

<p>STATE OF WISCONSIN 17 West Main Street Post Office Box 7857 Madison, WI 53707-7857,</p> <p>Plaintiff,</p> <p>v.</p> <p>McKESSON CORPORATION One Post Street San Francisco, CA 94104,</p> <p>FIRST DATABANK, INC. 701 Gateway Blvd., Suite 600 South San Francisco, CA 94080,</p> <p>THE HEARST CORPORATION 300 W. 57th Street New York, NY 10019</p> <p>and</p> <p>HEARST BUSINESS MEDIA 300 W. 57th Street New York, NY 10019</p>	<p>Case No. 12 CV _____</p> <p>Unclassified-Civil: 30703</p> <p>JURY TRIAL DEMANDED</p> <p>THE AMOUNT CLAIMED IS GREATER THAN THE AMOUNT CLAIMED UNDER WIS. STAT. § 799.01(1)(d)</p>
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The State of Wisconsin, by its counsel Attorney General J.B. Van Hollen, complains of the defendants as follows:

I. INTRODUCTION

1. This is an action brought by the State of Wisconsin (“Wisconsin” or “the State”) against McKesson Corporation (“McKesson”), First DataBank, Inc. (“First DataBank” or “FDB”), The Hearst Corporation, and Hearst Business Media (“HBM”), seeking damages, civil forfeitures, injunctive relief, and other relief.

2. The State alleges that McKesson, First DataBank, The Hearst Corporation, and HBM violated Wisconsin law in connection with a scheme through which, over nearly a decade, the defendants published and reported to the State false, fraudulent, and inflated average wholesale prices (“AWPs”) for more than 1,700 brand-name prescription drug products, causing the State’s Medicaid program to overpay for these drugs by tens of millions of dollars. More specifically, the State alleges that the defendants entered into a scheme through which they fraudulently inflated the AWPs published by First DataBank, The Hearst Corporation, and HBM (collectively referred to as “FDB/Hearst”) for these brand-name prescription drugs knowing, expecting, and intending that the Wisconsin Medicaid program would use the inflated AWPs to calculate how much to reimburse pharmacies and other providers that dispensed or administered these products to eligible Medicaid beneficiaries. As an intended consequence of the scheme, the State overpaid these Medicaid providers when reimbursing them based on these fraudulently inflated AWPs.

3. The State seeks injunctive relief, treble damages, civil penalties, and other relief deemed appropriate by the court to make the State whole for its overpayments and to ensure that the defendants do not engage in similar misconduct in the future.

II. THE PARTIES

4. Plaintiff is the State of Wisconsin, which brings this action in its sovereign capacity as a result of defendants’ unlawful conduct set forth below.

5. The Attorney General is authorized to bring this action on behalf of the State of Wisconsin by virtue of Wis. Stats. § 100.18(11)(d), Wis. Stats. § 165.25(1m), and Wis. Stat. § 14.11(1).

6. The Wisconsin Medicaid program, like all State Medicaid programs, is run jointly by the federal and state government and is administered by the State to provide healthcare services, including prescription drug benefits, to eligible beneficiaries (primarily the poor, elderly, disabled, and blind).

7. At all times relevant to this action, the Wisconsin Medicaid program was administered by the Wisconsin Department of Health Services (formerly the Wisconsin Department of Health and Family Services).

8. McKesson Corporation is a Delaware corporation with its principal place of business in San Francisco, California. At all times relevant to this action, McKesson was one of the three largest wholesalers of prescription drugs in the United States. McKesson purchased prescription drugs from pharmaceutical manufacturers and resold them to retail providers, including pharmacies, long-term-care pharmacies,¹ physicians, and clinics.

9. At all times relevant to this action, defendant McKesson has transacted business in the State of Wisconsin by, including but not limited to, storing, distributing and/or selling prescription drugs, including the drugs at issue in this Complaint, to purchasers within the State and to purchasers who are reimbursed by the State.

10. Defendant First DataBank is a wholly-owned subsidiary or division of The Hearst Corporation and a Missouri corporation with its current principal place of business in South San Francisco, California.

11. Defendant The Hearst Corporation is a corporation organized and existing under the laws of the state of Delaware. Its current principal place of business is located at 300 West 57th Street, New York, New York 10019.

¹ Long-term-care pharmacies provide pharmaceuticals to patients in nursing homes.

12. Defendant Hearst Business Media at all times relevant hereto, has been a division of The Hearst Corporation. The Hearst Corporation formed HBM as a division within The Hearst Corporation in 1999.

13. FDB/Hearst compiles and publishes pricing information, including AWP's, and other data regarding prescription drugs into a national compendium called the National Drug Data File ("NDDF") that is licensed to, sold to, and used by drug manufacturers, wholesalers, third party payors (including state Medicaid programs like Wisconsin's) and others.

14. At all times relevant hereto, The Hearst Corporation has wholly owned First DataBank and during the relevant time period, has held itself out also to have the same address as FDB (1111 Bayhill Drive, San Bruno, California 94066). At all relevant times hereto, The Hearst Corporation has operated and controlled FDB directly and/or through its operating group HBM. At all relevant times The Hearst Corporation directly and/or through HBM has controlled FDB policies, including policies related to price reports and other subjects relevant to this litigation.

15. At all times relevant hereto, The Hearst Corporation has operated and controlled HBM and its policies. HBM's current principal place of business is also 300 West 57th Street, New York, New York 10019. (The Hearst Corporation and HBM are collectively referred to herein as "Hearst")

16. At all relevant times hereto, Hearst operated and exercised complete domination over FDB, and used such domination to commit the fraud or wrong complained of herein:

- a. Hearst publicly stated in 1996 that First DataBank was a "division of the Hearst Corporation." (<http://www.hearst.com/press-room/pr-19960812a.php>.)
- b. Hearst currently represents to the public that it "operates" First DataBank:

Hearst Business Media [...], a division of Hearst Corporation [...], operates more than 20 business-to-business information services electronic databases and publications. Units in this group include: First DataBank, a premier supplier of pharmaceutical and drug interaction information

(<http://www.hearst.com/files/hearsttimeline.pdf>. See also Hearst Business Media homepage, <http://www.hearst.com/business-media/index.php>.)

c. In 2002, the Office of General Counsel of the Hearst Corporation communicated with pharmaceutical manufacturers on behalf of First DataBank (referred to by Hearst Counsel as “an operating unit of The Hearst Corporation”) and informed one manufacturer that AWP published by FDB reflected the actual price at which a product is sold by wholesalers to their customers, and that the AWP were the result of surveys conducted by FDB. The Hearst Counsel also requested that a manufacturer inform state Medicaid directors of this information.

d. Hearst publicly announced in 1999, that “Hearst Business Media is taking on responsibility for First DataBank, which previously was part of Hearst’s Entertainment & Syndication group.” (<http://www.hearst.com/press-room/pr-19990819a.php>.)

e. In 2004, Hearst Business Media president Richard P. Malloch said: “Through First DataBank, Inc., which the Hearst Corporation has owned for more than 20 years, we have developed longstanding associations with the majority of U.S. hospital system vendors for electronic drug knowledge-base integration.” (<http://www.hearst.com/press-room/pr-20040315b.php>.)

f. During the relevant time period, Hearst owned and administered the website through which FDB/Hearst’s customers accessed the NDDF, including pharmaceutical products’ AWP.

g. The Master Purchase Agreement pursuant to which Wisconsin Medicaid obtained access to the AWP in the NDDF was between “First DataBank, an operating group of the Hearst Corporation, a Delaware Corporation” and the State’s fiscal agent.

h. The forms provided by FDB/Hearst to manufacturers to provide the AWP when adding products to the NDDF have a bottom letterhead identifying The Hearst Corporation, with the 1111 Bayhill Drive, San Bruno, California 94066 address shared by FDB.

17. Hearst controls and appoints FDB’s officers and employees:

a. February 16, 2010 Hearst press release stating:

HEARST BUSINESS MEDIA NAMES DR. CHARLES TUCHINDA CHIEF
INNOVATION OFFICER, HEALTHCARE

Hearst Business Media, a unit of Hearst Corporation, announced today that it has named Dr. Charles Tuchinda chief innovation officer, healthcare. Tuchinda will also serve as vice president, innovation for the Group's Zynx Health and First DataBank subsidiaries.

- b. July 11, 2006 Hearst press release announcing:

HEARST BUSINESS MEDIA APPOINTS DONALD M. NIELSEN, M.D.,
PRESIDENT, FIRST DATABANK

Hearst Business Media President Richard P. Malloch today announced the appointment of Donald Nielsen, M.D., as president of First DataBank.

* * * *

"It is a tremendous honor to be selected as President of First DataBank and to join Hearst Corporation," said Nielsen.

- c. January 18, 2005 Hearst press release stating:

HEARST BUSINESS MEDIA APPOINTS NANCY GREENGOLD, M.D.,
MEDICAL DIRECTOR & VICE PRESIDENT OF ZYNX HEALTH, INC.
AND FIRST DATABANK, INC.

Hearst Business Media, a division of The Hearst Corporation, announced today that Nancy Greengold, M.D., M.B.A., has been appointed medical director for [Hearst Business Media] division and vice president of First DataBank and Zynx Health. The announcement was made by Richard P. Malloch, president, Hearst Business Media.

* * * *

"I am pleased to join Hearst Business Media with its leading electronic offerings in the health care arena," Greengold said.

18. During the relevant time period, Hearst and FDB shared officers, directors and employees, as demonstrated by the following:

- a. Richard P. Malloch, as:

Hearst Corp.:	Senior Vice President
HBM:	President & Group Head
FDB:	Vice President and Director (2001-2009)

- b. Ronald J. Doerfler, as:
 - Hearst Corp.: Senior Vice President of Finance and Administration and Director
 - FDB: Vice President (2001-2009)
- c. Robert D. Wilbanks, as
 - HBM: Group Controller
 - FDB: Vice President (2001-2009)
- d. William M. Wright, as
 - HBM: Executive Vice President and Deputy Group Head
 - FDB: President, Vice President, and Director (2001-2008)
- e. James M. Asher, as:
 - Hearst Corp: Senior Vice President, Chief Legal and Development Officer and Director
 - FDB: Vice President and Director (2001-2007)
- f. Dionysios Psychogios, as
 - Hearst Corp.: Vice President / Taxes
 - FDB: Assistant Treasurer (2001-2007)
- g. Thomas J. Hughes, as
 - Hearst Corp.: Vice President & Controller
 - FDB: Assistant Treasurer (2002-2005)
- h. Jodie W. King, as
 - Hearst Corp.: Vice President and Secretary
 - FDB: Secretary and Director (2002-2005)
- i. Caryn Klein Cohen, as
 - Hearst Corp.: Group Resident Controller
 - FDB: Vice President (2001)
- j. Nancy Greengold, M.D., as
 - HBM: Medical Director
 - FDB: Vice President (2005-2009)

k. Catherine A. Bostron, as

Hearst Corp.: Secretary
FDB: Secretary (2006-2009)

19. Hearst controls and operates Hearst and its subsidiaries as one unified company:

a. The Office of General Counsel of The Hearst Corporation represents and communicates on behalf of FDB in related litigation filed by other State Medicaid programs.

b. In 1996, Hearst acquired Multilex, a supplier of drug point-of-care databases for health care professionals, and merged it with First DataBank:

The Hearst Corporation has acquired Multilex, the United Kingdom's leading supplier of drug point-of-care databases for health care professionals. The announcement was made today by Frank A. Bennack, Jr., president and chief executive officer of The Hearst Corporation.

"The acquisition of Multilex will add significantly to Hearst's position as a major provider of computer-based health care information," Bennack said.

* * * *

Professor John Ashford, who is staying on as Managing Director, said, "... as part of a large corporation, we will have access to the resources necessary to develop new products and services in this rapidly growing market." The company becomes a part of First DataBank, a division of The Hearst Corporation.

(<http://www.hearst.com/press-room/pr-19960812a.php>.)

c. A Hearst employee was "responsible for the financial activities" of First DataBank, along with other divisions/subsidiaries:

NEW YORK, June 21, 1999 -- Nelson J. Maione has been named group finance and administrative officer of The Hearst Corporation's Entertainment & Syndication Group.

* * * *

In the Entertainment & Syndication Group, Maione will be responsible for the financial activities for all Hearst interests in the Group, including A&E Network, Lifetime Television, ESPN, The History Channel, King Features Syndicate, New England Cable

News, First DataBank, Hearst Entertainment, Inc. and the Group's foreign investments.

d. Hearst hires employees to serve the same roles in First DataBank and Zynx Health, Inc., another subsidiary/division of Hearst:

- Hearst hired Patrick Zvara as the senior director of human resources for both FDB and Zynx Health.
(<http://www.fdbhealth.com/company/executive-team.>)
- Hearst hired Nancy Greengold, M.D., M.B.A. in 2005 as vice president of both First DataBank and Zynx Health.
(<http://www.hearst.com/press-room/pr-20050118a.php>)
- Hearst hired Dr. Charles Tuchinda as Vice President, Innovation for both First DataBank and Zynx Health.
(<http://www.hearst.com/press-room/pr-20100216b.php>)

e. Prospective employees of First DataBank submit their applications to:

First Databank, Inc.
Hearst Corporation
Attn: Human Resources
500 E. 96th St., Ste. 500
Indianapolis, IN 46240

See, e.g., http://www.fdbhealth.com/careers/~link.aspx?_id=ECC63BE1393A478AA43D63B850B40E1C&__z=z

f. Hearst owns and administers First DataBank's webpages.

20. At all times relevant to this Complaint, Hearst engaged in the wrongful conduct complained of either in its individual capacity or as the alter-ego of FDB.

21. At all time relevant to this Complaint, FDB engaged in the wrongful conduct complained of either in its individual capacity or as the alter-ego of Hearst.

22. At all times relevant to this action, FDB/Hearst have transacted business in the State of Wisconsin by, including but not limited to, compiling, publishing, licensing, and/or selling pricing information regarding prescription drugs, including those at issue in this

Complaint, to purchasers within the State and to purchasers who are reimbursed by the State for drugs dispensed to Wisconsin Medicaid beneficiaries.

23. At all times relevant to this action, FDB/Hearst have licensed and/or sold pricing information, including AWP, to the Wisconsin Medicaid program pursuant to license agreements with Wisconsin Medicaid and/or its fiscal agents for use by the Wisconsin Medicaid program in determining the amount of reimbursement paid to providers for prescription drugs dispensed or administered to eligible Medicaid patients.

24. This Court has jurisdiction over the plaintiff's claims as they involve claims arising exclusively under Wisconsin law.

25. Jurisdiction and venue are proper in Dane County, Wisconsin, as all defendants do a substantial amount of business there.

III. FACTUAL BACKGROUND AND THE DEFENDANTS' SCHEME

A. Wisconsin's use of AWP to reimburse providers for drugs dispensed to Medicaid beneficiaries

26. So called "brand" drugs typically are distributed in the following manner. The manufacturer sells and ships the drug to a wholesaler who then re-sells and ships the drug to a retail customer such as a pharmacy (in some instances, the manufacturer may sell and ship the drug directly to the pharmacy). A patient obtains a prescription from his or her doctor and takes it to the pharmacy to be filled. A pharmacy then fills the prescription and dispenses the drug to the patient. If the patient is covered by the Wisconsin Medicaid program, the pharmacy (also called a "provider") submits a request for payment, called a "claim," to the Wisconsin Medicaid agency through an electronic point-of-sale system. Among other things, the claim identifies the

drug reimbursed by use of the 11-digit National Drug Code number (“NDC”)² assigned to each prescription drug sold in the United States by the U.S. Food and Drug Administration (“FDA”). If the claim is approved, the Wisconsin Medicaid program makes a payment, called a “reimbursement,” to the pharmacy.

27. At all times relevant to this action, it was necessary for the Wisconsin Medicaid program to handle claims processing and reimbursements electronically through computer systems due to the number of prescription drugs in the market (approximately 36,000), the number of Wisconsin pharmacies submitting claims (approximately 2,000), and the number of claims submitted (approximately 65,000 to 75,000 claims per day).

28. Additionally, each claim included the 11-digit NDC. During the time period relevant to this lawsuit, there were more than 60,000 different NDCs sold in the United States.

29. At all times relevant to this action, the Wisconsin Medicaid program, like other state Medicaid programs, has been required by federal law and regulation to reimburse pharmacies and other providers for brand name prescription drugs based on the “estimated acquisition cost” (“EAC”) for each drug, defined by federal regulation as “the price generally and currently paid by providers for a drug.” 42 C.F.R. §447.502 (formerly §447.301). (Another regulation governs reimbursement once the brand drug has lost patent protection and sufficient generic competition enters the market.)

30. At all times relevant to this action, Wisconsin complied with federal law by estimating an EAC for each brand name drug. At all times relevant to this action, Wisconsin Medicaid in fact reimbursed providers for brand name prescription drugs based on EAC and determined EAC for brand name drugs based on the published AWP.

² The first five digits identify the manufacturer, the next four digits identify the drug and dosage, and the last two digits identify the package size.

31. At all times relevant to this action, FDB/Hearst's NDDF has been the most comprehensive, current, computerized database of prescription drug prices available in the marketplace.

32. At all times relevant to this action, Wisconsin Medicaid obtained the AWP's it utilized to determine the EAC (and accordingly the amount of reimbursement to providers for brand name prescription drugs) from FDB/Hearst's NDDF pursuant to license agreements between FDB/Hearst and Wisconsin Medicaid and/or its fiscal agents.

33. At all times relevant to this action, the defendants knew that Wisconsin Medicaid, like most state Medicaid agencies, reimbursed providers for brand name prescription drugs based on the AWP's published by FDB/Hearst.

34. As explained in greater detail below, the defendants engaged in a scheme by which they fraudulently inflated the AWP's of thousands of NDCs, failed to disclose this to the State, and actively concealed their misconduct. The intended and actual consequence of this scheme was to cause Wisconsin Medicaid to pay pharmacies and other providers millions of dollars more in reimbursement than it would have paid if the AWP's had not been fraudulently inflated.

B. The relationship between AWP and WAC for brand drugs prior to the implementation of defendants' scheme

35. At all times relevant to this action, when brand manufacturers introduced a drug into the market, they set and established a price called wholesale acquisition cost ("WAC") for the drug. Brand manufacturers announced and published their WACs in a variety of ways, including by reporting them to FDB/Hearst, which in turn published them (at certain times FDB/Hearst also referred to WAC as "wholesale net"). Brand manufacturers also reported their WACs to wholesalers, including McKesson.

36. Historically, when brand manufacturers introduced a drug into the market, they also set and reported a price called an AWP for that drug, calculated by taking the WAC and adding, typically, either 20% or 25%. For example, if a brand manufacturer set a WAC of \$100, it set the AWP, typically, at either \$120 or \$125.

37. The percentage by which the AWP exceeded the WAC was known as the “WAC-to-AWP mark-up” or “spread.” Prior to the inception of the defendants’ scheme in or around August 2001, the WAC-to-AWP markup or spread of an NDC remained unchanged during the life of the NDC. Thus, if the WAC increased, the AWP increased commensurately. For example, if the WAC was \$100 and the AWP was \$120 (a 20% mark-up or spread), when the WAC increased to \$150, the AWP increased to \$180, maintaining the 20% mark-up or spread. Brand manufacturers announced and published their AWPs in a variety of ways, including by reporting them to FDB/Hearst, which in turn published them. Brand manufacturers also reported their AWPs to wholesalers, including McKesson.

38. As of the inception of the defendants’ scheme in or around August 2001, the defendants knew that the prices paid by wholesalers to purchase brand drugs from manufacturers were very close to WAC (they were never higher than WAC, but could be reduced slightly by prompt pay or other discounts or rebates). Furthermore, as of the inception of the defendants’ scheme in or around August 2001, the defendants knew that the prices charged by wholesalers to their retail customers, including pharmacies, was also very close to WAC, as these prices were determined by adding a very small percentage to the prices paid by the wholesalers to purchase the drugs from the manufacturers. However, as explained earlier, the amount of money a provider, such as a retail pharmacy, received in reimbursement from state Medicaid agencies like Wisconsin’s, was based on AWP.

39. Any difference between what retail providers such as pharmacies paid wholesalers to acquire brand name prescription drugs (which were based on, and very close to, WAC) and what they received in reimbursement (which was based on AWP) represented increased profits. Accordingly, the greater the mark-up or spread between WAC and AWP, the higher the providers' profits. At all times relevant to this action, the defendants knew this.

C. The defendants' scheme to secretly "bump up" AWP by 5% for certain brand drugs by increasing the WAC-to-AWP markups

40. Beginning in early 2001, for each of the NDCs that historically had a 20% markup, McKesson had already begun changing the WAC-to-AWP markups in its internal record-keeping system from 20% to 25%, increasing the AWP for each of the affected NDCs accordingly, even though the manufacturers of the affected NDCs had not increased the WAC-to-AWP markups or the AWP and even though McKesson had not changed the markup it was charging its customers. McKesson provided these fraudulently inflated WAC-to-AWP markups and the fraudulently inflated AWP to FDB/Hearst, expecting, intending, and (once FDB/Hearst agreed to participate in the scheme) knowing that FDB/Hearst would report them to state Medicaid programs, including Wisconsin's.

41. In or around August 2001, in order to effectuate its intention to increase the AWP-based reimbursement amounts to be paid by the state Medicaid programs, including Wisconsin's, and other third party payors, McKesson proposed to FDB/Hearst that it join in a scheme under which FDB/Hearst would secretly and unilaterally increase or "bump up" the AWP it was publishing and sending to payors, including the Wisconsin Medicaid program, for drugs for which the manufacturers had historically used a 20% markup to set AWP. McKesson proposed that FDB/Hearst do so using the bumped-up WAC-to-AWP markup of 25% that McKesson was providing to FDB/Hearst and ignoring the 20% markup provided by the

manufacturers. Pursuant to the scheme, FDB/Hearst would publish AWP's for these drugs that were 5% higher than the AWP's the drugs' manufacturers were reporting and had historically reported and that had been the basis for FDB/Hearst's published AWP's.

42. McKesson proposed this scheme despite the fact that there was, and would be, no commensurate increase in the actual (WAC-based) prices wholesalers charged their retail customers for these drugs.

43. The fact that there was no commensurate increase in the actual (WAC-based) prices wholesalers charged their retail customers for these drugs was central to the defendants' "bump-up" scheme. By increasing the AWP's of the historically 20% spread drugs by an additional 5%, the defendants caused state Medicaid programs, including Wisconsin's, to pay higher reimbursements to the defendants' customers, *i.e.*, retailer providers such as pharmacies, even though there had been no commensurate increase in the actual prices paid by these providers to wholesalers. By increasing the WAC-to-AWP markup for these drugs, the defendants used taxpayer money (in the case of public payors such as the Wisconsin Medicaid program) to increase the profits of the defendants' customers.

44. FDB/Hearst agreed to McKesson's proposal in or around August 2001 and began publishing the fraudulently inflated AWP's based on the fraudulently inflated WAC-to-AWP markups and fraudulently inflated AWP's McKesson provided.

45. Defendants further agreed to conceal, and in fact concealed, their scheme by, among other ways, having FDB/Hearst falsely claim that the markups were set in accordance with data received from surveying major wholesalers and that the number of surveys it was conducting to determine the published AWP was "increasing." In fact, for the NDCs at issue here, FDB/Hearst used the fraudulently inflated WAC-to-AWP markup and fraudulently inflated

AWPs McKesson provided as the basis for its published AWP and did not “survey” any other wholesalers.

D. The defendants’ motive to increase the reimbursement that their customers received from third-party payors, such as Wisconsin Medicaid

46. Each defendant had a financial interest and motive in carrying out the bump-up scheme, including but not limited to increasing the retail providers’ profits in order to secure their good will and their business. McKesson’s principal customers are retail pharmacies who have a choice of national wholesalers from which to purchase prescription drugs. During the relevant time period, McKesson competed for the business of retail pharmacies with, among others, national wholesalers Cardinal Health and Amerisource Bergen. By inflating AWP, causing payors such as Wisconsin Medicaid to pay inflated reimbursements, and conveying its role in doing so to retail pharmacies, McKesson sought to maintain and increase its market share in the highly competitive wholesale market.

47. In September 2001, McKesson’s Director of Brand Pharmaceutical Product Management Bob James explained the significance of this increase in AWP in an internal company email:

In August we were able to get the Concerta (formerly an Alza product now JOM) AWP spread raised to 20% from the previous 16 ⅔%. Last week we got agreement with First DataBank on raising the Searle Products, which are now part of Pharmacia, to a 20% spread as well as Genotropin which was a Pharmacia product (with a 16 ⅔% spread). This may not seem like a big deal but it has a huge positive impact on the profitability of our customers.³

48. A January 2002 e-mail from McKesson’s Director of Branded Rx Product Management and Investment John Bonner observed: “There’s been a great deal of activity of

late, by McKesson, to increase AWP's on brand items to a uniform 25%. That helps the pharmacy profitability greatly." Another McKesson employee explained in a February 2002 e-mail, "I received a response to an e-mail last week from John Bonner. He mentions that McK is working to increase the spread on AWP to a uniform 25% on branded Rx. One of the benefits of this will increase reimbursements to our customers from third parties." Another McKesson employee noted in a March 2002 e-mail that "Product Management is working closely with FDB to adjust their mark up. FDB [has] been changing their mark up to match with our mark up. Eventually our list price will [be] equal to FDB's AWP."

49. McKesson was aware of the additional profit its customers would receive based on the fraudulently inflated AWP's. For example, McKesson Director of Brand Pharmaceutical Product Management Bob James wrote that with the higher AWP, a customer's profit would nearly triple from \$6.86 to \$17.18 "and that is awesome!!"

50. However, in January 2002, several members of McKesson's upper management (including the aforementioned Bob James as well as Senior Vice President of Purchasing and Pharm Finance Greg Yonko) agreed to develop a "position statement" so that McKesson's management team would have a unified message when discussing issues relating to AWP and WAC with customers, suppliers, and legislative officials. This official position statement, subsequently circulated by Yonko, falsely denied that McKesson had had any role in changing the WAC-to-AWP markups:

³ The difference or spread between WAC and AWP for brand drugs can be expressed in two different ways: (1) the percent by which the AWP exceeds the WAC, or (2) the percent by which the WAC is below than the AWP. Accordingly, an AWP that exceeds the WAC by 20% is equivalent to a WAC that is 16 ⅔ % below the AWP. An AWP that exceeds the WAC by 25% is equivalent to a WAC that is 20% below the AWP. Hence, in the e-mail referenced in the paragraph above, Mr. James is referring to increasing the WAC-to-AWP markups from 20% to 25%.

What is AWP? – AWP or Average Wholesale Price represents a suggested retail-selling price for a branded or generic pharmaceutical and has been around for many years. Its [sic] calculated as a markup from WAC (Wholesale Acquisition Cost). The markup typically runs 20 to 25% and is for the most part determined by historical spreads from the manufacturer (not by McKesson). McKesson carries the price in our system and adjusts it if there is any pricing action. First DataBank publishes this price and it is the basis for all retail pharmacy dispensed prescriptions that are covered by 3rd Party reimbursement plans for branded products.

51. During the same time period, in an effort to retain customers and market share in the competitive wholesale market, McKesson informed select customers of its efforts to increase their profits with the falsely inflated AWP's. For example, McKesson informed its customers that it was "doing everything possible to 'raise' AWP's when appropriate." A McKesson executive noted, "This sounds like something we should at least [be] quietly communicating to our customers in order to get some mileage from it[.]". McKesson wanted credit for its role in raising AWP's because "it's possible that some of these accounts will believe this stuff just happens and the efforts will go unrecognized."

52. McKesson's "marketing" efforts seemed to work. A McKesson employee reported in September 2001 that its customers were "very appreciative of our efforts because they understand the profitability associated with higher AWP's." A McKesson employee noted in an e-mail to other McKesson employees that one of the comments made in his discussions with one customer regarding McKesson's role in the increase in AWP's was that "this would certainly be a good reason to renew our agreement with McKesson when it's time." A McKesson employee reported in May 2002 that "Some of the more savvy stores like Med-X have taken notice." A McKesson employee reported in May 2002 that in discussions with a customer, "when I mentioned we had been working on AWP expansion with some success, he was even more happy that McKesson was looking out for our customers." A McKesson employee noted

in June 2002 that one customer “both recognizes and appreciates our efforts with the AWP situation” and that “[t]his has most likely had a very positive impact on their gross profits.”

53. In an April 2003 memorandum identifying accomplishments for fiscal year 2003, the aforementioned Bob James listed the following:

We played a major role (and still do) in normalizing the AWP’s on Brand Pharmaceuticals from 16 ⅔ % to 20% spreads. This has had a huge impact on the profitability of our customers on their insurance based business (which is about 80% now). To summarize this impact, it’s the same as lowering their costs of goods 3 ⅓ % on 70% of the brand drugs. Historically, 75% to 80% of brand pharmaceuticals carried a 16 ⅔% AWP spread and the remaining a 20% spread. Today, almost 95% of brand drugs carry a 20% spread. This has provided millions of dollars in improved profits across our industry.⁴

The memorandum also listed the following accomplishment: “Worked on behalf of Vita RX (now MSD) in raising the AWP’s on Avonex, Copaxone, and Betaseron to 20%. The impact of this effort was to increase their profits by about \$800k per year ... each year, not just one time.”

E. The defendants’ efforts to conceal the scheme

54. The defendants never disclosed the scheme to the State of Wisconsin. Indeed, in an additional effort to conceal the bump-up and their role in implementing it, defendants agreed to and did stagger publication of the false, fraudulent, and inflated AWP’s to coincide with price increases announced by the relevant manufacturers for those drugs. As a result, the 5% bump-up occurred at different times for different drugs.

55. Exhibit 1 illustrates the staggered timing of the bump-up in the AWP’s that the State has discovered through its investigation. For each of the more than 1,700 affected NDCs, Exhibit 1 identifies the dates on which the false, fraudulent, and inflated AWP was first published.

⁴ See footnote No. 3 for an explanation of how spreads of 16 ⅔ % and 20% correspond to WAC-to-AWP markups of 20% and 25% respectively.

56. By agreement, defendants took other steps to conceal the scheme. For example, when manufacturers whose AWP's were increased contacted FDB/Hearst to inquire about the increase, FDB/Hearst falsely denied any involvement. In the case of at least one such inquiry, First DataBank employee Patricia Kay Morgan forwarded the e-mail exchange to McKesson Director of Brand Pharmaceutical Product Management Robert James stating that she thought he might want to see her answer. He responded, "I love it! You are the best."

57. In October 2006, McKesson falsely and publicly asserted that "a full reading of McKesson documents, including e-mails, demonstrates that McKesson did not enter into any agreement with First DataBank to raise published AWP's." *See also* ¶ 50.

58. The defendants' scheme to publish fraudulently inflated AWP's for more than 1,700 NDC's continued until around September 2009.

59. The State did not know that the defendants had intentionally inflated the AWP's of the NDC's in question or the reasons for the defendants' conduct. That is, the State did not know either that the defendants had unilaterally and intentionally, and without a commensurate increase in the actual (WAC-based) prices wholesalers charged their retail customers for these drugs, inflated the WAC-to-AWP mark-up for the NDC's in question above the mark-up theretofore set and reported by the manufacturers, or the reasons for the defendants doing so.

F. Wisconsin was damaged by the defendants' scheme

60. As a result of the bump-up scheme, the Wisconsin Medicaid program overpaid retail providers when reimbursing them based on the fraudulently inflated AWP's.

IV. TOLLING

61. Any applicable statute of limitations has been tolled by the defendants' knowing, active, and fraudulent concealment and/or because the defendants' conduct constitutes a continuing violation. Because of their knowing, affirmative and/or active concealment of their

scheme to inflate AWP's as described above, the defendants are estopped from relying on any statute of limitations.

62. Any applicable statute of limitations or other time-related defenses such as estoppel, waiver, or laches available to defendant McKesson has been tolled pursuant to the Tolling Agreement executed by the State and McKesson on or about February 16, 2010, attached hereto as Exhibit 2.

V. CAUSES OF ACTION

COUNT I — Violation of Wis. Stat. § 100.18(1) Deceptive Trade Practices Act

63. Plaintiff State of Wisconsin realleges and incorporates by reference all previous allegations.

64. Defendants' conduct described above violates Wis. Stat. § 100.18(1), which prohibits representations with the intent to sell, distribute, or increase the consumption of merchandise when the representation contains any assertion, representation, or statement of fact that is untrue, deceptive, or misleading.

WHEREFORE, Plaintiff State of Wisconsin prays that the Court:

- A. Grant judgment for the plaintiff State of Wisconsin;
- B. Enjoin the defendants from continuing the unlawful practices described above;
- C. Grant plaintiff State of Wisconsin restitution to restore its pecuniary loss, pursuant to Wis. Stat. § 100.18(11)(d);
- D. Grant plaintiff damages pursuant to Wis. Stat. § 100.18(11)(b)2 and § 100.263;
- E. Grant plaintiff its costs and attorneys' fees;

- F. Impose forfeitures against the defendants in the amount of not less than \$50 nor more than \$200 for each fraudulent representation defendants made or caused to be made;
- G. Impose the appropriate costs, penalty assessments, and surcharges, including surcharges imposed under Wis. Stats. § 100.261 and ch. 814; and
- H. Grant such other and further relief as this Court deems just and equitable.

**COUNT II — Violation of Wis. Stat. § 100.18(10)(b)
Deceptive Trade Practices Act – Wholesaler's Price**

65. Plaintiff State of Wisconsin realleges and incorporates by reference all previous allegations.

66. Wisconsin Stat. § 100.18(10)(b) explicitly states that it is deceptive to represent the price of any merchandise as a manufacturer's or wholesaler's price, or a price equal thereto, unless the price is not more than the price that retailers regularly pay for the merchandise. Defendants' conduct in publishing and causing to have published wholesale prices that were and are significantly greater than the true average prices for drugs paid by pharmaceutical retailers (pharmacists and healthcare providers) was, and is, a deceptive act within the meaning of Wis. Stat. § 100.18(10).

67. Wisconsin has been harmed by defendants' deceptive conduct in falsely inflating their average wholesale prices in that it has paid far more for the drugs manufactured by defendants than it would have paid had the defendants had not fraudulently inflated the AWP's.

WHEREFORE, plaintiff State of Wisconsin prays that the Court:

- A. Grant judgment for the plaintiff State of Wisconsin;
- B. Enjoin the defendants from continuing the unlawful practices described above;
- C. Grant plaintiff State of Wisconsin restitution to restore its pecuniary losses, pursuant to Wis. Stat. § 100.18(11)(d);

- D. Grant plaintiff damages pursuant to Wis. Stat. § 100.18(11)(b)2 and § 100.263;
- E. Grant plaintiff its costs and attorneys' fees;
- F. Impose forfeitures against the defendants in the amount of not less than \$50 nor more than \$200 for each fraudulent representation defendants made or caused to be made;
- G. Impose the appropriate costs, penalty assessments, and surcharges, including surcharges imposed under Wis. Stats. § 100.261 and ch. 814; and
- H. Grant such other and further relief as this Court deems just and equitable.

**COUNT III — Violation of Wis. Stat. § 49.49(4m)(a)(2)
Medical Assistance Fraud**

68. Plaintiff State of Wisconsin realleges and incorporates by reference all previous allegations.

69. Each of the defendants knowingly made or caused to be made false statements or representations of material fact for use in the determination and calculation of payment by the Wisconsin Medicaid Program in violation of Wis. Stat. § 49.49(4m)(a)(2).

70. Each of the defendants used a variety of schemes, devices, agreements and false statements, and misrepresentations that had the effect of increasing the amount the Wisconsin Medicaid Program paid as part of the Medicaid Program. The governing statute of limitations for this Count is set forth in Wis. Stats. § 893.87.

WHEREFORE, the plaintiff respectfully requests:

- A. Judgment for the plaintiff State of Wisconsin;
- B. An injunction enjoining the defendants from continuing the unlawful practices described above;
- C. An amount reasonably necessary to remedy the harmful effect of the defendants' conduct;

- D. Forfeitures in the amount of not less than \$100 and not more than \$15,000 for each false statement that defendants made or caused to be made;
- E. The reasonable and necessary costs of investigation and prosecution of this case, including reasonable attorneys' fees;
- F. Appropriate penalty assessments and surcharges, including surcharges imposed under ch. 814.

COUNT IV — Violation of Wis. Stat. § 20.931(2)
False Claims for Medical Assistance

71. Plaintiff State of Wisconsin realleges and incorporates by reference all previous allegations.

72. Each of the defendants violated Wis. Stats. § 20.931(2) by:

- a. Knowingly causing to be presented to agents of Wisconsin a false claim for Medical Assistance.
- b. Knowingly making, using or causing to be made or used a false record or statement that was used by the Medical Assistance Program to obtain payment of a false claim for medical assistance.
- c. Being the beneficiary of a false claim for Medical Assistance submitted to any officer, employee, or agent of this state, knowing that the claim was false and failing to disclose the false claim to the state within a reasonable time after becoming aware that the claim was false.

WHEREFORE, the plaintiff respectfully requests:

- A. Judgment for the plaintiff State of Wisconsin;
- B. An injunction enjoining the defendants from continuing the unlawful practices described above;
- C. Forfeitures in the amount of not less than \$5,000 and not more than \$10,000 for each false claim;

- D. Treble damages;
- E. All applicable assessments and surcharges, including surcharges imposed under ch. 814; and
- F. The reasonable and necessary costs of investigation and prosecution of this case, including reasonable attorneys' fees.

COUNT V – Aiding and Abetting

73. Plaintiff, the State of Wisconsin realleges and incorporates by reference all previous allegations herein.

74. McKesson, First DataBank, The Hearst Corporation, and Hearst Business Media each aided one another in fraudulently increasing the WAC-to-AWP mark-up from 20% to 25% for the drugs at issue and in publishing the fraudulently inflated AWP's without disclosing what they had done.

75. Each defendant knowingly gave substantial assistance to the others in carrying out the scheme and consciously desired or intended that its conduct would yield such assistance.

76. The defendants' assistance with the scheme caused damage to the State of Wisconsin by causing the Wisconsin Medicaid program to pay more when it reimbursed providers based on the fraudulently inflated AWP's than it would have paid had the AWP's not been secretly and fraudulently inflated.

WHEREFORE, the plaintiff respectfully requests:

- A. Judgment for the plaintiff State of Wisconsin;
- B. An injunction enjoining the defendants from continuing the unlawful practices described above;
- C. An amount reasonably necessary to remedy the harmful effect of the defendants' conduct;
- D. All remedies available under Counts I-IV;

- E. The reasonable and necessary costs of investigation and prosecution of this case, including reasonable attorneys' fees; and
- F. Appropriate penalty assessments and surcharges, including surcharges imposed under ch. 814.

COUNT VI – Civil Conspiracy

77. Plaintiff, the State of Wisconsin realleges and incorporates by reference all previous allegations herein.

78. McKesson, First DataBank, The Hearst Corporation, and Hearst Business Media formed a conspiracy to fraudulently inflate the AWP's published by FDB/Hearst. Defendants agreed to and did fraudulently increase the WAC-to-AWP mark-up from 20% to 25% for the drugs at issue, then effectuated the conspiracy by publishing the fraudulently inflated AWP's without disclosing what they had done. As part of the conspiracy, defendants further agreed to take, and did take, affirmative steps to conceal the scheme and their roles in it.

79. The defendants committed an unlawful act or acts in furtherance of this conspiracy to defraud Wisconsin and violate Wisconsin law as set forth herein in Counts I through IV.

80. The defendants' conspiracy caused damage to the State of Wisconsin by causing the Wisconsin Medicaid program to pay more when it reimbursed providers based on the fraudulently inflated AWP's than it would have paid had the AWP's not been secretly and fraudulently inflated.

WHEREFORE, the plaintiff respectfully requests:

- A. Judgment for the plaintiff State of Wisconsin;
- B. An injunction enjoining the defendants from continuing the unlawful practices described above;

- C. An amount reasonably necessary to remedy the harmful effect of the defendants' conduct;
- D. All remedies available under Counts I-IV;
- E. The reasonable and necessary costs of investigation and prosecution of this case, including reasonable attorneys' fees; and
- F. Appropriate penalty assessments and surcharges, including surcharges imposed under ch. 814.

PLAINTIFF DEMANDS TRIAL BY JURY OF 12.

Dated this 2nd day of October, 2012.

Respectfully submitted,


One of Plaintiff's Attorneys

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