

STATE OF WISCONSIN *Ex rel.*
Peggy A. Lautenschlager
252 Sheboygan Street
Fond du Lac, WI 54935,

and

Bauer & Bach, LLC
123 East Main Street, Suite 300
Madison, WI 53703,

Plaintiffs,

v.

ACTAVIS
(f/k/a Alharma USPD and Purepac)
60 Columbia Road, Building B
Morristown, NJ 07960,

PAR PHARMACEUTICAL, INC.
300 Tice Boulevard
Woodcliff Lake, NJ 07677,

TEVA PHARMACEUTICALS USA, INC.
1090 Horsham Road
North Wales, PA 19454,

FOREST LABORATORIES, INC.
909 Third Avenue
New York, NY 10022, and

FOREST PHARMACEUTICALS, INC.
13600 Shoreline Drive
St. Louis, MO 63045,

Defendants.

Case No. 11CV5544

Case Code: 30301

Classification: Money Judgment

**Filed under Seal pursuant to
Wis. Stat. §20.931(5)(b)**

2011 DEC 20 AM 9:38
DANE CO. CIRCUIT COURT

COMPLAINT

The plaintiffs, the State of Wisconsin, *ex rel.* Peggy A. Lautenschlager and Bauer & Bach, LLC (collectively “*qui tam* plaintiffs”), bring this action pursuant to Wis. Stat. §20.931(5)(b) against the above named defendants and allege, the following:

I. INTRODUCTION

1. The *qui tam* plaintiffs are a law firm that includes the former Wisconsin Attorney General, Peggy A. Lautenschlager, who, while attorney general, filed the action entitled *State v. Abbott Labs, et al.*, Dane County Case No. 04-CV-1709. That action alleged that thirty-eight defendant drug companies defrauded the Wisconsin Medicaid program by engaging in the mark-up scheme described in the complaint. At the time Dane County Case No. 04-CV-1709 was filed, the State of Wisconsin was one of the first states in the United States to file such a suit.

2. To the knowledge of the *qui tam* plaintiffs, the State of Wisconsin is not a party to an action or an administrative proceeding to assess a civil forfeiture against the defendants that is based upon the scheme alleged herein and was filed prior to the instant action.

3. Accordingly, the *qui tam* plaintiffs bring this action pursuant to Wis. Stats. § 20.931(5) to recover tens of millions of dollars in damages to the Wisconsin Medicaid program¹ caused by the defendants’ fraudulent scheme to inflate the amount Wisconsin Medicaid paid for prescription drugs.

4. This is a lawsuit by the *qui tam* plaintiffs to recover forfeitures, penalties, and other appropriate relief, and to secure injunctive relief from the defendants who are manufacturers of prescription drugs. As described in this complaint, the defendants’

¹ All references to “Wisconsin Medicaid program” or “Wisconsin Medicaid” herein include all prescription drug benefits provided by Wisconsin Medicaid including, but not limited to, the prescription drug benefits provided through BadgerCare Plus and SeniorCare.

deceptive practices and unlawful acts involve a scheme and course of conduct that directly resulted in Wisconsin taxpayers paying inflated prices for prescription drugs. The scheme involves the publication by the defendants of phony “average wholesale prices,” which become the basis for calculating the cost at which “providers” – the physicians, clinics, and pharmacies that provide these prescription drugs to patients – are reimbursed by Wisconsin. By willfully engaging in this scheme, the defendants have created a system in which the State of Wisconsin and its taxpayers financed windfall profits to these providers. The defendants attempted to profit from their scheme by using the lure of these windfall profits competitively to encourage providers to buy more of their drugs instead of competing in the market place solely on the basis of legitimate factors such as price and the medicinal value of their drugs.

II. PARTIES

1. *Qui tam* plaintiff, Peggy A. Lautenschlager, is an individual residing at 252 Sheboygan Street in the City of Fond du Lac, Wisconsin, and is of counsel to Bauer & Bach, LLC. Attorney Lautenschlager served as Wisconsin Attorney General from 2003 – 2006.

2. *Qui tam* plaintiff, Bauer & Bach, LLC, is a law firm organized under the laws of the State of Wisconsin. Its members are attorneys Michael R. Bauer and Daniel P. Bach. It is located at 123 East Main Street, Suite 300, in the City of Madison, Wisconsin. Attorneys Bauer and Bach served in supervisory capacities at the Wisconsin Department of Justice from 2003-2006.

3. The *qui tam* plaintiffs bring this action in the place of the State of Wisconsin pursuant to Wis. Stat. § 20.931 to recover damages and penalties as a result of the defendants’ unlawful conduct as set forth.

4. The defendants are pharmaceutical companies whose deceptive schemes, described in this complaint, have resulted in drugs being sold to the State of Wisconsin and its citizens as detailed below.

5. The defendant, Actavis (f/k/a Alpharma USPD and Purepac), is a New Jersey corporation with its principal place of business located at 60 Columbia Road, Building B, Morristown, NJ, 07960. Actavis is engaged in the business of manufacturing, distributing, marketing, and/or selling prescription drugs that are reimbursed by state Medicaid agencies nationwide.

6. The defendant, Par Pharmaceutical, Inc. ("Par"), is a New Jersey corporation with its principal place of business located at 300 Tice Boulevard, Woodcliff Lake, NJ 07677. Par is engaged in the business of manufacturing, distributing, marketing, and/or selling prescription drugs that are reimbursed by state Medicaid agencies nationwide.

7. Defendant Teva Pharmaceuticals USA, Inc. ("Teva") is a Delaware corporation engaged in the business of manufacturing and selling pharmaceuticals. Teva's principal place of business is located at 1090 Horsham Road, North Wales, Pennsylvania 19454. Teva is a subsidiary of Teva Pharmaceutical Industries, Ltd., an Israeli corporation. Teva is also the successor in interest to Barr Laboratories, Inc. In December 2008, Teva Pharmaceutical Industries, Ltd. acquired Barr Laboratories, Inc. and Barr Laboratories, Inc. was subsequently merged into Teva.

8. The defendant, Forest Laboratories, Inc. ("Forest"), is a Delaware corporation with its principal place of business located at 909 Third Avenue, New York, NY, 10022.

9. The defendant, Forest Pharmaceuticals, Inc. (“Forest Pharm”), a wholly owned subsidiary of Forest, is a Delaware corporation with its principal place of business located at 13600 Shoreline Drive, St. Louis, MO, 63045.

10. Forest and Forest Pharm (collectively, the “Forest defendants”) are diversified health care companies that individually, and/or in combination with one another, engage in the business of manufacturing, distributing, marketing, and/or selling prescription drugs that are reimbursed by state Medicaid agencies nationwide.

III. JURISDICTION AND VENUE

11. The *qui tam* plaintiffs bring this action on behalf of themselves and in the name of the State of Wisconsin pursuant to Wis. Stat. § 20.931(5)(a). In accordance with Wis. Stat. § 20.931(12), this action is not brought against a state public official and, to the best of *qui tam* plaintiffs’ knowledge, the state is not a party to an action or administrative proceeding against the defendants related to the allegations contained herein that was filed before the instant action.

12. This court has jurisdiction over the claims alleged herein because the claims are brought on behalf of the state and arise exclusively under Wisconsin statutes.

13. This court has personal jurisdiction over each of the defendants because the defendants do or did business in Wisconsin, purposefully direct or directed their actions toward Wisconsin, and/or have the requisite minimum contacts with Wisconsin necessary to permit the court to exercise its jurisdiction.

14. Venue is proper in Dane County, Wisconsin, in that all of the defendants do substantial amounts of business there. In addition, the state pays reimbursement through Wisconsin Medicaid for prescription drugs dispensed in Dane County and throughout the state. The events giving rise to the claim herein arose, in substantial

part, in Dane County. The state's capital and primary operations are in Dane County, and the state regularly and systematically conducts business in Dane County.

IV. THE INJURY TO GOVERNMENTAL HEALTH PLANS CAUSED BY THE DEFENDANTS' FALSE WHOLESALE PRICES.

A. The Wisconsin Medicaid Program.

15. Medicaid is a joint federal and state health care entitlement program authorized by federal law, with mandatory and optional provisions for eligibility and benefits covered, including prescription drugs. Wisconsin Medicaid has three major programs: 1) Medicaid provides medicines and medical care to very low-income children, parents, pregnant women, and elderly and disabled adults; 2) BadgerCare provides medicines and medical care for children and parents with income up to 185% of the federal poverty level; and 3) SeniorCare provides medicines and medical care to seniors with income up to 240% of the federal poverty level.

16. Wisconsin, through its Medicaid program, purchases large quantities of drugs. Although participation by the defendants in the Wisconsin Medicaid program is purely voluntary, because of the size of the Wisconsin Medicaid program, all defendants have chosen to participate and sell drugs to Wisconsin's Medicaid participants. Thus, Wisconsin may at any given time have to reimburse a pharmacist for any of the drugs of any of the defendants – a universe of many thousands of drugs and drug sales.

17. Federal law places limits on what Wisconsin may pay for any particular drug. According to 42 C.F.R. § 447.331, Wisconsin may reimburse pharmacists at “the lower of the – 1) Estimated acquisition costs plus reasonable dispensing fees established by the agency; or 2) Providers' usual and customary charges to the general public.” 42 C.F.R. § 447.331. The “estimated acquisition cost” “means the agency's estimate of the

price generally and currently paid by providers for a drug marketed or sold by a particular manufacturer or labeler in the package size of drugs most frequently purchased by providers.” 42 C.F.R. § 447.301. Thus, pursuant to federal law, the highest price Wisconsin can pay for a drug is the estimated acquisition cost of that drug to a provider.

18. The defendants have hidden the wholesale prices at which they sell their drugs and their knowledge about the prices at which wholesalers sell their drugs to providers, thus depriving Wisconsin of access to the pricing information it needs to estimate accurately the acquisition cost of the defendants’ drugs. Because neither Wisconsin, nor any other state, has the knowledge base required to estimate accurately the defendants’ drug prices, entire businesses have grown up to provide pricing information to the states and others. The businesses that publish the drug-pricing compendiums purport to supply accurate price information about the defendants’ drugs through information obtained from the defendants.

19. Because Wisconsin, like most other states, has no consistent source of systematic information about providers’ acquisition costs for the drugs that it reimburses, Wisconsin has used the prices reported to the publishing companies to estimate the acquisition cost of most of its drugs.

20. As a practical matter, Wisconsin, as most other states, is dependent on the publishing companies’ pricing reports for the maintenance of its Medicaid claims processing system.

21. Thus, Wisconsin is functionally dependent on the accuracy of the data supplied to the publishing companies by the defendants, in meeting its obligation to pay providers no more than its estimated actual acquisition cost of their drugs.

B. The Defendants' Corruption of the Government Medicaid Program.

22. The defendants have defeated the intent of the Medicaid program to pay providers at a rate no greater than their acquisition cost by reporting false and inflated average wholesale prices ("AWP") to the publishing companies and/or by reporting prices that they knew or know, because of the manner of publishing companies' operations, would misrepresent the defendants' true wholesale prices. By using the term "average wholesale price," defendants convey the term's commonly understood meaning; i.e., that the price is an average of actual prices that are charged by wholesalers. One purpose of this scheme was and is to create a spread between the true wholesale price of a drug and the false and inflated AWP reported by the publishing company. This increases the incentive for providers to choose that drug for their patients, or, at a minimum, counteract the same tactic used by a competitor.

23. The higher the spread between the AWP and the wholesale price the provider actually pays, the more profit a provider can make. The defendants often market their products by pointing out (explicitly and implicitly) that their drug's spread is higher than that of a competing drug.

24. All of the defendants have inflated the reported AWPs of their drugs to levels far beyond the real average wholesale price of their drugs.

25. Similarly, the defendants have illegally and deceptively misrepresented and inflated the wholesale acquisition cost ("WAC") of their drugs. This practice has made it appear that any reduction in the purchase price beyond the listed WAC would result in a loss to the wholesaler and was, hence, unachievable. In fact, the WAC was

often secretly discounted by the defendants to purchasers other than the Medicaid program through an elaborate charge back system.

C. The Defendants' Exacerbation of the Complexities of the Market and Affirmative Concealment of their Wrongdoing.

26. The defendants have been able to succeed in their drug pricing scheme for more than a decade by exacerbating the complexities of the incredibly huge, and dauntingly complex, drug market, and by purposely concealing their pricing scheme from Wisconsin, as set forth below.

27. The defendants have themselves continuously concealed the true prices of their drugs and continued to publish deceptive AWP and WACs as if they were real, representative prices.

28. The defendants' unlawful scheme has completely corrupted the market for prescription drugs. Instead of competing on prices and medicinal value alone, the defendants have deliberately sought to create powerful financial incentives for providers to prescribe drugs based primarily on the spread between the true price of a drug and the published AWP or WAC. Creating incentives for providers to prescribe drugs based on such a spread is inconsistent not only with Wisconsin statutes, but also its public policy. Large price spreads on higher priced drugs encourage providers to prescribe more expensive drugs instead of their lower priced substitutes, thereby increasing the cost of healthcare. Moreover, competition on the basis of such spreads has the potential to influence (consciously or unconsciously) providers to prescribe less efficacious drugs over ones with greater medicinal value. Because of the defendants' concealment of their scheme, Wisconsin and its citizens have unknowingly underwritten this perversion of competition in the drug market. In sum, the defendants have been engaged in an

insidious, deceptive scheme that is causing Wisconsin and its citizens to pay scores of millions of dollars a year more than they should for their prescription drugs, and may well be inducing some providers to prescribe less efficacious drugs.

29. With some exceptions, reimbursement to pharmacies and physicians for drugs covered by the Wisconsin Medicaid program has been historically made at the AWP minus a percentage, plus a dispensing fee.

30. At all times, each defendant was aware of the reimbursement formula used in the Wisconsin Medicaid program and the impact of the Medicaid program on the defendants' reported prices.

31. By publishing false and inflated wholesale prices, and by keeping their true wholesale prices secret, the defendants have knowingly enabled providers of drugs to Medicaid recipients to charge Wisconsin false and inflated prices for these drugs, and interfered with Wisconsin's ability to set reasonable reimbursement rates for these drugs.

32. As a consequence, Wisconsin's Medicaid program has paid more for prescription drugs than it would have paid if the defendants had published their true wholesale prices.

V. THE DEFENDANTS' CONDUCT WAS INTENTIONALLY IN DISREGARD OF ESTABLISHED LAW.

33. The defendants have a legal duty to deal honestly with the State of Wisconsin and they know of their obligation.

34. Moreover, for more than 60 years, it has been unlawful for a seller to cause to be circulated a price at which no, or few, sales are actually expected, whether it is called a "list price," "suggested price," or "benchmark price." *E.g., FTC v. Colgate-*

Palmolive Co., 380 U.S. 372 (1965); *FTC v. The Crescent Publishing Group, Inc.*, 129 F.Supp. 311 (S.D.N.Y. 2001). The defendants either knew of this law or acted in reckless and willful disregard of it.

35. Wisconsin has specifically declared that it is a deceptive practice, Wis. Stat. § 100.18(10)(b), to call a price a “wholesale price” if retailers are actually purchasing the product at a lesser amount.

36. The pharmaceutical industry has been excoriated at congressional hearings for causing untrue AWP’s to be published.

37. The defendants have willfully ignored, and continue to ignore, 1) their duty to Wisconsin to behave with scrupulous honesty; 2) case law uniformly holding that their pricing practices are unlawful; 3) Wisconsin’s clear statutory prohibition of their conduct; and 4) the reprimands of Congress.

38. As a result, penalties and forfeitures, consistent with Wisconsin’s statutory scheme, are mandated in this case.

VI. HARM TO WISCONSIN AND ITS CITIZENS.

39. The defendants’ unlawful activities have significantly and adversely impacted Wisconsin and its citizens. Wisconsin has had to pay more for the drugs it purchases through its Medicaid program.

VII. CLAIMS AND PRAYER FOR RELIEF

COUNT I—Violation of Wis. Stat. § 20.931, et seq. False Claims for Medical Assistance

40. The *qui tam* plaintiffs re-allege and incorporate by reference all previous allegations.

41. At all relevant times, the defendants “knowingly” (as defined in Wis. Stat. § 20.931(1)(d)): a) caused to be presented to officers and/or employers of the state false claims for medical assistance, in the form of the false price information for the drugs discussed herein; b) made, used, or caused to be made or used, a false record or statement to obtain approval or payment of a false claim for medical assistance, in the form of the false price information for the drugs discussed herein; c) conspired to defraud the state by obtaining allowance or payment of a false claim for medical assistance and by making, using, or causing to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money to Wisconsin Medicaid by engaging in the fraudulent acts as alleged herein; d) made, used, or caused to be made a false record or statement to conceal, avoid, or decrease obligations to pay Wisconsin Medicaid as alleged above; and/or e) was a beneficiary of the submission of false claims for medical assistance to officers and/or employees and/or agents of the state, knew that that the claim was false, and failed to disclose the false claim to the state within a reasonable time after becoming aware that the claim was false.

42. As a result of the defendants’ conduct, the state paid reimbursements to Wisconsin Medicaid providers of the specified prescription drugs sums of money grossly in excess of the amounts contemplated by law, resulting in great financial loss to the state. Such inflated reimbursements have occurred throughout the time period at issue in this complaint.

43. As a result of the defendants’ conduct in violation of Wisconsin’s false claims for medical assistance statute, the state has suffered substantial injuries and

damages for which it is entitled to relief, including but not limited to three times the amount of its damages and civil penalties for each violation of Wis. Stat. § 20.931.

WHEREFORE the *qui tam* plaintiffs on behalf of the State of Wisconsin, pray that the court:

- a. Grant judgment for the *qui tam* plaintiffs;
- b. Declare that the defendants' actions violate Wis. Stat. § 20.931;
- c. Award the state treble damages and enter judgment against the defendants and in favor of the state;
- d. Order the defendants to pay civil penalties for violations of the statutes referenced above of not less than \$5,000 for each fraudulent claim paid to them by the state; and
- e. Award the *qui tam* plaintiffs their appropriate share of the proceeds of this action, pursuant to Wis. Stat. § 20.931;
- f. Order that the *qui tam* plaintiffs recover, in addition to their appropriate share, their reasonable expenses, costs, and attorneys' fees as provided by law; ; and
- g. Grant the *qui tam* plaintiffs such other further relief as may be determined to be just, equitable, and proper by the court.

VIII. JURY DEMAND

QUI TAM PLAINTIFFS DEMAND A TRIAL BY A JURY OF 12 ON ALL ISSUES SO TRIABLE.

Signed and dated this 19th day of December, 2011.

BAUER & BACH, LLC
On behalf of *Qui Tam* Plaintiffs
Bauer & Bach, LLC and
Peggy A. Lautenschlager

By: 

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