. It is the Attorney General's view that private persons are not precluded from bringing class actions for violations of

the Donnelly Act, and that the decisions in *Cox* v. *Microsoft* and *Asher* v. *Abbott Labs* were erroneously decided. In any event, this Court need not consider the issue because class certification should be determined under Fed. R. Civ. P. 23 of the Federal Rules of Civil Procedure, and not section 901(b) of the CPLR. Accordingly, the Attorney General joins the section of the State Law Plaintiffs' brief in reply on this issue.

16. North Carolina

North Carolina's umbrella consumer protection and antitrust law, N.C. Gen. Stat. § 75-1.1 (prohibiting unfair methods of competition and unfair or deceptive practices), has been construed to incorporate the Sherman Act. *ITCO Corp.* v. *Michelin Tire Corp.*, 722 F.2d 42 (4th Cir. 1983), *aff'd on reh'g*, 742 F.2d 170 (4th Cir. 1984), *cert. denied*, 469 U.S. 1215, (1985). North Carolina law includes the following express provision for restitution in cases under that statute brought by the Attorney General:

> § 75-15.1. Restoration of property and cancellation of contract
>
> > In any suit instituted by the Attorney General to enjoin a practice alleged to violate G.S. 75-1.1, the presiding judge may, upon a final determination of the cause, order the restoration of any moneys or property and the cancellation of any contract obtained by any defendant as a result of such violation.

In the face of this explicit authority, the claim that North Carolina may not obtain restitution is meritless.

18. Oklahoma

The Attorney General of Oklahoma is acting pursuant to *parens patriae* authority expressly contained in the Oklahoma Antitrust Reform Act, Okla. Stat. tit.79 § 205 (West 2000). This provision also allows for the Attorney General to seek "other equitable relief," which would include restitution and disgorgement.

Oklahoma has also alleged that Defendants' conduct is an unfair and deceptive trade practice in violation of Okla. Stat. tit.15 § 753(20) (West 2000) of the Oklahoma Consumer Protection Act. Similar to the authority granted under the Oklahoma Antitrust Reform Act, the Consumer Protection Act grants the Attorney general express authority to bring restitution claims on behalf of aggrieved consumers pursuant to Okla. Stat. tit. 15 § 756.1 (West 2000). The Attorney General's authority to bring restitution claims on behalf of consumers that would otherwise be considered indirect purchasers was upheld in *FTC* v. *Mylan Laboratories*, 99 F. Supp. 2d 1 (1999).

19. Puerto Rico

In invoking the *parens patriae* authority; the Attorney General of the Commonwealth of Puerto Rico is acting pursuant 10 P.R. Laws Ann. §251 . Article 13, 10 P.R. Laws Ann. §269, states:

> "it shall be the duty of the Secretary of Justice (Attorney General) to institute proceedings for injunctions *or any other proceeding* to prevent, prohibit, enjoin and punish such violations *and to obtain such other and further relief* as may be appropriate." (Emphasis ours.)

The Commonwealth of Puerto Rico is authorized by statute to pursue damages as well as injunction suits on behalf of consumers as stated in Law 118 of June 25, 1971, 32 P.R. Laws Ann. §3341- §3344.

"§3341. Suit for damages.

> There is recognized the right to consumers of goods and services and/or to the Commonwealth of Puerto Rico, through their agencies, dependencies and instrumentalities in their capacity of "parens patriae" to file a class suit on behalf of said consumers by reason of damages as well as injunction suits ...

§3342. Suit against monopolies.

> There is recognized the right to merchants, to consumers of goods and services and to the Commonwealth of Puerto Rico to file a class suit on behalf of said merchants or consumers based on the Antitrust Act of the Commonwealth, sections 257-274 of Title 10."

These specific statutory provisions allow *parens patriae* actions on behalf of Puerto Rican citizens.

In relation to the relief sought on behalf of consumers, and any non-Medicaid purchasers in the Commonwealth of Puerto Rico, the Puerto Rican Antitrust Act, Law No. 77 of June 25, 1964, 10 P.R. Laws Ann.§251-§276, in its Article 12, states as follow:

"§268 Actions by persons suffering damages.

(a) Any person who shall be injured in his business or property by any other person, by reason of acts or intended acts, forbidden or declared to be unlawful by the provisions of this chapter, except sections 259 and 261, may sue therefore in the Superior Court and ***shall recover threefold the damages*** by him sustained, plus costs, including a reasonable amount for attorney's fees.

(b) Whenever the Commonwealth of Puerto Rico, its agencies or instrumentalities or any municipality shall suffer damages caused by any person by reason of acts or intended acts forbidden or declared unlawful by the provisions of this chapter, it may sue therefore for the recovery of damages in the same manner and with the same consequences as in the case of a private entity, but shall have no right to recover threefold the damages, but instead ***the amount of such damages.*** Neither shall attorney's fees be recovered except in the case where the plaintiff shall be a municipality or an instrumentality."(Emphasis ours.)

In addition, the law authorizing the Commonwealth of Puerto Rico class actions on behalf of consumers, Law No. 118 of June 25,1971, 32 P.R. Laws Ann. §3341-§3344, states,

"§ 3343. In its order and judgment, the Superior Court shall impose **an amount equal to the damages determined as *compensation for damages*,** plus a reasonable amount not less than twenty five percent (25%) for attorney's fees, **plus legal interests from the moment the damage is caused** and costs of the proceedings..."(Emphasis ours.)

In conclusion, pursuant to the state law, a consumer is entitled to triple damages, a reasonable amount not less than twenty-five percent (25%) for attorney's fees, legal

interests from the moment the damage is caused and costs of the proceedings. On the other hand, an agency or instrumentality shall recover the amount of damages suffered and attorney's fees.

20. Rhode Island

The Attorney General of Rhode Island is acting pursuant to R. I. Gen. Laws § 6-36-12 (1992). These statutory provisions grant the Rhode Island Attorney General authority to maintain *parens patriae* actions on behalf of Rhode Island residents, and contain similar provisions to the federal *parens patriae* statute, 15 U.S.C. § 15c, *et seq.*, regarding notice, opportunity of *parens* group members to elect exclusion from representation, and *res judicata.*

The statutory provisions that allow Rhode Island to bring an action as an indirect purchaser are R.I. Gen. Laws § 6-36-4, 6-36-5 and 6-36-11.

To the extent Defendants argue Rhode Island's state law claims should be dismissed because these authorities are lacking, Defendants are wrong.

21. South Carolina

Andrx is seeking dismissal of South Carolina's claim based upon its argument that South Carolina is not authorized by statute to bring actions for damages as *parens patriae*. The State of South Carolina is not proceeding under *parens patriae* authority[20] but under similar specific authority as set forth in its "Unfair Trade Practices Act" (UTPA), S.C. Code Ann. §§ 39-5-10, *et. seq*. The UTPA provides the Attorney General with authority to claim restitution on behalf of indirect purchasers.[21]

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[20]However, see, *Daniel* v. *Broad River Power*, 153 S.E. 537 (1929) wherein the South Carolina Supreme Court stated:

> Where the injury sought to be redressed is public in its nature, the Attorney General may institute proceedings in his own relation against a private corporation, even though the wrong complained of results in private as well as public harm. 153 S.E. at 560.

[21]Also see Section 39-5-10(b) of the UTPA that states as follows:

> The UTPA includes that definition of trade or commerce in declaring certain activities are violations of the Act at Section 39-5-20(a) when it states as follows:
>
> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade* or *commerce* are hereby declared unlawful.
>
> (b) "Trade" and "commerce" shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible,, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce *directly or indirectly affecting the people* of this State. (Emphasis added).

22. Utah

Defendants' grounds for dismissing Utah's claims are all without merit, as discussed below.

The Utah Antitrust Act ("Utah Act") authorizes the Utah Attorney General to "proceed under *any* antitrust laws . . . on behalf of this State, any of its political subdivisions or agencies, or as *parens patriae* on behalf of natural persons in this State" for "appropriate injunctive relief *and* for damages or a civil penalty", together with costs and reasonable attorney's fees. (Utah Code Ann. §§ 76-10- 916(3), 76-10-918(1), 76-10-919(3), emphasis added.) Utah Code Ann. § 76-10-912 states that the purpose of the Utah Act is "to encourage free and open competition in the interest of the general welfare and economy of this state by prohibiting monopolistic and unfair trade practices, combinations and conspiracies in restraint of trade or commerce and by providing adequate penalties for enforcement of its provisions."

The Utah Act focuses on the conduct of the defendant and does not require a direct purchaser relationship between the defendant and the injured person or entity. Nothing in the Utah Act reflects an intent of the Utah Legislature to limit the Attorney General's authority to obtain relief for the State or it agencies, or its *parens patriae* authority on behalf of "natural persons," only to claims for the State, its agencies, or natural persons who are direct purchasers. The beneficial purposes of the Utah Act extend to both direct and indirect purchasers. For example, natural persons usually are ultimate consumers and indirect purchasers whose losses as victims of antitrust violations are not sufficient to induce them to take action. Nothing in the Utah Act reflects a

legislative intent to shield violators from having to answer to these injured citizens in actions brought on their behalf by the Attorney General.

These points were recognized by the court In *FTC* v. *Mylan Laboratories, Inc.*, 99 F. Supp. 2d 1 (D.D.C. 1999), where the court construed the Utah Act to authorize Utah's restitution claims on behalf of indirect purchasers, holding that: (1) under Section 5(a)(1) of the FTC Act, the FTC can "pursue equitable remedies such as disgorgement" (*Id.* at 4); (2) Section 76-10-918, UCA "empowers the Attorney General to proceed in equity for injunctive relief"[22] (*Id.* at 8); and (3) "[a]s the cause of action authorized by Section 76-10-918 is a public one, that must be brought by the Utah Attorney General, the FTC Act is a 'comparable federal antitrust statute'" (*Id.* at 8). See also, discussion in Section II.A of the State Attorneys General Brief.

Aventis argues that *Illinois Brick* bars Utah's indirect purchaser claims because the Utah Act directs courts to "be guided by interpretations given by the federal courts to comparable federal antitrust statutes." (Aventis Brief, p. 7, fn. 8.) Aventis misquotes and misconstrues the Utah Act and disregards the controlling U.S. Supreme Court decision in *California* v. *ARC America,* 490 U.S. 93 (1989), holding that *Illinois Brick* does not preempt the application of state antitrust laws. Utah Code Ann. § 76-10-926 states that the courts, "in construing this act, will be *guided by* interpretations given by the federal courts to comparable federal antitrust statutes *and by other state courts to comparable*

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[22]The court relied upon *Porter* v. *Warner Holdings Co.* and its progeny, discussed in the State Attorneys General Brief, Section II.A, *supra* , in concluding that this provision for injunctive relief provides federal courts with the power to impose a full range of equitable remedies, including restitution and disgorgement.

state antitrust statutes." (Emphasis added.)[23] This neither *compels* the court to follow interpretations of comparable federal antitrust laws nor specifies *which* federal laws are to be used for guidance. Taking guidance from federal laws such as the FTC Act, as utilized by the court in the *Mylan* case, *supra,* is expressly encouraged by the Utah Act.

The Utah Act also expressly encourages guidance from interpretations by other *state* courts to comparable *state* antitrust statutes. State courts construing statutes similar to the Utah Act have interpreted them to allow suits by indirect purchasers. See *Hyde* v. *Abbott Laboratories, Inc.*, 473 S.E. 2d 680 (N.C. App.1996) (allowing class action suit by indirect purchasers of infant formula alleging conspiracy by manufacturers to fix wholesale prices under the North Carolina antitrust act, N.C. Gen. Stat. § 75-1 *et. seq.*, 1994, because the act's authority for suits by "any person" who is injured by a violation includes suits by indirect purchasers as well as direct purchasers).[24] *See also*, *Blake v. Abbott Laboratories, Inc.*, 1996 WL 134947 (Tenn. App. 1996) (indirect purchasers are included in Tennessee Unfair Trade Practices Act authorization for "any person" to sue for injury caused by agreements to fix prices).[25]

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[23]In purporting to quote this Section in its Brief, Aventis omits the second italicized phrase. (Aventis Brief, p. 7, fn 8.)

[24]The court stated: "We find it unlikely that the legislature intended to 'establish an effective private cause of action for aggrieved consumers in this State . . . but intended to exclude from this remedy all indirect purchasers, many of whom are consumers." (123 N. C. App. at 578, 473 S.E. 2d at 684.)

[25]For the foregoing reasons, Aventis' reliance on *Op. Utah Att'y Gen.*, 1985-2 Trade Cas. (CCH) ¶ 66,882 (see Aventis Brief, p. 8, fn. 9 and Appendix B) and *Albertson's Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah 1973), *affd in part, rev'd in part*, 503 F. 2d 459 (10th Cir.) (see Aventis Brief, Appendix B), is misplaced. The statement in *Op. Utah Att'y Gen.* that the Utah Act is to be construed in accordance with interpretations of the federal antitrust laws, doesn't specify any particular federal law and doesn't exclude the FTC Act, as followed in *Mylan*, nor did it refer to the provisions of Utah Code Ann. § 76-10-926, *supra*, relating to comparable state antitrust laws.

Andrx argues that Utah's claims for "punitive damages" should be "dismissed" because Utah Code Ann. § 76-10-919 "specifically reserv[es] treble damages for 'persons'." (Andrx Brief, pp. xl- xli.) If Andrx includes Utah's civil penalty claims in referring to "punitive damage" claims it is in error, as civil penalties are expressly and separately authorized by the Utah Act.[26]

Andrx argues further that one or the other of Utah's claims for damages or a civil penalty must be dismissed because Utah Code Ann. § 76-10-918 (1) authorizes the Attorney General to bring an action for "damages *or* a civil penalty." (Andrx Brief, p. xl.) Assuming, *arguendo,* that Utah cannot obtain restitutionary equitable relief (including disgorgement) *and* civil penalties,[27] Andrx is not entitled to have any claim or remedy dismissed at this juncture. As stated in Section VI of the State Attorneys General Brief, *supra*, Fed. R. Civ. P 12(b)(6) does not provide for dismissal of claims merely because they raise the possibility of duplicative recoveries. Utah law permits the

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Furthermore, opinions of the Utah Attorney General are not dispositive. *Andrew* v. *Ideal National Insurance Company*, 29 Utah 2d 343, 509 P. 2d 367 (1973). *Albertson's*, decided sixteen years before *California* v. *ARC America*, *supra*, provides no authority for Andrx's assertion that Utah's claims under the Utah Antitrust Act are barred by *Illinois Brick*. (Aventis Brief, Appendix B.) *Albertson's* was limited solely to issues of the availability of a class action under Rule 23, F.R.C.P., to a proposed class of plaintiffs composed *entirely* of *direct* purchasers. All indirect purchasers were excluded from the class by stipulation. (62 F.R.D. at 50.)

[26]Utah Code Ann. §§ 76-10-918(1) ("attorney general may bring action for appropriate injunctive relief, and for damages or a civil penalty") and 76-10-919(3) ("state . . . may recover the actual damages it sustains, or the civil penalty provided by the Utah Antitrust Act, in addition to injunctive relief, costs of suit, and a reasonable attorney's fee").

[27]The Utah Act does not exclude the conclusion that violators may be punished by the imposition of civil penalties *and* assessed with restitutionary equitable relief (including disgorgement allowed in *Mylan*) for the same violations. Utah Code Ann. § 76-10-918(1) provides that the Utah Attorney general "may bring an action for appropriate injunctive relief, *and* for damages or a civil penalty." (Emphasis added.) Utah Code Ann. § 76-10- 919(3) further provides that "the state . . . may recover the actual damages it sustains, or the civil penalty provided by the Utah Antitrust Act, *in addition to* injunctive relief, costs of suit and a reasonable attorney's fee." (Emphasis added.)

simultaneous litigation of separate claims based on the same conduct of the defendant. *Royal Resources, Inc.* v. *Gibralter Financial Group*, 603 P. 2d 793 (Utah 1979) (doctrine of election of remedies is a technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong). See also, *Angelos v. First Interstate Bank of Utah,* 671 P. 2d 772 (Utah 1983).[28] The legislative purpose of the Utah Act to provide "adequate penalties for enforcement of its provisions" (*See* Utah Code Ann. § 76-10-912, *supra*) and its provisions for specific remedies would be frustrated if claims and/or remedies are dismissed prematurely. This Court has broad powers to fashion the ultimate relief so as to avoid double recoveries. See discussion in Section VI, of the Attorneys General Brief and discussion of *Porter v. Warner Holding Co., supra* and progeny cases in Section II.A, of the Attorneys General Brief. Utah does not seek a double recovery but it does not and cannot know at this juncture which of remedies available to it will produce the best, lawful result for the agencies and persons injured by Defendants' illegal acts.

Andrx's further claim that Utah's reliance upon its common law is an unlawful "end run" around *Illinois Brick,* also is in error. See discussion in Section I, of the State Attorneys General Brief.

The State of Utah respectfully requests that the Court deny Aventis's and Andrx's Motions to Dismiss.

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[28]Michigan law is the same. *Walraven v. Martin*, 333 N.W. 2d 569 (Mich. App. 1983) (a plaintiff is entitled to simultaneously pursue all its remedies, regardless of legal consistency, so long as it is not awarded double recovery). The Court of Appeals for the Sixth Circuit has also recognized this procedural rule (applying Ohio law). *Great American Insurance Company* v. *Merchants & Manufacturers Mutual Insurance Company, et al.*, 423 F.2d 1143, 1146 (6th Cir. 1970).

23. Vermont

The Vermont Attorney General will not seek "damages" on behalf of Vermont consumers in this matter. In addition to damages incurred by the state and state entities, the Attorney General seeks penalties, restitution for consumers, and injunctive relief, as well as costs and expenses. The Vermont Attorney General's role as *parens patriae*, or its equivalent, to act on behalf of residents of the state, is expressly recognized by the Vermont Consumer Fraud Act ("VCFA"), which authorizes the Attorney General to sue to restrain acts prohibited by the VCFA, and to seek penalties, restitution on behalf of consumers, injunctive relief, reimbursement to the state of Vermont for the Attorney General's costs and expenses in investigation and prosecution of the action, and "any other temporary or permanent relief, or both, as may be in the public interest." Vt. Stat. Ann. tit. 9 § 2458(b).

Defendants assert that Vermont's Attorney General may not seek relief on behalf of indirect purchasers because, defendants argue, Vt. Stat. Ann. tit. 9 § 2465 should not be applied "retroactively." Defendants ignore, however, the fact that Vermont's unfair competition law never barred recovery of damages for indirect purchasers. Although § 2465, passed in 2000, expressly provided that consumers should not be denied a recovery because of their status as indirect purchasers, its passage only clarified what was already existing law on this issue. Moreover, even if consumers had no private right of action for damages as indirect purchasers for antitrust violations taking place prior to the passage of § 2465, the "VCFA" is clear that there is no limitation on the Attorney General's authority to take action and seek relief on behalf of any class of consumers.

A. Vermont Law Never Barred Indirect Purchaser Claims Under The VCFA

The Vermont Supreme Court has held that as a statute "remedial in nature," the courts should construe the VCFA "liberally so as to furnish all the remedy and accomplish all the purposes intended." *State* v. *Custom Pools*, 556 A.2d 72, 74 (Vt. 1988); S*ee also Bisson* v. *Ward*, 628 A.2d 1256, 1260 (Vt. 1993) (citing 9 Vermont. Stat. Ann. § 2451) (citing statute's "broad remedial purpose" to govern "unfair methods of competition and unfair or deceptive acts or practices in order to protect the public, and to encourage fair and honest competition").

The VCFA nowhere distinguishes direct and indirect purchasers for purposes of determining available remedies. Rather, in declaring a private right of action for violation of the statute, it provides that:

> *Any consumer* who . . . sustains injury as a result of any . . . practices prohibited by section 2453 of this title . . . may sue for appropriate equitable relief and may sue and recover from the seller, solicitor *or other violator* the amount of his damages . . . .

9 Vt. Stat. Ann. § 2461(b) (emphasis added). As the emphasized language makes evident, there is no requirement of any direct relationship between the consumer claimant and the wrongdoer liable for the harm. The legislature must be presumed to have purposely inserted "or other violator" and have intended the phrase to have meaning. *See Payea* v. *Howard Bank*, 663 A.2d 937, 938 (Vt. 1995) (discussing interpretation of Vermont statutes generally). The VCFA plainly means not to preclude claims on behalf of "any consumers" against "any violators" based on the class of victim or perpetrator of prohibited acts.

While the Vermont Supreme Court has never directly addressed the application of the VCFA to indirect purchaser claims in cases involving unfair competition, it has endorsed the statute's broad application to claims brought by plaintiffs against a defendant with whom they had not directly dealt. *Custom Pools,* 556 A.2d 72 (allowing VCFA claim to go forward against assignee of notes obtained by its assignor through unfair and deceptive conduct).

Defendants' arguments and legal citation with respect to Vermont law are without merit. Unlike the characterization of the VCFA asserted by Defendants, the statute does not direct courts to interpret it according to "federal law." Rather, in defining prohibited practices, under the VCFA, the statute is specific in incorporating by reference interpretations of Section 5(a)(1) of the Federal Trade Commission Act ("FTCA"), Vt. Stat. Ann. tit. 9 § 2453(b),[29] and makes no mention of federal law generally nor the Sherman and Clayton Acts specifically. Indeed, the VCFA's declaration of prohibited acts and practices, Vt. Stat. Ann. tit. 9 § 2453(a), is taken verbatim from § 5(a)(1) of the FTCA. If the VCFA directs its interpretation to federal law other than the FTCA itself, such as the Sherman and Clayton Acts, it can only be through and to the extent that the FTCA is held or interpreted to incorporate such law in its own interpretation.

Neither in the FTCA, itself, however, nor in any case law interpreting it, is there any distinction between claims on behalf of direct or on behalf of indirect purchasers from entities engaged in illegal anticompetitive behavior. *FTC* v. *Mylan Laboratories,*

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[29]"It is the intent of the legislature that in construing subsection (a) of this section, the courts of this state will be guided by the construction of similar terms contained in section 5(a)(1) of the federal trade Commission Act as from time to time amended by the Federal Trade Commission and the courts of the United States."

Inc., 99 F. Supp. 3d 1, 5, n.2 (D.C. 1999) (FTC has authority to seek restitution on behalf of indirect purchasers).

Although the Vermont Supreme Court has not yet addressed the issue, it would not find against indirect purchaser relief under the VCFA as it stood prior to the 2000 legislative clarification of the law. The court has made clear its disinclination to read any limitation into enforcement of consumer rights and remedies under the VCFA that is not expressly declared in the statute. *State* v. *International Collection Service, Inc.*, 594 A.2d 426, 427 (Vt. 1991) (finding no express limitation in the VCFA based on the status of the consumer victim, supreme court reversed a lower court dismissal of VCFA action on behalf of business consumers).

When the VCFA is understood as what it is, a *consumer* protection law, it is further clear that it should not be construed to incorporate the limitations on indirect purchaser remedies that the United States Supreme Court has held applicable to actions under the Sherman Act. Actions can be brought under the Sherman Act on behalf of the businesses that purchase directly from the wrongdoers – indeed, actions for damages must be brought on behalf of those businesses, under *Illinois Brick*. In fact, the reasoning of *Illinois Brick* was based on a concern that defendants not be liable under the Sherman Act for damages both to an immediate purchaser and to an indirect purchaser. Under the VCFA, however, private rights of action are limited to "consumers," from which are excluded those businesses that purchase to resell in the ordinary course. Vt. Stat. Ann. tit. 9 § 2451a(a). Thus, by definition, it is only the indirect purchasers of Cardizem CD (or its generic alternatives) in Vermont that can obtain damages under the VCFA from Defendants for their illegal conduct. Thus, unlike under the Sherman Act, under which

claims for damages are not limited to consumers, wholesalers and retailers cannot recover damages under the VCFA. If Defendants' argument for application of *Illinois Brick* to the VCFA were to prevail, manufacturers would be legally immunized from any claim of damages under state law for any goods that are not sold directly to the ultimate user. The federal construction of the Sherman Act, in which direct purchasers are elected to seek damages, if shoe-horned into the VCFA, would result in a state law under which nobody could obtain damages in cases like this one. That would hardly result in the broad remedial effect for which the VCFA was intended.

While offering no authoritative precedent to support their desired interpretation of Vermont law, Defendants have cited two recent trial court opinions. *FTC v. Mylan Labs, Inc.*, 99 F. Supp. 3d 1, 10 (D.D.C. 1999) *and Elkins* v. *Microsoft Corp.* (Windham (Vt.) Superior Ct., Docket No. 165-4-01, August 31, 2001). Both decisions were simply wrong. First, while correctly holding that the Vermont Attorney General could seek restitution on behalf of indirect purchasers under the VCFA, the *Mylan* court summarily and incorrectly declared that they could not seek damages under the Act, relying for that proposition on a single 1980 trial court decision, *Vermont* v. *Densmore Brick, Inc.* 1980 WL 1846 (D.Vt. 1980) that did not even address the issue for which it was cited.

In *Densmore Brick*, the Vermont Attorney General sued a stove distributor engaged in a resale price maintenance scheme with retailers, under the Sherman Act and under the VCFA. While noting that "the *Illinois Brick* decision stands for the proposition that an antitrust plaintiff" could not recover as an indirect purchaser, the court never held that *Illinois Brick* was applicable to the Vermont state law claim. Instead, the court simply denied the defendant's motion, finding that the suit had anyway been brought on

behalf of direct purchasers.[30] Thus, the *Mylan* court's reliance on *Densmore Brick* was misplaced. Its description of the opinion as "Vermont caselaw" was correct only in geographic terms – with respect to the indirect purchaser question at issue, *Densmore Brick* was neither a Vermont state court nor was it applying Vermont law.

In following *Mylan* in *Elkins*, the state trial court simply compounded the error. Importantly, Judge Wesley also misconstrued the holding in *California* v. *ARC America Corp.*, 490 U.S. 93 (1989), which is discussed elsewhere in the attached State Attorneys General Brief. While the Supreme Court in *ARC America* held that state antitrust and consumer protection laws were not required to follow *Illinois Brick*, the court did not hold, as Judge Wesley appears to have understood, that state law must be construed to bar indirect purchaser suits in the absence of statutes expressly providing for them.[31] Judge Wesley's decision is currently on appeal to the Vermont Supreme Court. Docket No. 2001-431. The Vermont Attorney General is filing a brief as *amicus curiae* in the appeal.

Rather than follow these incorrect interpretations of Vermont law, this Court should follow the plain meaning of the VCFA and the better-reasoned decision in *In Re Microsoft Antitrust Litigation*, 127 F. Supp. 2d 702, 725 (D.Md. 2001). In *Microsoft*,

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[30]Indeed, it is not evident from the court's brief, unreported decision alone, but, although the defendant had brought a motion for summary judgment on all claims on the ground that there was no evidence of a price-fixing scheme (rejected by the court because it found disputed issues of fact on the issue), the *Illinois Brick* issue was before the court only through defendant's supplemental memorandum seeking dismissal *only of the plaintiff's federal cause of action*. *See* Memorandum of Law of Densmore Brick Company, Inc., in Support of its Motion For Summary Judgment on Additional Ground, February 15, 1980 (D.Vt., Docket No. 78-297).

[31]In fact, one of the statutes under which the *ARC America* court held indirect purchasers could recover damages (Arizona's) did not include an express provision for indirect purchaser recovery. Finding, despite the absence of specific indirect purchaser language, that the Arizona statute "might be interpreted as a matter of state law as authorizing indirect purchasers to recover," 490 U.S. at 98, n.3, the Supreme Court declined to dismiss the case.

Judge Motz held that, although the VCFA and the Sherman Act may provide "the same protections," in that they may prohibit similar conduct in antitrust matters, it does not necessarily follow that a defense to an antitrust claim not based on the merits [the indirect purchaser defense asserted by Microsoft and here by Defendants] precludes the underlying conduct from being actionable under the VCFA. *Id.*

If it is not inclined to follow the position on Vermont law urged here by the state's Attorney General, this Court should at least not further muddy the jurisprudential waters on this issue while it is pending before the state's high court. The Court should instead allow the appeal of the state court decision to be heard and decided before making its ruling on the issue here.

B. Even If Contrary To The Plain Meaning And Purpose Of The VCFA, Indirect Purchasers Had No Private Action For Damages Prior To The Attorney General Can Seek Any Equitable Remedy Including Restitution On Their Behalf

Whatever the right of indirect purchaser consumers to bring a private action against an antitrust defendant under the VCFA, the Attorney General's authority to bring an action against any wrongdoer and to seek restitution on behalf of any injured party cannot be challenged. The Attorney General's authority to bring such an action is set forth in Vt. Stat Ann. tit. 9 § 2458, which authorizes him to seek injunctions, civil penalties, restitution on behalf of consumers, attorneys fees and costs, and "any other temporary or permanent relief, or both, as may be in the public interest." The statute does not indicate any limitation based on the class of consumers on whose behalf the Attorney General can seek relief; nor does it limit in any way the type of remedy that

may be obtained. *See International Collection Services*, 594 A.2d at 427 ("Nothing in this section limits the Attorney General's power to bring an action based on the status of the victim"). Even the *Mylan* court, while incorrectly "following" *Illinois Brick* with respect to antitrust damages claims under the VCFA, allowed the Vermont Attorney General "to proceed in equity and obtain restitution" for indirect purchasers under the Act. 99 F.Supp.3d at 10. Vermont's claims in this case should be allowed to stand.

24. Washington

A. Indirect Purchasers And Equitable Relief

Washington's Attorney General has standing to seek damages for the State's indirect purchases and monetary equitable relief for the benefit of its consumers. Aventis's Memorandum misses this distinction and misstates Washington law. Contrary to Aventis's representations, Washington courts have consistently upheld the State's authority to seek both kinds of relief under Wash. Rev. Code 19.86, the Unfair Business Practices-Consumer Protection Act ("CPA").

The State of Washington has standing under its antitrust laws to bring damage claims for its indirect purchases. Wash. Rev. Code 19.86.090. In *Mylan Labs, Inc.*, 99 F. Supp. 2d 1, 11 the court upheld Washington's indirect purchaser standing, denying the defendants motion to dismiss Washington's claims on *Illinois Brick* grounds .

State law provides solid ground for the *Mylan* decision. Washington courts, harmonizing Washington's state antitrust law with the *Illinois Brick* doctrine, have unequivocally granted the Attorney General standing in "indirect purchaser" cases. In *State of Washington* v. *American Tobacco Co.*, 1996 WL 931316 (Wash. Super. Ct. Nov. 19, 1996), the court concluded that "direct purchaser" standing analysis was not applicable to a claim brought under Wash. Rev. Code 19.86.090, which authorizes damages actions by the State.

The court analyzed the CPA and the policies that inform it, as well as relevant State and federal antitrust jurisprudence, and concluded that the broad language of Wash. Rev. Code 19.86.090 mandated that the Washington Attorney General has indirect purchaser standing. The court reached this conclusion by comparing paragraph two of

Wash. Rev. Code 19.86.090, which authorizes lawsuits by the State under the CPA, with paragraph one, which authorizes private actions. *Id.* at 1. Unlike the State, private plaintiffs must show an injury to "business or property." That requirement restricts compensable injuries under the CPA. *Washington State Physicians Ins. & Exch. Ass'n* v. *Fisons Corp.*, 858 P.2d 1054 (Wash. 1993) (citing *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979)). A similar requirement of injury to "business or property" in Section 4 of the Clayton Act, 15 U.S.C. § 15 has been judicially constructed to restrict the broad statutory language of Section 4. *State of Washington* v. *American Tobacco Co.*, 1996 WL 931316, at 1.

In contrast, the broader language of paragraph two of Wash. Rev. Stat.19.86.090 authorizes damage actions by the State where the State is "injured," without any restriction as to the type of injury. "This broader language recognizes that the State, with its wide-ranging responsibilities for the health and welfare of its citizens, may incur substantial damages as a result of anti-competitive activity even though the State is not actively engaged in the sphere of business in which an antitrust violation occurred." *Id.*

Applying basic rules of statutory construction to this important distinction, the court held that the absence of "business or property" language for the State meant that the State of Washington had broader standing to bring damage claims than that accorded to private parties and that any limitation of Section 4 of the Clayton Act should not be imposed on the State's claim. *Id.* at 3.

Additionally, the court considered Wash. Rev. Code 19.86.920, which provides in part: "in construing [the CPA], the courts [are to] be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various

federal statutes dealing with the same or similar matters . . .." Relying on long settled precedent, however, the court recognized that Washington courts were not conclusively bound by federal antitrust precedents. *Id.* at 2, citing *State* v. *Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 510 P.2d 233 (Wash. 1973). Since the standing provision in the CPA for the State is different from the federal statute, the Court ultimately ruled that the State had standing to proceed to trial.

In light of the clear precedent, the State of Washington respectfully requests that this Court deny Defendant Aventis's Motion to Dismiss Washington's claims, and allow the State's action to recover damages for its indirect purchases to proceed.

In addition to its standing under Wash. Rev. Code 19.86.090, the State also has standing to bring claims for equitable relief premised on indirect purchases under § 19.86.080 of the code. That right was upheld by the court in *Mylan Labs. Inc., supra.* The *Mylan* court based its analysis on *Blewett* v. *Abbott Labs.*, 938 P.2d 842 (Wash. App. 1997), *review denied,* 950 P.2d 475 (Wash. 1998). The *Blewett* court applied *Illinois Brick's* analysis to deny standing to a private indirect purchaser, and stated unequivocally:

> If direct purchasers decide not to sue, the indirect purchaser is not entirely without a remedy. While a private plaintiff must be "injured in his or her business or property" in order to bring any suit under the Act, this requirement does not exist in the section that enables action by the attorney general. We conclude that direct purchasers and the attorney general are the enforcers of antitrust law in Washington.

Id. at 847.

Hence, the Attorney General properly seeks here to obtain equitable relief in the form of restitution or disgorgement for its consumers.

The Legislature has declared that " . . . in order to protect the public and foster fair and honest competition" the CPA "shall be liberally construed that its beneficial purpose may be served . . .." Wash. Rev. Code 19.86.920. Interpreting the equitable remedies available under the CPA, the Washington Supreme Court has held that trial courts are authorized by Wash. Rev. Code 19.86.080 to issue restitution orders as "are appropriate and necessary." *State* v. *Ralph Williams' Northwest Chrysler Plymouth, Inc., supra,* at 241. In fact, the court's discretionary authority under Wash. Rev. Code 19.86.080 to grant restitution "as may be necessary to *restore to any person* in interest any moneys or property, . . . which may have been acquired by means of any act herein prohibited or declared to be unlawful," is expansive. *Id.* The Washington Supreme Court has further held that the Attorney General may seek restitution orders on behalf of others when enforcing the CPA. *See, e.g., Seaboard Surety Co.* v. *Ralph William's Northwest Chrysler Plymouth, Inc.*, 504 P.2d 1139 (Wash. 1973).

The award of restitution or disgorgement in the case at bar will indeed return illegal gains to those consumers who were harmed by Defendants' illegal acts. The award, will also help to deter any future wrongful conduct by the Defendants. As such, restitution and disgorgement are appropriate remedies.

The courts also possess independent authority at common law to grant equitable relief, including restitution or disgorgement. One of the underpinnings of a claim for restitution is that a wrongdoer must not be permitted to retain its illegal gains. The Washington Supreme Court has declared:

> The recovery of that which has been illegally acquired and which has given rise to the necessity for the injunctive relief not only restores the property to the party but insures

> future compliance where it is assured a wrongdoer is compelled to restore illegal gains.

State v. Ralph Williams' Northwest Chrysler Plymouth, Inc., supra, at 241. This can be met by awarding restitution or disgorgement.

The cases cited by Defendants are of no avail for they do not contradict the authorities cited above. In *Murray Publ'g Co., Inc.* v. *Malmquist,* 832 P.2d 493, 497 (Wash. Ct. App.1992), the court merely stated that the courts are to be guided by federal decisions interpreting *comparable* federal provisions. As discussed above, key differences exist between the Washington State statute and how it has been construed by Washington courts. Defendants' extensive reliance on *In re Terazosin Hydrochloride Antitrust Litigation,* 160 F.Supp.2d 1365 (2001) is likewise misplaced. Washington State was not a party to that case, and the *Terazosin* court had no opportunity to interpret Washington's "indirect purchaser" law. Similarly, *Free v. Abbott Labs, Inc.*, 176 F.3d 298, 300 (5th Cir. 1999), a federal decision interpreting Louisiana antitrust law, is of no precedential value insofar as Washington's state law is concerned. Accordingly, Washington respectfully requests that the State's claim for equitable remedies should also be allowed to proceed.

B. Washington State's Attorney General Is Authorized To Represent Washington Citizens As *Parens Patriae*

The defense argument that expresses statutory authority is required under Washington law is clearly misplaced.

The Washington Attorney General has broad discretion to represent the state, its agencies and citizens and does not require express statutory authority in each instance. In

State v. Gattavara, 47 P.2d 18 (Wash.1935) the state's Supreme Court confronted the issue of the scope of the Attorney General's authority under the state Constitution and statutes. In affirming the Attorney General's discretionary powers, the Court explained, "On the Attorney General in some instances, and on the prosecuting attorneys of the several counties ... in others, is imposed the duty of prosecuting offenders against the laws. The rights and powers of these officers in this respect are absolute in all cases where the statute has not specially granted the power to another."*Id.* at 8 (citations omitted).

The Court was again confronted with the discretionary powers in *Young Americans for Freedom v. Gorton*, 588 P.2d 195 (Wash. 1978). The challenged power was the authority to file an *amicus* brief, something that the Attorney General was not expressly authorized to do. Plaintiffs in *Young Americans* made the same argument as that asserted by Defendants herein, *to-wit*, that the Attorney General was powerless to act without express statutory authority. In rejecting that argument, the state Supreme Court affirmed the Attorney General's discretionary authority to act:

> "The general rule of *Taylor* is applicable here. In this case, the Attorney General has taken an action which is not specifically authorized by the pertinent constitutional and statutory provisions. However, as we have noted, the applicable provisions are couched in language broad enough, in our view, to include the filing of an *amicus curiae* brief under appropriate circumstances. In *Taylor* we rejected the requirement of express statutory authorization, and we decline to declare such a requirement now. Furthermore, the Attorney General's action in this case comports with the limitation set out in *Taylor*, since the filing of an *amicus curiae* brief is cognizable both at common law and by authorized court rule."

Id. at 209.

Federal courts have also acknowledged Washington's authority to represent its citizens as *parens patriae. See, e.g. In Re Insurance Antitrust Litigation,* 938 F.2d 919 (9th Cir. 1991.).

Plaintiffs cite the case of *State* v. *Seattle Gas & Electric Co.*, 70 P.114 (Wash.1902) in support of their argument that the Washington Attorney General cannot act without express statutory authority. Defendants' reliance on that case is misplaced. In *Seattle Gas & Electric,* the state Supreme Court found that the Attorney General lacked authority to bring a *quo warranto* action, not because he lacked statutory authority, but because exclusive power to bring such actions was statutorily conferred upon the county prosecutor's office. This case works against the Defendants' argument. There is no similar statutory shifting of authority to bring a *parens* action.

It is clear that both state and federal courts have consistently recognized the discretionary authority of the Washington Attorney General to proceed without specific statutory authority. Courts have expressly recognized the power to bring a damages action as *parens patriae.* Accordingly, the Defendants' arguments to the contrary should be rejected.

C. Federal Antitrust Cases Are Guiding Authority For Washington Courts, But Are Not Binding Precedent

Defendants assert that because federal law is "persuasive" to state courts, it is therefore "binding" upon them as a matter of state law. Andrx brief, p. 16. This misstates Washington law.

The Washington Consumer Protection Act says:

> "...in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition...."

Wash. Rev. Code 19.86.920. The state Supreme Court explained the difference between "guiding" and "controlling" in *Blewett* v. *Abbott Labs, supra.*

> "The directive to be "guided by" federal law does not mean the courts are bound to follow it; however, any departure from federal law must be for a reason rooted in Washington statutes or case law and not in the general policy arguments that the courts would weigh if the issue came before them as a matter of first impression.

Blewett v. *Abbott Labs,* 938 P.2d 842 (1997), *review denied* 950 P.2d 475 (1998).

D. The State Attorney General Has Exclusive Authority Under Washington Law to Bring A Damages Claim For Indirect Purchasers

Defendants argue that the states are requesting relief identical to that sought in the private class actions. Andrx brief p. 8.. Again, this misstates Washington law. The Washington Attorney General in her capacity as *parens patriae* has exclusive authority to seek damages on behalf of indirect purchasers. Private plaintiffs lack standing to do so. See, *Blewett* v. *Abbott Labs, supra.*

25. West Virginia

The Attorney General of West Virginia is acting pursuant to authority granted him under the West Virginia Antitrust Act, W. Va. Code §47-18-1 *et seq*. and under the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101 *et seq*. ("WVCCPA"). The Attorney General has broad powers to investigate and commence civil actions against violators of the Antitrust Act, W. Va. Code §§ 47-18-7, -8 and -9. Furthermore, the Attorney General may commence a civil action in his *parens patriae* capacity on behalf of natural persons who are citizens of the state, in both federal and state court, under both federal and state law. W. Va. Code § 47-18-17.

The Attorney General also has broad powers to investigate and commence civil actions against violators of the WVCCPA. W. Va. Code §§ 46A-7-104, -108, -109 and -111. The West Virginia Legislature clearly stated its intentions in enacting consumer protection statutes in W. Va. Code § 46A-6-101:

> (1) The Legislature hereby declares that the purpose of this article is to compliment the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the Legislature that, in construing this article, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. To this end, this article shall be liberally construed so that its beneficial purposes may be served.

W. Va. Code § 46A-6-101(1). The beneficial purposes of the WVCCPA extend to indirect purchasers, by statute. W. Va. Code §§ 46A-6-102(e) and 46A-6-104. Under the WVCCPA, the Attorney General is free to request all appropriate relief, including restitution and disgorgement. *State ex rel. McGraw* v. *Imperial Marketing*, 506 S.E.2d

799, 811-812 (W. Va. 1998); *FTC v. Mylan Laboratories, Inc.*, 99 F.Supp.2d 1 (D.D.C. 1999).

26. Wisconsin

The Attorney General of Wisconsin is acting pursuant to Wis. Stat. Ann. §§ 133.16, 133.17(1), and 133.18. These sections grant the Wisconsin Attorney General broad authority to initiate and control all antitrust cases brought under state law. Specifically, § 133.16 allows the Wisconsin Department of Justice to maintain actions designed to prevent further violations of State antitrust law, and § 133.17(1) provides that the Wisconsin Department of Justice "shall institute, control, manage, and direct all prosecutions for a violation of this chapter." Because the Wisconsin legislature has conferred such broad powers upon the Attorney General to initiate proceedings aimed at enforcing the State's antitrust laws, the Wisconsin Attorney General maintains that he or she has *parens patriae* authority under State law.[32]

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[32]Unlike the situation in *Estate of Sharp* v. *State*, 217 N.W.2d 258 (1974) where no state statute gave the Attorney General "the power to prosecute a specific action," here the Attorney General is explicitly given the power not only to prosecute but also to "control, manage and direct" litigation addressing violations proscribed by the Wisconsin legislature. *See* Wis. Stat. Ann. § 133.17(1). Therefore, the Wisconsin Attorney General may properly maintain a *parens patriae* action on behalf of Wisconsin citizens under State law.

27. Wyoming

The Wyoming Consumer Protection Act is intended to prevent the use of unfair and deceptive trade practices. Therefore, as with all remedial statutes, it is appropriate to apply the statutory language with a view to promoting the remedial intent of the legislature when it enacted the law. *Corkill* v. *Nowells*, 955 P.2d 438 (Wyo. 1988). Dismissal of this claim would permit unfair and deceptive practices where wrongdoers insulated themselves from consumers by one intermediary, frustrating the legislature's purpose.

Similarly, Wyoming's "discrimination" statutes, Wyo. Stat. Ann. § 40-4-101 *et seq.*, are to be liberally construed to "safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented." Wyo. Stat. Ann. § 40-4-116.

In light of the parallel purposes and remedies of the aforementioned Wyoming Statutes and Section 5 of the FTC Act, dismissal of Wyoming's claims is inappropriate.

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

WILLIAM J. RICHARDS
Deputy Attorney General

P.O. BOX 30213
LANSING, MICHIGAN 48909

JENNIFER MULHERN GRANHOLM
ATTORNEY GENERAL

January 25, 2001

VIA UPS OVERNIGHT MAIL

Clerk of the Court
United States District Court
Eastern District of Michigan
231 W. Lafayette Blvd.
Detroit, Michigan 48226

Dear Clerk:

Re: *Cardizem CD Antitrust Litigation; Master File No. 99-MD-1278*

Enclosed for filing in the usual manner is the State Attorneys General Brief in Opposition To Defendants Aventis And Andrx's Motion To Dismiss The State Attorneys General Second Amended Complaint and Proof of Service.

If you have any questions, please feel free to contact me.

Very truly yours,

Paul Novak
Assistant Attorney General
Consumer Protection Division
Telephone: (517) 241-2060
Facsimile: (517) 335-1935

Enc.

pj.cases.Cardizem.l.USCourt(brief)

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