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June 3, 1991

Honorable Harry D. Leinenweber
United States District Judge
United States Courthouse
219 S. Dearborn Street
Chicago, Illinois 60604

RECEIVED
JUN 07 1991
ANTITRUST BUREAU

Re: In Re: Clozapine Antitrust Litigation

Dear Judge Leinenweber:

Enclosed is a courtesy copy of defendant Caremark Inc.'s Supplemental Memorandum In Support Of Its Motion To Dismiss. I also am enclosing a copy of Caremark's original motion to dismiss and the two memoranda of law which were filed in the U.S. District Court for the Southern District of New York prior to the time the actions filed by various state attorneys general were transferred to this Court for consolidation under MDL Docket No. 874.

Sincerely yours,



Michael A. Forti

MAF/nm

Enclosures

BY MESSENGER

cc: All Counsel of Record (w/o enclosures)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: CLOZAPINE ANTITRUST) MDL Docket No. 874
LITIGATION)
)
) No. 90 C 6412
)
) Consolidated for Pretrial
) Proceedings With the Following
) Actions That Have Been Trans-
) ferred from the Southern
) District of New York:
)
This Document Relates To)
Docket Numbers 90 Civ. 8055,) 90 Civ. 7724, 8055, 8060,
8060, 8062-8065, 8067, 8069,) 8062-8065, 8067, 8069, 8071,
8071, 8073-8077, 8079-8082,) 8073-8077, 8079-8082, 8084,
8084, 8086-8087, 8089, 8092;) 8086-8087, 8089, 8092;
91 Civ. 0244, 0921, 1043,) 91 Civ. 0244, 0921, 1043,
1165, 1219-1220, 1392, 1673,) 1165, 1219-1220, 1392, 1673,
1813-1814) 1813-1814
)
)
)
) Honorable Harry D. Leinenweber

**DEFENDANT CAREMARK INC.'S
SUPPLEMENTAL MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS**

Defendant Caremark Inc. ("Caremark") respectfully sub-
mits this supplemental memorandum of law in support of its motion
to dismiss the complaints of the States^{1/} in these consolidated
proceedings for their failure to state a claim upon which relief
can be granted. This motion was fully briefed before the U.S.
District Court for the Southern District of New York at the time
these actions were transferred to this Court for consolidation

^{1/} The thirty-three states, commonwealths and the District of
Columbia which have filed actions against Sandoz Pharmaceuticals
Corp. ("Sandoz") and Caremark are collectively referred to herein
as "the States."

under MDL Docket No. 874. This memorandum supplements Caremark's two memoranda previously filed in the U.S. District Court for the Southern District of New York on January 28, 1991, and April 5, 1991, with relevant case authority decided by this Court and the U.S. Court of Appeals for the Seventh Circuit.

PRELIMINARY STATEMENT

The States attempt in their First and Second Claims for Relief to implicate Caremark in tying and price fixing conspiracies in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, based upon Caremark's participation in Sandoz' CLOZARIL® Patient Management Systemsm ("CPMS").^{2/} Because a plain reading of the States' allegations is that Caremark is merely Sandoz' agent, the States' complaints fail to aver a cognizable antitrust conspiracy between Sandoz and Caremark. Recognizing this defect, the States attempt to salvage at least their tying claim by suggesting an illegal agreement among Sandoz and CLOZARIL® patients. The States' most recent theory, however, is as flawed as the original; purported victims of an alleged restraint of trade cannot satisfy the concerted action requirement of a Section 1 claim. The States' Third Claim for Relief, which purports to allege a Section 2 monopolization claim, also should be dismissed as to Caremark because this claim is against Sandoz alone. For these reasons,

^{2/} For a more thorough discussion of the factual background of this litigation, Caremark refers the Court to its Memorandum of Points and Authorities Supporting Its Motion to Dismiss the States' Actions ("Opening Mem.") filed on January 28, 1991, in the United States District Court for the Southern District of New York and its Preliminary Report filed with this Court on April 30, 1991.

and for the reasons discussed in the memoranda previously filed by Caremark, this Court should dismiss the States' complaints.^{3/}

ARGUMENT

I

THE STATES FAIL TO PLEAD THE THRESHOLD REQUIREMENTS FOR A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT

The States allege that Sandoz and Caremark have "illegally tied the sale of the drug clozapine (tying product) to blood drawing, case administration, data base, dispensing, and laboratory services (tied products)" and have "engaged in a vertical price fixing agreement relating to the sale of the drug Clozaril, blood drawing, case administration, data base, dispensing, and laboratory services in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1." (Compl. ¶¶ 54 and 60)^{4/} Caremark's argument for dismissal developed fully in its prior memoranda is straightforward: (1) Section 1 of the Sherman Act proscribes only

^{3/} The States are incorrect in their assertion that the Federal Rules of Civil Procedure merely require "that the complaint give the defendant 'fair notice of what the plaintiff's claim is'" (States' Response to Caremark's Motion to Dismiss ("States' Response") at 3) This Court has held that "[a] complaint must contain direct or inferential allegations of every material element necessary to state a legal theory of relief." Devilbiss v. Arvid C. Walberg & Co., No. 83 C 1133, slip op. at 3 (N.D. Ill. 1986) (Leinenweber, J.) (citing Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985)), attached hereto as Exhibit 1. Moreover, on a motion to dismiss, a court is not bound by the legal characterizations that a plaintiff attributes to the facts. Republic Steel Corp. v. Pennsylvania Engineering Corp., 785 F.2d 174, 182-83 (7th Cir. 1986).

^{4/} All citations are to the complaint filed by the State of Minnesota.

those restraints of trade achieved through concerted conduct; (2) under the Sherman Act, an agent is incapable of engaging in illegal concerted action with its principal; (3) the States' allegations establish that Caremark is an agent of Sandoz with respect to the sale and distribution of CLOZARIL®; and therefore, (4) Caremark's participation in CPMS cannot as a matter of law violate Section 1 of the Sherman Act. (See Caremark's Opening Mem. at 15-18; Caremark's Reply Memorandum In Support of Its Motion to Dismiss ("Reply Mem.") at 2-9)

The States alternative theory -- that CLOZARIL® patients are parties to a purportedly unlawful agreement -- also fails because the victim of an alleged restraint of trade cannot be a co-conspirator to such a restraint. Moreover, the tying claim fails for the independent reason that the States do not allege that there is a substantial danger that either Caremark or Sandoz will attain market power in the "tied" services, a necessary allegation according to the well-established precedent of this Circuit. Finally, the States' price fixing claim fails for the additional reason that the States do not allege that Caremark agreed to adhere to Sandoz' suggested price or that Sandoz sought such an agreement.

A. The States' Allegations Establish That Caremark Is Sandoz' Agent and Incapable of Conspiring With Sandoz Within the Meaning of the Sherman Act

The States' complaints fail under Section 1 of the Sherman Act because Caremark, as Sandoz' agent, is incapable of engaging in an antitrust conspiracy. See Morrison v. Murray

Biscuit Co., 797 F.2d 1430, 1436-38 (7th Cir. 1986); Illinois Corporate Travel, Inc. v. American Airlines, Inc., No. 85 C 07079, slip op. at 5 (N.D. Ill.), aff'd, 806 F.2d 722 (7th Cir. 1986), attached hereto as Exhibit 2. ("[R]estraints imposed on individuals who do not possess entrepreneurial indicia [e.g., agents] are outside the scope of Section 1."). Because the States fail to plead concerted action, their Section 1 claims must be dismissed. (See also Opening Mem. at 16-18; Reply Mem. at 7-9)

Although the States argue that "Sandoz and Caremark are two separate entities that unreasonably restrained trade" (States' Response at 20), their conduct is "concerted" within the meaning of Section 1 only if their relationship is one of independence, rather than agency. Thus, to claim that Caremark engaged in illegal concerted action under Section 1 of the Sherman Act, the States must allege facts which establish that Caremark is truly independent from Sandoz and entrepreneurial with respect to the distribution of CLOZARIL®. See Illinois Corporate Travel, Inc. v. American Airlines, Inc., supra, No. 85 C 07079, slip op. at 5 ("[W]hile [a firm may] operat[e] as an independent business entity generally, it [may] not possess sufficient independence with respect to the sale[s] [at issue] to qualify as a reseller under antitrust analysis.").

In Illinois Corporate Travel, Inc. v. American Airlines, Inc., 806 F.2d 722 (7th Cir. 1986), the Seventh Circuit affirmed the order of the district court denying a preliminary injunction and held that this requisite independence did not exist between a travel agency company and an airline. The Court held that with

respect to the sale of airline tickets for major airlines, the travel agency was not an independent actor but merely an "agent" whose prices could lawfully be fixed by the airlines. Id. at 725. The Court reasoned that the "relation [between the plaintiff and the airline] is a genuine agency [because] [t]ravel service operators do not resell air travel." Id.

Here, as in Illinois Corporate Travel, an agency relationship exists between Sandoz and Caremark. The necessary independence found lacking in Illinois Corporate Travel would exist between Sandoz and Caremark only if Caremark were a reseller of CLOZARIL®. The States' pleadings, however, clearly establish that Caremark is not a reseller of CLOZARIL®. The States acknowledge that Caremark merely "receives a fee from Sandoz for its services under CPMS." (Compl. ¶ 41) It is Sandoz and not Caremark who retains the purchase price and the attendant profits of CPMS. (Compl. ¶ 40) Because the States admit that Sandoz reimburses Caremark for its CPMS services and that Caremark does not retain the purchase price for the sale of CLOZARIL® therapy, Caremark is not a reseller.^{5/} Consequently, as in Illinois Corporate Travel, Sandoz and Caremark are not economically independent actors capable of engaging in concerted action that violates Section 1 of the Sherman Act. Because the States plead an

^{5/} As Caremark argued in its opening and reply memoranda, retention of receipts and profits is a clear indicia of agency. See Ally Gargano/MCA Advertising, Ltd. v. Cooke Properties, 1989-2 Trade Cas. (CCH) ¶ 68,817, 62,277 (S.D.N.Y.) ("In view of the retention of profits provision it is difficult to characterize MCA's role with respect to subleasing as remotely that of 'entrepreneur' or 'independent businessman.'") (See Caremark's Reply Mem. at 8)

agency relationship that is immune from antitrust liability under Section 1 of the Sherman Act, this Court should dismiss the States' First and Second Claims for Relief.^{6/}

B. Patient Participation In CPMS Does Not Constitute an "Agreement" Under Section One of the Sherman Act

Recognizing their pleading infirmities, the States retreat from their reliance on Caremark as a "co-conspirator." (See Caremark's Reply Mem. at 2, citing the States' Response at 18-19) Instead, the States concoct an alternative theory of antitrust conspiracy claiming that CLOZARIL® patients themselves and Sandoz form the requisite contract, combination or conspiracy. The States now assert that the concerted action "requirement is met when a patient (or payor) agreed [sic] to the purchase of CPMS." (States' Response at 19) As Caremark urged in its reply memorandum, this theory is not tenable in law or in logic. The action of a single entity imposing a tying arrangement on its customers is not proscribed by Section 1 of the Sherman Act. McKenzie v. Mercy Hospital of Independence, 854 F.2d 365, 368 (10th Cir. 1988). (See Caremark's Reply Mem. at 4) That "the buyer took both products in a package against his will negates the existence of a 'contract, combination, or conspiracy.'" Will v.

^{6/} As Caremark argued in its reply memorandum, dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper because the States' pleadings establish that Caremark is Sandoz' agent. (Caremark's Reply Mem. at 9, citing North American Produce v. Nick Penachio Co., 705 F. Supp. 746, 750 (E.D.N.Y. 1988) (Dismissal of Section 1 claim under Federal Rule of Civil Procedure 12(b)(6) was proper because "from plaintiff's own allegations th[e] [c]ourt conclude[d] that for antitrust purposes, plaintiff was defendant's agent.") (emphasis added).

Comprehensive Accounting Corp., 776 F.2d 665, 669 (7th Cir. 1985), cert. denied, 475 U.S. 1129 (1986).^{2/} See generally United States v. Nasser, 476 F.2d 1111, 1118-20 (7th Cir. 1973) (alleged victim cannot be co-conspirator unless victim is subject to liability under the statute at issue). Because the States have failed to allege concerted action between parties capable of an antitrust conspiracy, this Court should dismiss their claims under Section 1.

C. The Proscription on Vertical Price Restraints Does Not Apply to the Sandoz-Caremark Relationship

The States' recognition that Caremark is Sandoz' agent similarly defeats their Section 1 price fixing claim. The prohibition on vertical price agreements does not apply to restrictions on the price to be charged by one who is in reality an agent of, not a buyer from, the manufacturer. Morrison v. Murray Biscuits, supra, 797 F.2d at 1426 (citing United States v. General Electric Co., 272 U.S. 476 (1926)). Accordingly, as Sandoz' agent in the distribution of CLOZARIL[®], Caremark is legally incapable of conspiring to maintain resale prices. (See also Caremark's Opening Mem. at 20-22 and Reply Mem. at 6-9)

^{2/} To the extent that the Seventh Circuit's decision in Will v. Comprehensive Accounting Corp., supra, cites Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), overruled in part, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), for the principle that "unwilling compliance" satisfies the joint actions requirement of Section 1, that holding has been effectively overruled by Fisher v. City of Berkeley, 475 U.S. 260, 267 (1986) ("[A] restraint imposed unilaterally . . . does not become concerted action within the meaning of [Section 1 of the Sherman Act] simply because it has a coercive effect upon the parties who must obey.").

D. The States Have Failed to Allege That a Substantial Danger Exists That Either Sandoz or Caremark Will Acquire Market Power in the Alleged Tied Service Markets

As Caremark argued in its other memoranda, to state a claim for tying, the States must allege that the tie forecloses a substantial volume of commerce in the market for the tied product. (See Caremark's Opening Mem. at 18-20; Caremark's Reply Mem. at 6 n.5) The case authority established by this Circuit, however, places an even greater burden on plaintiffs alleging an unlawful tying arrangement: "One of the threshold criteria the plaintiff must satisfy . . . is that there is a substantial danger that the tying seller will acquire market power in the tied product market." Will v. Comprehensive Accounting Co., *supra*, 776 F.2d at 674 (emphasis added) (quoting Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Development Co., 758 F.2d 203, 210 (7th Cir. 1985)). Accordingly, the States must allege facts which establish a substantial danger that either Sandoz or Caremark will acquire market power in the alleged tied services. The States merely conclude that "[t]he Clozaril/CPMS tie forecloses competition in the markets for blood drawing, case administration, data base, dispensing, or laboratory services." (Compl. ¶ 46) The States fail to allege that either Sandoz or Caremark currently has or will acquire market power in any of those services. Because the States fail to meet this threshold pleading requirement, this Court should dismiss their tying claims.

E. The States Fail to Plead Facts to Support Their Vertical Price Fixing Claim

The Seventh Circuit adheres, as it must, to the Supreme Court doctrine that a manufacturer may suggest a resale price and that a distributor may freely conform to such price. See, e.g., Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698 (7th Cir.), cert. denied, 469 U.S. 1018 (1984); Skokie Gold Standard Liquor v. Joseph E. Seagram & Sons, 661 F. Supp. 1311 (N.D. Ill. 1986). Thus, to state a claim for resale price maintenance under Section 1 of the Sherman Act, the States must allege something more than Sandoz' suggestion of a "resale" price and Caremark's adherence to such a price. The States must allege facts which would exclude the possibility that Sandoz and Caremark were acting independently. Id. at 1318; Magid Manufacturing Co. v. U.S.D. Corp., 654 F. Supp. 325, 328 (N.D. Ill. 1987). The States merely conclude that "Sandoz sets the resale price." (States' Response at 25) The States' complaints allege no facts which would establish that Caremark communicated its acquiescence or agreement to a resale price, and that such agreement was sought by Sandoz. Accordingly, the States' price fixing allegations should be dismissed.^{8/} (See Reply Mem. at 9-10)

^{8/} Dismissal of the resale price fixing claim is proper under Federal Rule of Civil Procedure 12(b)(6). See Char Crews, Inc. v. Christofle Silver, Inc., No. 81 C 3940, slip op. at 2 (N.D. Ill. 1982), attached hereto as Exhibit 3. ("General allegations that defendants conspired together . . . are not sufficient to state a cause of action [for resale price maintenance.] . . . [G]eneral allegations of conspiracy are merely legal conclusions, and must be supported with allegations of some specific facts tending to show the existence of the alleged conspiracy.") (emphasis added). See also Cayman Exploration Corp. v. United Gas Pipe Line Corp., 873 F.2d 1357, 1360 (10th Cir. 1989) ("To adequately state a vertical price fixing violation ('resale price maintenance'),

II

THE STATES HAVE NOT PLEADED A
MONOPOLIZATION CLAIM AGAINST CAREMARK

The States' monopolization claim is against Sandoz and Sandoz alone:

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

(Compl. ¶ 67; emphasis added) The States have failed to name Caremark as a monopolist and have not alleged that Caremark engaged in any monopolistic conduct.^{9/} Because it "alleges no specific act or conduct on the part of" Caremark, the States' Third Claim for Relief should be dismissed as to Caremark. See Potter v. Clark, 497 F.2d 1206, 1207 (7th Cir. 1974).

plaintiff must allege at least some facts which would support an inference that the parties have agreed that one will set the price at which the other will resell the product or service to third parties." (emphasis added in part).

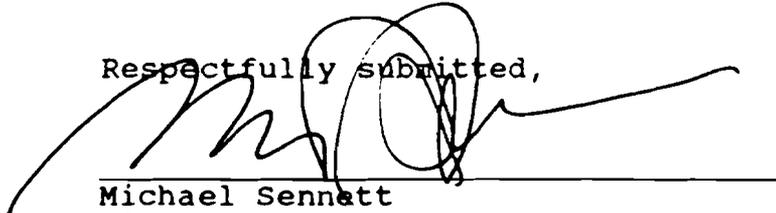
^{9/} Confronted with this obvious deficiency, the States advance an entirely new claim against Caremark. For the first time in their Response, they contend that "Caremark has conspired with Sandoz to monopolize the market for clozapine." (States' Response at 25) This covert attempt by the States to amend their complaints must fail. This Court has held that "[i]f a complaint is insufficient it may not be amended by briefs in opposition to the motion to dismiss." Devilbiss v. Arvid C. Walberg & Co., supra, No. 83 C 1133, slip op. at 3; see also Car Carriers, Inc. v. Ford Motor Co., supra, 745 F.2d at 1107 ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.").

CONCLUSION

For these reasons, and for all the reasons set forth in its opening and reply memoranda, Caremark respectfully moves this Court for an order dismissing the States' complaints, and each of them, for failure to state a claim upon which relief can be granted.

Dated this 3rd day of June, 1991.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MS', is written over a horizontal line. The signature is stylized and extends to the right of the line.

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Attorneys for Defendant
CAREMARK INC.

THE DEVILBISS COMPANY, a Division of Champion Spark Plug
Company, a Delaware Corporation, Plaintiff, v. ARVID C.
WALBERG & CO., an Illinois Corporation, Defendant

NO. 83 C 1133

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION

Slip Opinion

February 27, 1986

OPINIONBY: LEINENWEBER

OPINION: MEMORANDUM OF OPINION AND ORDER

HARRY D. LEINENWEBER, Judge

Counter/plaintiff, Arvid C. Walberg & Co. ("Walberg"), filed an amended counterclaim Count I seeking \$8000 for engineering time it was forced to expend as a result of the inferior construction of two spray booths it had purchased from counter/defendant, The Devilbiss Company ("Devilbiss"), for a customer under its purchase order No. 04127.

Devilbiss has moved for summary judgment supported by the deposition of Arvid C. Walberg, a principal of Walberg, taken on December 14, 1983, and a series of letters between the parties identified in the deposition.

This same issue was previously before the court on a motion for summary judgment which was denied on August 30, 1983. The basis of that ruling was the existence at that time of a question of fact whether the parties had intended an agreement to split customer's back charges of \$7319.30 to encompass the \$8000 Walberg seeks.

Exhibits A, B and C indicate that during the spring of 1982 Walberg and Devilbiss had a dispute over back charges being made against Walberg by its customer. At that time, Walberg was claiming \$7319.30 reimbursement while Devilbiss was offering \$1580.25.

Apparently, through negotiations over the telephone in August, 1983, the parties agreed that they would "equally share the responsibility in the matter" and accept the sum of \$3659.65 each. (Ex. D correspondence between Devilbiss and Walberg, dated 9/7/82) Devilbiss' share was passed on to Walberg in the form of a credit to its account with Devilbiss, leaving a balance due of \$14,316.35. To remove any doubt that Walberg understood this, it wrote Devilbiss on September 17, 1982 (Ex. E) acknowledging Devilbiss' letter of September 7, 1982 and indicating payment of the account was delayed because Walberg "was a little short of cash." The balance was not disputed.

Walberg proceeded to make a "payment on account" of \$1000 on December 9, 1982. (Ex. F)

On January 19, 1983, Devilbiss sent Walberg a dunning letter clearly referring to Walberg's purchase order No. 04127 and an "unpaid balance on

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[this] account in the amount of \$13,316.35." (Ex. G) Walberg responded on January 26, 1983 apologetically advising that it had "not been able to raise funds as yet to clear up our old obligations." (Ex. H)

DeVilbiss contends, inter alia, on the basis of the foregoing, an account stated was created between the parties which forecloses Walberg's claim of \$8000 credit on this same account.

Walberg contends first, that the court order of September 30, 1983 was final and appealable because of an order, dated September 14, 1983, finding the judgment in favor of DeVilbiss of \$13,316.25 final and appealable; second, that DeVilbiss' raising of account stated is not timely; and third, in any event, it is a question of fact. More importantly, Walberg has not disputed any of the deposition references or exhibits and has supplied no additional references or exhibits.

In Counts III and IV of the counterclaim, Walberg alleges that DeVilbiss and Champion Spark Plug commenced a direct attack against Walberg to drive it into bankruptcy and out of business. Allegedly, the attack was executed through the following acts: (1) manufacturing substandard exhaust plenum chambers for use by Walberg as a component part of a process bearing Walberg's name; (2) publication through its agents of slander; (3) breach of an agreement to test a Walberg product; and (4) sale of competing products to mutual distributors and customers at unfairly low prices. Count III alleges that these acts constitute "unfair trade and unfair competition" and cause irreparable damage. Count IV alleges these acts were in restraint of trade and thereby violated Secs. 1 and 2 of the Sherman Act, 15 U.S.C. §1 and 2, and Secs. 4, 7 and 16 of the Clayton Act, 15 U.S.C. §15, 18 and 26A. DeVilbiss has moved to dismiss on the ground that Counts III and IV fail to state any claim upon which relief could be granted.

DISCUSSION

I. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNT I OF THE COUNTERCLAIM

The order of September 14, 1983 rendered only the judgment in favor of DeVilbiss for \$13,316 final. The balance of the case under Rule 54(b), Fed.R.Civ.P., including Walberg's counterclaim, (which was subsequently amended), is not final and is subject to revision at any time prior to final adjudication.

DeVilbiss' motion for summary judgment was in response to plaintiff's amended counterclaim and DeVilbiss is within its rights to raise any defense it might have at the time the pleading is filed. Rule 56, Fed.R.Civ.P. Even if Walberg had not filed an amended counterclaim, where there is an expanded record such as is the case here, a party may renew its motion for summary judgment. Kirby v. P. R. Mallory & Co., Inc., 489 F.2d 904, 913 (7th Cir. 1973).

Lastly, Walberg claims that account stated is a question of fact. However, the existence of an account stated is a question of fact like any other factual issue. Under some circumstances its existence or absence can be one of law.

An "account stated" is an agreement between parties to previous transactions that the account representing the balance due is correct, with a promise, express or implied, that the debtor shall pay the full amount of the agreed balance. LaGrange Metal Products V. Pettibone Mulliken, 106 Ill.App.3d 1046,

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436, N.E.2d 645, 651, 62 Ill. Dec. 619, 625 (1st Dist. 1982). Here, Walberg acknowledged in writing on two occasions that DeVilbiss' claim of balance due on its purchase order No. 04127 was correct. (Exs. E & H) In addition, he made "payment on account" of \$1000 on December 9, 1982. (Ex. F)

Since all of Walberg's engineering work was done on account No. 04127 and was completed prior to January 18, 1982 (Ex. C, p.4, enumerated P11), Walberg obviously had knowledge of its potential claim at the time it wrote Exhibits E & H and made the payment. (Ex. F) Therefore, there are no issues of fact over the existence of the account stated.

Walberg has not sought to dispute any of the foregoing, being content to rest on its legal arguments.

Accordingly, DeVilbiss' motion for summary judgment on Count I of the counterclaim is granted.

II. PLAINTIFF'S MOTION TO DISMISS COUNTS III and IV OF THE COUNTERCLAIM

For the reasons stated herein, DeVilbiss' motion to dismiss is granted. A complaint will not be dismissed for failure to state a claim unless it appears that the plaintiff could not prove any set of facts which would entitle him to relief. *Brillhart v. Mutual Medical Ins., Inc.*, 768 F.2d 196, 199 (7th Cir. 1985); *Zapp v. United Transportation Union*, 727 F.2d 617, 627 (7th Cir. 1984). A complaint must contain direct or inferential allegations of every material element necessary to state a legal theory of relief. *Carl Sandburg Village Condo. Assn. No. 1 v. First Condo Develop. Co.*, 758 F.2d 203, 207 (7th Cir. 1985), *Sutliff, Inc. v. Donovan Co., Inc.*, 727, F.2d 648, 655 (7th Cir. 1984). A court can grant a motion to dismiss "if there is no reasonable prospect that the plaintiff can make out a cause of action from the events narrated in the complaint." *Carl Sandburg Village*, 758 F.2d, at 207; *Brillhart*, 768 F.2d, at 198. Defendant is correct in asserting in his reply that if a complaint is insufficient it may not be amended by briefs in opposition to the motion to dismiss. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984). Counts III and IV of the counterclaim fail to state any claim upon which relief may be granted. Count III fails to set forth, either directly or indirectly, allegations necessary to state a cause of action for "unfair trade" or "unfair competition". This court and the counter/defendant can only guess at the manner in which the activities set forth in Count III constitute unfair trade or unfair competition. If Walberg is alleging that they constitute commercial disparagement, it has failed to allege the appropriate elements. See, e.g., *Smith-Victor Corp. v. Sylvania Electric Products, Inc.*, 242 F. Supp. 302, 307 (N.D. Ill. 1965).

If Walberg is alleging wrongful interference with a prospective business advantage, it did not set forth the necessary elements. See, e.g., *Crinkley v. Dow Jones & Co.*, 67 Ill.App.3d 869, 878, N.E.2d 714 (1st Dist. 1979). To the extent that the facts set forth in Count III may give rise to a cause of action for defamation, as was noted by Judge Grady in his Memorandum Opinion of September 30, 1983 regarding Count II, Count III only duplicates Count II. See, e.g., *Chicago Heights Venture v. Dynamite Nobel of America, Inc.*, No. 84-3087, slip op. at 15 (7th Cir. 1/28/86).

Count IV also fails to state any claim upon which relief could be granted. Count IV is totally devoid of allegations necessary for a violation of Sec. 1

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of the Sherman Act, 15 U.S.C. §1. See, generally, Copperweld Corp. v. Independence Tube Corp., -U.S.-, 104 S.Ct. 2731 (1984); Car Carriers, 745 F.2d 1101. Count IV also lacks any allegations of facts regarding a violation of Sec. 2 of the Sherman Act, 15 U.S.C. §2, such as a threatened actual monopoly, market power, or relevant product or geographic markets. See, generally, Copperweld, 104 S.Ct. 2731. Similarly, there are no allegations of facts supporting a violation of Sec. 7 of the Clayton Act, 15 U.S.C. §18, such as those regarding the illegal acquisition of a business enterprise and a corresponding lessening of competition. See, generally, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

Accordingly, since the counter/plaintiff has not and apparently could not allege the necessary legal or factual elements of any legal theory for which this court could grant relief, Counts III and IV of the amended counterclaim are dismissed.

IT IS SO ORDERED.

ILLINOIS CORPORATE TRAVEL, INC. d/b/a McTRAVEL TRAVEL
SERVICES, Plaintiff, v. AMERICAN AIRLINES, INC., Defendant

No. 85 C 07079

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION

Slip Opinion

January 8, 1986

OPINION BY: GETZENDANNER

OPINION: MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This antitrust case is before the court on the plaintiff's motion to reconsider and set aside the court's September 16, 1985 memorandum opinion and order denying plaintiff's motion for a preliminary injunction. Although the case has now been reassigned to Judge Brian Duff, I offered to rule on the motion in order to avoid the necessity of reconvening any evidentiary hearings, and Judge Duff agreed by order dated December 6, 1985. Plaintiff raises two arguments: 1) that the court erred in balancing the hardships to the parties; and 2) that the court improperly applied common law agency principles to plaintiff's allegations of resale price maintenance.

1. Balance of Hardships

Plaintiff raises two distinct arguments concerning the balance of hardships. First is that the court erred in characterizing plaintiff's estimates of harm as "conclusory." Second is that the court unfairly relied on American's claims of harm to its distribution system when plaintiff was precluded from investigating and exposing the weaknesses of those claims at the preliminary injunction hearing. Neither argument seems to the court persuasive grounds for reconsideration.

Plaintiff's evidence of irreparable harm consists almost entirely of opinion evidence from its president Richard Dickieson not that it will go out of business, but that it will be prevented from opening a number of additional McTravel offices through use of an admittedly novel pricing and advertising system. As Dickieson set forth in his affidavit, McTravel is both a "recent entrant into the travel agency business" and the "first" travel agency to promote the discount travel concept. (Dickieson Aff. PP 26-27). While current losses due to delays in this strategy are clearly difficult to quantify, the fact remains that what McTravel seeks by an injunction is not a preservation of the status quo, under which American's travel agencies are not allowed to advertise rebates, but a chance to capitalize on a newly competitive market. Thus, while McTravel's injuries are "irreparable" in the sense that they are difficult to quantify, the chief losses of which McTravel complains involve benefits not presently enjoyed.

Plaintiff vigorously argues that granting an injunction would preserve rather than alter the status quo since McTravel, while not an authorized American

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agent, was nonetheless authorized under its ARC agreement to issue American tickets by using the imprint plates of other carriers with which American has a bilateral ticketing arrangement. The flaw in this argument is that at no time until just before this suit did McTravel make national efforts to promote its rebating policies. (A chief example would be the promotional spots on "Good Morning America.") While permitting McTravel to continue issuing American tickets would in part preserve the status quo, permitting McTravel to issue such tickets while pursuing an aggressive marketing strategy would greatly alter the status quo.

For similar reasons, the court rejects plaintiff's contention that reliance on American's harm was erroneous. In weighing the relative hardships between American and McTravel, the court was not opining that the injunction would economically diminish American's business. Had the court done so, plaintiff would be correct to complain that evidentiary rulings impaired its ability to refute American's claims. My point, however, was that any legitimate interest American had in maintaining its distribution system would be irreparably lost were McTravel allowed to pursue its aggressive new strategies. The court's use of the word "harm" was apparently misleading, but was based on McTravel's claims that its new marketing would revolutionize the travel agency business. Taking those claims of success as correct, to grant the preliminary injunction would, as a practical matter, moot the entire controversy by requiring American to change its distribution system whether that system is lawful or not. The court therefore adheres to its conclusions about the relative balance of hardships, absent a stronger showing of success on the merits.

2. Probability of Success

Plaintiff makes two related arguments in favor of reconsidering the court's assessment on the merits of the case: first that the court erroneously found McTravel to be an "agent" of American under common-law principles and second that common-law agency analysis is in any event inappropriate for antitrust analysis. In support of the first argument, plaintiff cites two cases, both presented to the court for the first time on this motion, which hold that a travel agency is not an "agent" of the airline for bankruptcy related purposes. In *In re Shulman Transport Enterprises, Inc.*, 744 F.2d 293 (2d Cir. 1984), Pan American Airlines attempted to assert a priority over proceeds held by an international freight forwarder which had filed for Chapter 11 protection. The court rejected the argument that the debtor held the proceeds of the air space sales in the fiduciary capacity of an agent, and thus held that the debtor's secured lender had priority over the airline to the funds. The court laid particular stress on the airline's lack of control over the debtor's collection of funds. *Id.* at 295.

The other case, *In re Morales Travel Agency*, 667 F.2d 1069 (1st Cir. 1981), involved a similar situation: Eastern Airlines attempted to claim immediate possession of funds held by a bankrupt travel agent on the ground that the funds represented proceeds of its sales. Notwithstanding language in the governing trade agreement that such proceeds were property of the airline to be held in trust, the court noted that the travel agent nowhere segregated the proceeds of airline sales from its general funds, and held the relationship to be one of debtor-creditor rather than one of trust. *Id.* at 1071-72.

Assuming that the facts in *Shulman* and *Morales* are fully applicable here, it still does not follow as a matter of law that defendant's ban on the

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advertising of rebates is per se illegal. Both Shulman and Morales were concerned with the ostensible ownership problems created when a travel agent commingles funds collected for particular carriers in its general accounts. Those cases theoretically have little application to the agency inquiry under antitrust law, which is couched in terms of whether a given consignment masks an unlawful resale price maintenance scheme. Here, the function of travel agents is to act as mere conduits through whom American sells directly to customers, not resellers, and the agency inquiry holds.

n1 The Airlines Reporting Corporation (ARC) agreement which governs American's relations with plaintiff provides at Section VII-B that ICT shall designate a bank account for the benefit of ARC and the carrier to hold the proceeds from sales of air transportation. The court has assumed that this language does not require ICT to designate separate bank accounts for each carrier. If this assumption is erroneous, however, Shulman and Morales might be factually distinguishable.

Plaintiff secondly argues that application of common-law agency principles was in any event improper. Plaintiff relies in its brief chiefly on *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), in which the Supreme Court made clear that the formalities of consignment relationships, such as passage of title, may not be used to avoid antitrust liability for an otherwise unlawful resale price maintenance scheme. Plaintiff interprets *Simpson* to require a finding that the agent lacks independence and is in effect little more than an employee before a court can find an agent's lack of pricing authority to be a lawful attribute of a true consignment relationship.

Plaintiff's interpretation is borne out in many cases which stress an agent-plaintiff's lack of entrepreneurial independence as one basis for finding no resale price maintenance in a particular fixed price consignment. See, e.g., *Holter v. Moore & Co.*, 702 F.2d 854 (10th Cir.), cert. denied, 464 U.S. 937 (1983); *Hardwick v. Nu-Way Oil Co., Inc.*, 589 F.2d 806, 810 (5th Cir.), cert. denied, 444 U.S. 836 (1979); *American Oil Co. v. McMullin*, 508 F.2d 1345, 1351 (5th Cir. 1975); *Laurence J. Gordon, Inc. v. Brandt, Inc.*, 554 F.Supp. 1144, 1150 (W.D. Wash. 1983). However, the above courts have also interpreted *Simpson* not to invalidate all fixed price consignment relationships, but simply to require courts to examine the substance of a purported consignment relation in determining whether the consignment is bona fide or not. This examination involves many factors, particularly whether the agent bears the risks of the distribution process. See, e.g., *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 343 (9th Cir.), cert. denied, 464 U.S. 820 (1983); *Hardwick*, 589 F.2d at 809; *Pogue v. International Industries, Inc.*, 524 F.2d 342, 345 (6th Cir. 1975); *Greene v. General Foods Corp.*, 517 F.2d 635, 653 (5th Cir. 1975), cert. denied, 424 U.S. 942 (1976); *Laurence J. Gordon, Inc.*, 554 F.Supp. at 1150. Travel agents assume no risk of loss due to unsold air space, and the court relied chiefly on that lack of risk in finding a true consignment relationship to exist.

Even assuming that entrepreneurial independence is the true litmus test for vertical price restraints under *Simpson*, plaintiff's status as an independent business entity does not control the question of its agency status with respect to the purchase and sale of American tickets. Just as a so-called agent may act in that capacity as to some matters but not others, *In re Shulman Transport Enterprises, Inc.*, 744 F.2d 293, 295 (2d Cir. 1984), so may an otherwise independent business entity be a mere agent with respect to certain

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activities. See, e.g., *Hardwick*, 589 F.2d at 809-810 (store owner, although an independent operator in many respects, held an agent with respect to sale of gasoline from pump outside store).

Application of this principle to the present case produces mixed results. McTravel, while clearly not an "employee" of American, does not bear the indicia of an entrepreneur in selling defendant's tickets: plaintiff can only negotiate a sale after checking with American that a flight seat is in fact available, does not assume the risk of unsold seats, never purchases the tickets for resale, and is not a party to the contract for the sale of the flight, which is executed as if between the airline and the customer. These factors strongly support the court's earlier analysis.

On the other hand, the customer remits payment to the travel agency in the latter's name, and the contract between American and its agents does not specify how funds should be collected. While this risk can be minimized through accepting only cash or approved credit cards, the risk of nonpayment due to customer default nonetheless remains with McTravel, not American. Unlike the risks incurred by the plaintiff in *Simpson*, however, this risk does not attach until after the customer agrees to purchase an airline ticket. The court therefore assumed that American's interest in price regulation of airline tickets would be justified by the fact that the risk of unsold tickets remains with American throughout the sales process, despite its use of outside agents instead of employees as salespeople. n2

n2 McTravel has also argued that the court erred in finding no true competition between the airline and the agent. While American collects less money on tickets sold by agents than tickets sold through American salespeople, it also incurs less expenses on those sales. Even assuming, however, that American has an interest in maximizing the number of sales it makes through its own offices, any competition between travel agents and sales personnel reflects the fact that the travel agents function as salesmen and not as independent distributors who purchase for resale to third parties.

Plaintiff finally argues that the distinction between sales and consignment transactions has been specifically discredited for antitrust purposes in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977). In *Sylvania*, the Supreme Court reversed its earlier decision in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), and held that vertical nonprice restrictions should be invalidated only under a rule-of-reason standard based on demonstrable economic effect. The court's language overruling *Schwinn* is instructive. In *Schwinn*, the court had ruled that vertical nonprice restrictions should be held per se unlawful where a manufacturer seeks to "restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." 388 U.S. at 379, quoted in *Sylvania*, 433 U.S. at 44. But the *Schwinn* court went on to state that the rule of reason governs when "the manufacturer retains title, dominion, and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer." 388 U.S. at 380, quoted in *Sylvania*, 433 U.S. at 44-45.

The *Schwinn* decision was the subject of numerous scholarly critiques, many of them arguing that its distinction between sale and consignment transactions was essentially formalistic and unrelated to any relevant economic impact. See Baker, *Vertical Restraints in Times of Change: From White to Schwinn to*

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Where?, 44 Antitrust L.J. 537, 537 (1975); Comanor, Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath, 81 Harv. L. Rev. 1419, 1422 (1968); McLaren, Territorial & Customer Restrictions, Consignments, Suggested Resale Prices and Refusals to Deal, 37 Antitrust L.J. 137, 145 (1978); Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 288-89 (1975); Note, Vertical Territorial & Customer Restrictions in the Franchising Industry, 10 Colum. J. Law & Soc. Problems 497, 503 (1974). The Sylvania Court acknowledged the weight of this collective scholarship, noted that Schwinn provided "no analytical support" for distinguishing between sale and nonsale restrictions, and concluded that Schwinn's exemption of nonsale transactions from the per se rule was due to the Court's unexplained belief that a complete per se prohibition of vertical restraints would be inflexible. 433 U.S. at 54. The Court concluded "that the distinction drawn in Schwinn between sale and nonsale transactions is not sufficient to justify the application of a per se rule in one situation and a rule of reason in the other." 433 U.S. at 57. The Court then concluded that the per se rule stated in Schwinn for nonprice restrictions, instead of being expanded to include non-sale transactions, should be abandoned in favor of a reasonableness analysis. Id.

Plaintiff's extrapolations from Sylvania can be summarized as follows. Because sale and nonsale transactions cannot be distinguished in terms of economic effect, the Supreme Court's continued per se condemnation of vertical price fixing must be adhered to regardless of the form in which American runs its distribution system. This argument is certainly not without force. Sylvania, however, concerned the distinction between consignments and sales as systems of distribution, and did not address the continued vitality of the rule that a retailer is entitled to determine the price at which it sells its own products directly to consumers even though negotiated through outside agents. In this court's opinion, Sylvania's logic should not be extended to hold per se unlawful an agency type sales network similar to those upheld by other courts, even after Sylvania, under the rule of Simpson and General Electric. See, supra, pages 5-6.

Significantly, none of the post-Sylvania cases addressing the continued vitality of the "agency" exception articulated in Simpson have considered the argument put forward by plaintiff. The only case to discuss Sylvania at all, Laurence J. Gordon, Inc. v. Brandt, Inc., 554 F.Supp. 1144 (W.D. Wash. 1983), expressly reaffirms the teaching of Simpson that restraints imposed on individuals who do not possess entrepreneurial indicia are outside the scope of Section 1. Id. at 1151. In this case, while plaintiff operates as an independent business entity generally, it does not possess sufficient independence with respect to the sale of airline tickets to qualify as a reseller under antitrust analysis. The court adds, however, that this conclusion is based on the record of the preliminary injunction hearing, and is not meant to foreclose a different result after a fuller hearing on the merits.

American argues that Sylvania is inapt since the Court in that case actually relaxed the rules under the Sherman Act with regard to vertical restrictions, and thereby offers justification for American's prohibition of rebate advertising. While there is some cogency to this argument, and scholarly support as well, see, e.g., Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L.Rev. 6, 9 (1981), the Court in Sylvania expressly declined to call into question the long standing prohibition on resale price maintenance. 433 U.S. at 51 n.18. That position has since been reaffirmed. Monsanto Co. v. Spray-Rite Service Corp., 104 S.Ct.

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CHAR CREWS, INC., Plaintiff, vs CHRISTOFLE SILVER, INC.,
et al., Defendants.

No. 81 C 3940

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION

Slip Opinion

February 8, 1982

OPINIONBY: DECKER

OPINION: MEMORANDUM OPINION AND ORDER

Plaintiff, Char Crews, Inc., brought this action against defendants, Christofle Silver, Inc., Baccarat, Inc., and Richard Kaplan, alleging that they had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by attempting to force plaintiff to engage in retail price maintenance. Pending are motions to dismiss from all defendants.

Plaintiff alleges the following in its complaint, which, for the purposes of the instant motions, must be taken as true. Prior to March 1981, defendant Baccarat was the sole United States distributor of Christofle silverplate tableware and other items, which are manufactured in France. As part of its distribution duties, Baccarat provided retailers with lists of suggested retail prices for the silverplate. Beginning in March of 1980, plaintiff began to purchase silverplate from Baccarat for retail. Plaintiff is in the business of selling at a discount china, crystal, stainless steel tableware and silverplate. Char Crews resold the Christofle silverplate at a discount of twenty percent from the suggested retail prices provided by Baccarat.

According to the complaint, Baccarat began to put pressure on Char Crews to stop discounting the Christofle silverplate. The "coercion" began by conversations with Baccarat's sales representative, David Armstrong, and escalated to Baccarat's refusal to fill Char Crews' orders on a timely basis and to provide the customary display and promotional materials to Char Crews. Those actions were allegedly carried out at the direction of defendant Kaplan, who was an employee of Baccarat and in charge of the distribution of Christofle silverplate. It seems, however, that through March 1981, Char Crews continued to sell Christofle silverplate.

In March 1981, Baccarat ceased its business of selling Christofle silverplate to retailers, and Christofle Silver succeeded it as the sole distributor of the silverplate to retailers in the United States. Christofle Silver was organized as a corporation in 1958, but it had remained dormant until it undertook the distribution duties in March 1981. Plaintiff alleges that the change in distributors was done so that the new distributor could refuse to sell to retailers who were offering the silverplate at discount prices. When the change was made, Kaplan resigned from Baccarat and accepted employment with Christofle Silver, where he remained in charge of distributing Christofle silverplate.

On March 31, 1981, Char Crews sent an order for silverplate to Christofle Silver. Christofle Silver refused to fill the order, and in April 1981,

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informed Char Crews that Christofle Silver would no longer sell silverplate to it. Plaintiff alleges that that action was taken because it refused to comply with defendants' list of suggested retail prices.

Plaintiff claims that the above acts, effectively terminating it as a retailer of Christofle silverplate, were part of a conspiracy between the defendants to engage in unlawful resale price maintenance. Plaintiff also alleges that other retailers of Christofle silverplate also conspired with defendants to commit the per se violations of Section 1 of the Sherman Act.

Defendants have filed two separate motions to dismiss the claims against them, one motion filed by defendant Baccarat, and one filed jointly by defendants Christofle Silver and Kaplan. Several issues have been raised by the various defendants, however, because the court finds that one issue is dispositive as to all defendants, only it will be discussed below.

One of the basic elements necessary to state a cause of action under Section 1 is the presence of a conspiracy. The Seventh Circuit Court of Appeals recently stated:

"Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies unreasonably restraining trade or commerce. The fundamental prerequisite is unlawful conduct by two or more parties pursuant to an agreement, explicit or implied. Solely unilateral conduct, regardless of its anti-competitive effects, is not prohibited by Section 1. Rather, to establish an unlawful combination or conspiracy, there must be evidence that two or more parties have knowingly participated in a common scheme or design to accomplish an anti-competitive purpose."

Contractor Utility Sales Co. v. Certain-teed Products Corp., 638 F.2d 1061, 1074 (7th Cir. 1981). Even a per se antitrust violation like resale price maintenance is not prohibited if done unilaterally by the manufacturer or distributor. See United States v. Colgate & Co., 250 U.S. 300 (1919).

The allegations of plaintiff's complaint fail to adequately set forth that element of a Section 1 claim. Initially, the court notes that the general allegations that defendants conspired together, either among themselves or with retailers other than plaintiff, are not sufficient to state a cause of action. General allegations of conspiracy are merely legal conclusions, and must be supported with allegations of some specific facts tending to show the existence of the alleged conspiracy. See McCleneghan v. Union Stock Yards Co. of Omaha, 298 F.2d 659 (8th Cir. 1962). That rule applies, even recognizing the liberal notice pleading allowed by the Federal Rules of Civil Procedure. Sims v. Mack Truck Corp., 488 F.Supp. 592 (E.D.Pa. 1980).

It is evident, then, that the only facts alleged in plaintiff's complaint, which could potentially show a conspiracy to violate the antitrust laws, involve the actions taken by the named defendants to eliminate Char Crews as a dealer of Christofle silverplate. However, the facts, as stated, show as a matter of law that such a conspiracy was not possible.

Plaintiff alleges that Baccarat was the sole U.S. distributor of Christofle silverplate until March 1981. At that time, Baccarat ceased being the distributor. No allegations of the complaint suggest that Baccarat had any further interaction with plaintiff after that date, nor do any allegations

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suggest that Baccarat had any contacts with the new distributor, Christofle Silver. Plaintiff has not alleged any facts showing any conspiracy between the corporate defendants after March 1981.

Nor could the corporate defendants have conspired before that date either. The complaint states that Christofle Silver was a dormant corporation until it undertook the distribution duties on March 1981. Plaintiff has suggested no way, nor is the court able to imagine one, that a dormant corporation, without employees or business, can conspire with anyone about anything.

Finally, plaintiff's complaint is not saved by the allegations that the individual defendant, Richard Kaplan, conspired with the two corporate defendants to violate the antitrust laws. Plaintiff alleged that at all times relevant to this suit, Mr. Kaplan was an employee of one or the other of the two successive distributors. It is a general rule of antitrust law that a corporation cannot conspire with one of its own employees. *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978). An exception to that rule exists for those rare occasions where the employee has an independent personal stake in achieving the object of the conspiracy. *Id.* No allegation has been made that that is the case here.

The court therefore holds that plaintiff has failed to state a cause of action. The conclusory allegations that the named defendants conspired with retail sellers other than plaintiff are insufficient as a matter of law. In addition, the facts pleaded in the complaint show that a conspiracy between the named defendants was impossible.

For the reasons stated above, defendants Baccarat, Christofle Silver, and Kaplan's motions to dismiss are granted. This action is hereby ordered dismissed.

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I, Michael A. Forti hereby certify that true and correct copies of Defendant Caremark Inc.'s Supplemental Memorandum In Support Of Its Motion To Dismiss have been served upon:

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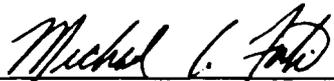
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAN 31 1991

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In re: Clozapine Antitrust : 90 Civ. 8055, 8060, 8062-8065,
Litigation : 8067, 8069, 8071, 8073-8077,
: 8079-8082, 8084, 8086-8087,
: 8089, 8092; 91 Civ. 244 (JFK)
:
: (See Attached Schedule of
Actions)
:
Return Date: February 11, 1991

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This Document Relates to All :
Captioned Docket Numbers :

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**DEFENDANT CAREMARK INC.'S
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: Clozapine Antitrust : 90 Civ. 8055, 8060, 8062-8065,
Litigation : 8067, 8069, 8071, 8073-8077,
: 8079-8082, 8084, 8086-8087,
8089, 8092; 91 Civ. 244 (JFK)

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: (See Attached Schedule of
Actions)

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Return Date: February 11, 1991

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This Document Relates to All :
Captioned Docket Numbers :

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**DEFENDANT CAREMARK INC.'S
MEMORANDUM OF POINTS AND AUTHORITIES
SUPPORTING ITS MOTION TO DISMISS ACTIONS**

Pursuant to Rule 3(b) of the General Rules for the United States District Court for the Southern District of New York, defendant Caremark Inc. ("Caremark") respectfully submits this memorandum of points and authorities in support of its motion to dismiss these actions against it for failure to state any claim upon which relief can be granted.

PRELIMINARY STATEMENT

Caremark here seeks dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure of 24 virtually identical actions brought by 24 state Attorneys General as parentes

patriarum.¹ The proceedings involve the patented new schizophrenia drug clozapine, trade name CLOZARIL[®], a pharmaceutical developed, manufactured and marketed by Caremark's co-defendant Sandoz Pharmaceuticals Corporation ("Sandoz"), which also holds an exclusive license for it. The States² frame their Complaints under the Sherman and Clayton antitrust Acts, 15 U.S.C. §§ 1, 2, and 15. However, the Complaints reveal that the States' real grievance is the cost of CLOZARIL[®] treatment and the link between CLOZARIL[®] dispensing and blood testing, neither of which can be construed to constitute an antitrust violation. This Court should reject the States' efforts to hoodwink it into a spurious use of the antitrust laws to diminish the price, and the safeguards, for CLOZARIL[®].

The States correctly assert that "clozapine treatment is vastly superior to treatment with standard neuroleptics for many schizophrenia patients." (Complaint ¶ 25)³ However, clozapine poses a potentially fatal threat to the immune system of users, agranulocytosis. As defined by the States, "[a]granulocytosis' [is] a medical condition resulting from acute suppression of the bone marrow's ability to produce white

¹ The parens patriae doctrine permits the government to bring an action on behalf of persons who have suffered antitrust injury. Kansas v. Utilicorp United, Inc., ___ U.S. ___, 110 S. Ct. 2807, 2818 (1990).

² The twenty-four plaintiffs are sometimes collectively referred to herein as "the States."

³ Except where noted, all citations are to Minnesota's Complaint.

blood cells," which "may lead to death from infection."

(Complaint ¶¶ 4, 27) Because of this risk, the FDA required that "blood monitoring be reliably linked to the use of clozapine" as a condition of approval of the drug. (Complaint ¶ 48, 50) (emphasis added) As part of its FDA approval, Sandoz received the exclusive right to market clozapine in the United States for five years. (Complaint ¶ 48)

Caremark and Sandoz developed the CLOZARIL® Patient Management System ("CPMS") to ensure that drug dispensing took place only following reliable blood tests. FDA approval for new drugs includes approval of labelling. Sandoz's labelling submitted to, and approved by, the FDA included a description of CPMS. (Complaint ¶¶ 48-50) The FDA subsequently "interpreted" its approval for CLOZARIL® not to mandate CPMS by name. (Complaint ¶ 50)

Under CPMS, Caremark provides "blood drawing, case administration, data base, and dispensing services" and administers CLOZARIL® therapy under the terms of a Commercial Agreement between Sandoz and Caremark. CLOZARIL® therapy in accordance with CPMS costs \$172 per week. (Complaint ¶¶ 37, 40, 50) At present CLOZARIL® is distributed only through the CPMS; a patient receives "CLOZARIL® therapy," including the mandatory weekly blood testing, upon enrolling in CPMS, and pays one price for CLOZARIL® therapy.⁴ Contrary to the States' allegations,

⁴ Sandoz has announced that CLOZARIL® will be available via other dispensing mechanisms, (Wall St. Journal, January 15, 1991, § B, at 4, col. 1; copy attached) but

CPMS is not a package of services, but a single commodity, the form for treatment using clozapine approved by the FDA.

The heart of these proceedings is unhappiness on the part of the States with the FDA drug approval system and with this country's patent system, which Congress enacted to give inventors a limited-time, lawful monopoly over their inventions. The States' concerns may belong before Congress, but they do not belong before this Court, and they certainly do not belong under the guise of seeking protection from antitrust violations.

no such alternative is in place at present and the States allege none.

ARGUMENT

I

THE STATES LACK STANDING TO BRING THESE ACTIONS ON BEHALF OF THEMSELVES OR THEIR INSTITUTIONS, AGENCIES, DEPARTMENTS, DIVISIONS, OR ANY INDIRECT PURCHASERS

Each state purports to bring an action on "its own behalf, on behalf of its institutions, agencies, departments, divisions and political subdivisions that purchase health care goods and services, as parens patriae on behalf of schizophrenia patients and other natural persons for whom plaintiff may act, and as parens patriae on behalf of plaintiff's economy and general welfare." (Complaint ¶ 5) The parens patriae doctrine created no new or expanded substantive liability. Utilicorp United, Inc., __U.S.__, 110 S. Ct. at 2818. The States thus derive their standing from two, and only two, sources:

- standing to represent themselves and their agencies and subdivisions, as states; and
- standing as parentes patriarum to represent their citizens.

If a state on its own, or the citizen[s] which the state intends to represent on their own, could not bring suit, then neither can a state as parens. It follows that where, as here, neither the state nor any natural person state resident has alleged facts showing antitrust injury, that is, antitrust injury to their property, the States have no standing as parentes patriarum. 15 U.S.C. § 15c (a)(1).

A. Unidentified State Agencies Have No Standing

The Attorney General of a state lacks standing to sue on behalf of unnamed, unidentified "institutions, agencies, departments, divisions, and subdivisions" ("agencies").

(Complaint ¶ 5) In New York v. Cedar Park Concrete Corp., 665 F. Supp. 238, 240 (S.D.N.Y. 1987), the state Attorney General as parens patriae sought damages "on behalf of governmental agencies, political subdivisions and public authorities of the State of New York . . ." under Section 1 of the Sherman Act, 15 U.S.C. § 1, and pendent state claims. In granting defendants' motion to dismiss, this Court admonished that "the complaints should be dismissed insofar as they purport to state treble damages claims on behalf of unidentified state subdivisions." Id. at 242. Because the States fail to identify the agencies harmed by the alleged antitrust violations, their actions on behalf of the agencies must be dismissed.

B. The States Fail to Allege Antitrust Standing Under Section 4 of the Clayton Act for the States or Their Agencies

Standing to sue under the Sherman Act, 15 U.S.C. § 1 et seq., arises from Section 4 of the Clayton Act, 15 U.S.C. § 15.⁵ However, Congress did not intend to enable "every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages . . ." Blue Shield of Virginia v. McCready, 457 U.S. 465, 477 (1982). Accordingly, the Supreme

⁵ Section 4 of the Clayton Act entitles "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to sue for treble damages. 15 U.S.C. § 15.

Court has limited Clayton Act standing. The States' allegations are insufficient to confer standing in the following ways.

1. The States have alleged no antitrust injury to themselves or their agencies

For antitrust standing under the Clayton Act, a plaintiff must allege not simply an injury "causally linked" to an antitrust violation, but antitrust injury, that is

- injury to its business or property,
- of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

15 U.S.C. § 15; Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977); accord, Triple M Roofing Corp. v. Tremco, Inc., 753 F.2d 242, 247 (2d Cir. 1985); Repp v. F.E.L. Publications, Ltd., 688 F.2d 441, 444 (7th Cir. 1982); In re Industrial Gas Antitrust Litigation, 681 F.2d 514, 519 (7th Cir. 1982), cert. denied sub nom. Bichan v. Chemetron Corp., 460 U.S. 1016 (1983); RJM Sales & Marketing v. Banfi Products Corp., 546 F. Supp. 1368 (D. Minn. 1982).

As to the first requirement, the States do not allege the existence of a single CLOZARIL® therapy purchase by a state or state agency. They purport to allege that "prices for CPMS have been fixed, raised, maintained, and stabilized[.]" Complaint ¶ 56(b). However, they nowhere aver that any state or state agency has purchased CLOZARIL® therapy directly at any price, let alone a "fixed," "raised," "maintained" or "stabilized" price. Absent allegation of such a direct purchase, the States cannot as a matter of law meet the antitrust standing

requirement of pleading direct injury flowing from the market conditions affected by defendants' conduct.

As to the second requirement, Congress enacted the Sherman Act "to assure customers the benefits of price competition[.]" Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 538 (1983). However, the Complaints do not aver that the states and their agencies are consumers of CLOZARIL® therapy afforded the protection of the Sherman Act, and therefore they do not allege any injury akin to those which the antitrust laws were to prevent.

2. The States are not proper plaintiffs

Even assuming that the States had stated claims upon which relief could be granted, and had alleged antitrust injury, these actions would still require dismissal because under Section 4 of the Clayton Act, the states and their agencies are not the "proper plaintiff[s]" here. Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110 n.5 (1986). The reasons that an entity may not be a "proper plaintiff" include "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement;" the directness or indirectness of the asserted injury; the speculativeness of the alleged injury; and the difficulty of identifying and apportioning damages among direct and indirect victims so as to avoid duplicative recoveries. Associated General Contractors, 459 U.S. at 540-45; Triple M Roofing Corp., 753 F.2d at 247. Courts interpret these

four factors with the teaching of McCready, 457 U.S. 465, which narrowed the limits on antitrust standing to (1) prevent duplicative recoveries and (2) limit recovery for injuries remote from the alleged antitrust violation. See, e.g., de Atucha v. Commodity Exchange, Inc., 608 F. Supp 510, 514 (S.D.N.Y. 1985).

Here, permitting the states and their agencies to sue would create a risk of duplicative recoveries, since the States nowhere allege that they or their agencies have purchased CLOZARIL® therapy directly. Others more immediately harmed by the alleged violations -- actual purchasers of CLOZARIL® therapy and arguably defendants' competitors -- might also seek compensation for the same antitrust violations alleged by the States.

Similarly, under the facts alleged, treatment recipients who themselves paid for CLOZARIL® therapy have suffered a more direct injury and therefore have a greater interest in challenging the purported violations than do the states and their agencies. "[D]irect purchasers . . . were the injured parties who as a group were most likely to press their claims with the vigor that the § 4 treble-damages remedy was intended to promote." McCready, 457 U.S. at 474 (citing Illinois Brick Co. v. Illinois, 431 U.S. 720, 735 (1977)).⁶ Under

⁶ Even if this Court inferred that the States or their agencies were direct purchasers of CLOZARIL® therapy, Illinois Brick confirms the absence of antitrust standing of all indirect purchasers (both schizophrenia patients who obtained CLOZARIL® therapy indirectly through the state and its agencies, rather than directly from Caremark, and any schizophrenia patients

Associated General Contractors, 459 U.S. at 538-42, any injury suffered by a would-be party who is "neither a consumer nor a competitor in the market" is too indirect to confer standing. The States' failure to aver specifically that they and their agencies are consumers or competitors in the CLOZARIL® therapy market makes their alleged injuries indirect and speculative, and hence difficult to identify or apportion. See International Television Productions Ltd. v. Twentieth Century-Fox Television, 622 F. Supp. 1532, 1539 (S.D.N.Y. 1985) (denying standing to indirect antitrust victim with speculative injuries); Ashley Meadows Farm, Inc. v. American Horse Shows, 593 F. Supp. 1184, 1188 (S.D.N.Y. 1984), summary judgment denied, 609 F. Supp. 677 (S.D.N.Y. 1985) (derivative victim of alleged antitrust violation denied standing).

Considering Congress' intent in enacting Section 4 of the Clayton Act, the Supreme Court noted that "there is a point beyond which the wrongdoer should not be held liable." Associated General Contractors, 459 U.S. at 534-35. The States' failure to allege that they or their agencies are participants or customers in the CLOZARIL® therapy market removed them from the class of those qualified to assert claims under the antitrust laws.

who did not obtain CLOZARIL® therapy). 431 U.S. at 735. Thus, the Complaints would have to be dismissed, at a minimum, as to patients who received CLOZARIL® therapy from the states or their agencies, and as to schizophrenics who have not bought CLOZARIL® therapy.

C. The Attorneys General as Parentes Patriarum Lack Standing to Represent "Schizophrenia Patients"

The States purport to bring this action not only on behalf of CLOZARIL® purchasers, but also on behalf of "schizophrenia patients and other natural persons." (Complaint ¶ 5) The States' term "schizophrenia patients" may fairly be read to include (i) those who have personally purchased CLOZARIL® therapy; (ii) those who have received CLOZARIL® therapy but have not personally purchased it; and (iii) those who have not received CLOZARIL® therapy. As set forth above, only CLOZARIL® therapy purchasers can allege an antitrust injury under the Clayton Act. Nowhere do the States represent that even one specific natural person is a direct purchaser of CLOZARIL® therapy. The States accordingly have not alleged standing as parentes patriarum on behalf of a single schizophrenia patient.

Because the Complaints do not aver that any natural person in each state has expended personal property to purchase CLOZARIL® therapy, whether the property of any state resident has been injured by an alleged antitrust violation remains speculative. See Reading Industries, Inc. v. Kennecott Copper Corp., 631 F.2d 10, 13-14 (2d Cir. 1980), cert. denied, 452 U.S. 916 (1982) (holding that Illinois Brick indicates that the antitrust laws "exclude claims based on conjectural theories of injury and attenuated economic causality. . . ."); Triple M Roofing, 753 F.2d at 247; de Atucha, 608 F. Supp. at 516. Under McCready, 457 U.S. at 474-78, and Associated General Contractors, 459 U.S. at 542, an entity is not the proper plaintiff in an

antitrust suit if his injury is too remote or if permitting his claim to stand would create the possibility of duplicative recoveries. Here, the States, far from alleging direct injury, imply that most CLOZARIL® therapy recipients are not direct purchasers.⁷ "[T]reble damages under § 4 of the Clayton Act are only recoverable by those directly overcharged by violators of the antitrust laws" New York v. Dairylea Cooperative, Inc., 570 F. Supp. 1213, 1215 (S.D.N.Y. 1983) (dismissing patria suit on behalf of indirect purchasers), citing Illinois Brick, 431 U.S. 720. State government agencies and insurance companies⁸ are the entities directly affected by the overcharges

⁷ "Many schizophrenia patients depend in part on governmental entities for medical services." (Complaint ¶ 18) "At least 80% of the institutionalized patients identified by Sandoz as suitable candidates for CLOZARIL® treatment are treated at public expense[,]" and "[m]ost in-patient treatment of schizophrenia occurs in state funded and operated institutions." (Complaint ¶¶ 21-22)

⁸ Rule 17(a) of the Federal Rules of Civil Procedure requires that "[e]very action shall be prosecuted in the name of the real party in interest." When an insurer-subrogee "has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name." United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 380-81 (1949). The same principle applies to all government agencies which ultimately pay for Clozaril® therapy. In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 280 (S.D.N.Y. 1971) (states "stand in the shoes of" drug users reimbursed by welfare programs); cf. Hatcher v. Heckler, 772 F.2d 427, 428 n.3 (8th Cir. 1985) (noting district court's determination that a Medicare patient who had been fully reimbursed "had suffered no injury and, thus, lacked standing"). To the extent that any insurance companies or government agencies have paid for CLOZARIL® therapy, they are the real parties which purportedly have suffered injury to property.

alleged, so patients who have not received CLOZARIL® therapy or purchased it with their own funds have suffered no direct injury. These entities, however, are not natural persons, and the States as parentes patriarum cannot represent them. See 15 U.S.C. § 15c (a)(1).⁹

Similarly, "natural persons" or "schizophrenia patients" who have not received CLOZARIL® therapy lack antitrust standing because their injuries are too remote to warrant recovery under the antitrust laws. Nonpurchasers have been denied standing because their injuries were too tenuous and speculative: "If nonpurchasers who have never dealt with a defendant could recover, a seemingly unlimited number of plaintiffs could assert a virtually unlimited quantity of lost purchases, perhaps exceeding the potential output of the entire industry." Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 867-68 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982) (citing Illinois Brick, 431 U.S. at 730); Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 586-87 (3d Cir. 1979).

Even if the States had alleged antitrust injury to them, "schizophrenia patients" or "other natural persons" would not be the proper plaintiffs under Cargill, 479 U.S. at 110 n.5. The facts pled demonstrate that actual purchasers are the only

⁹ For the same reasons, the Attorneys General cannot seek redress for any alleged damages to "actual and potential competitors of defendants" and "hospitals, laboratories, and businesses". See, e.g., Complaint ¶¶ 56, 62, and 69.

proper plaintiffs. (See Complaint ¶ 45) Purchasers constitute an identifiable class whose self-interest motivates them to enforce the antitrust laws. Of those allegedly injured by an antitrust violation, only the ones "who can most efficiently vindicate the purposes of the antitrust laws have antitrust standing" In re Industrial Gas Antitrust Litigation, 681 F.2d at 516 (and cases cited therein). Nonpaying CLOZARIL® therapy recipients have no standing to sue for injuries which affected only the property of the paying government agencies and insurance companies.

D. The Attorneys General as Parentes Patriarum Cannot Recover Under the Antitrust Laws for Injuries to the States' Economy and General Welfare

The States purport to sue "on behalf of [their] economy and general welfare;" as a matter of law, a state cannot recover damages under the antitrust laws for injuries to its general economy. Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 265 (1972). Standard Oil was a parens patriae suit seeking damages under Section 1 of the Sherman Act for conduct which allegedly "injured and adversely affected the economy and prosperity of the State" Id. at 255. Affirming dismissal of that portion of the complaint, the Supreme Court explained that injury to a state's general economy "is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4." Id. at 264. Authorizing the recovery of such speculative damages "would open the door to duplicative recoveries." Id. at 263-64.

Thus, to the extent that the States purport to seek damages for alleged injury to their general welfare and economy, the actions must be dismissed.

II

THE STATES FAIL TO ALLEGE THE SUBSTANTIVE ELEMENTS OF A VIOLATION OF SECTION 1 OF THE SHERMAN ACT

The States' three claims alleged under Section 1 of the Sherman Act, 15 U.S.C. § 1, are deficient as a matter of law. As to the first two claims, for allegedly tying the sale of clozapine to the purchase of "blood drawing, case administration, data base, and dispensing services," and for allegedly fixing the price of CLOZARIL[®], the States fail to assert facts supporting the existence of entities capable of tying or price fixing in violation of Section 1 of the Sherman Act. (Complaint ¶¶ 11, 40) The tying claim also fails for the independent reason that the States do not adduce that a substantial amount of commerce in the "tied" services was affected. The price fixing claim fails for the additional reasons that the States do not plead a vertical distribution arrangement and do not allege that Caremark agreed to adhere to Sandoz's suggested price. In their fourth claim, for "general restraint of trade," the States simply fail to enumerate any ground for relief beyond those alleged in the defective first, second and third claims.

A. The States Aver a Relationship That is Exempt from the Prohibitions Against Tying and Price Fixing

The facts as pled describe at most an agency relationship, the antitrust equivalent of one entity, rather than an independent reselling relationship.¹⁰ The States plead that Caremark does not retain the purchase price for CPMS, but instead that "Caremark receives a fee from Sandoz for its services under CPMS." (Complaint ¶ 41) This type of "contract [which] provides for payment to [the distributor] in the form of commission and payment to [the manufacturer] on the formula of [the distributor's] receipts less commission [is] consistent with a

¹⁰ The States assert that: "[t]he Caremark Contract defines the relationship between Caremark and Sandoz as that of independent contractors, not agents or partners." (Complaint ¶ 40) However, that the Commercial Agreement provides that Caremark is an independent contractor is not dispositive. Grand Union Co. v. FTC, 300 F.2d 92, 97 n.14 (2d Cir. 1962) ("Under the antitrust laws the difference between a 'sale' and an agency relationship is not simply one of form, but may be 'outcome-determinative'") (citing United States v. General Electric Co., 272 U.S. 476 (1926); Loom Crafters, Inc. v. New Central Jute Mills Co., 1971 Trade Case. (CCH) ¶ 73,734, 91,073 (S.D.N.Y. 1971) ("In determining whether a principal-agent or a principal-principal relationship exists, the courts have ignored the technical terms with which the parties describe themselves in legal documents and have scrutinized the substance and conduct of the legal relationship"); North American Produce v. Nick Penachio Co., Inc., 705 F. Supp. 746, 750 (S.N.D.Y. 1988) ("[A party] may be an independent businessman, but for antitrust purposes, it may be an agent"). Further, the passage of title is not a factor in defining the substance of the relationship. Fuch Sugars & Syrups, Inc. v. Amstar, 602 F.2d 1025 (2d Cir.), cert. denied, 444 U.S. 917 (1979); Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1436 (7th Cir. 1986) ("Passage of title has lost its magic in commercial law, see, e.g., UCC § 2-509(2); why should it retain it in antitrust law?").

principal-agent relationship rather than that of principal-principal." Loom Crafters, Inc., 1971 Trade Cas. ¶ 73,734 at 91,073; see also Ally Gargano/MCA Advertising, Ltd. v. Cooke Properties, Inc., 1989-2 Trade Cas. (CCH) ¶ 68,817, 62,277 (S.D.N.Y. 1989) ("retention of profits provision" precluded finding of economically independent business relationship").

"Only if the structure of the relationship between two entities is one of independence, rather than agency, can the conduct be labeled concerted within the meaning of [Section 1]."¹¹ Ally Gargano/MCA, 1989-2 Trade Cas. ¶ 68,817, 62,276 (citing United States v. General Electric, 272 U.S. 476); Ryko Manufacturing Co. v. Eden Services, 823 F.2d 1215, 1223 (8th Cir. 1987), cert. denied, 484 U.S. 1026 (1988) (An agent is "incapable of engaging in an antitrust conspiracy with [its] corporate principal.")

A tying arrangement by a single entity is not "proscribed by Section 1 of the Sherman Act." McKenzie v. Mercy Hospital of Independence, Kansas, 854 F.2d 365, 368 (10th Cir. 1988). Similarly, the prohibition on vertical price agreements "does not apply to restrictions on price to be charged by one who is in reality an agent of, not a buyer from, the manufacturer." Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 733 (1988) (citing United States v. General Electric Co., 272 U.S. 476 (1926)).

¹¹ Section 1 of the Sherman Act proscribes only concerted conduct. Copperweld Corp. v. Independence Tube Corp., 476 U.S. 752, 767-68 (1984).

Since the States aver that Sandoz (and not Caremark) retains the purchase price of CPMS and that Caremark receives a fee for its services, the States cannot meet the concerted action requirement of Section 1 of the Sherman Act. See Ally Gargano/MCA, 1989-2 Trade Cas. ¶ 68,817, 62,276-78; North American Produce Corp., 705 F. Supp. at 750 (When plaintiff's own allegations concerning defendant's distribution system describe an "agency" relationship, a claim for vertical price fixing should be dismissed.) Since the States essentially contend that Caremark is not an independent reseller of CPMS, the tying and vertical price fixing claims must fail.

B. The States Fail to Allege That the Purported Tying Arrangement Has Had a Substantial Effect on Commerce

The States assert that Sandoz, Caremark and unnamed "co-conspirators" "have illegally tied the sale of the drug clozapine" "to blood drawing, case administration, data base, dispensing, and laboratory services . . ." (Complaint ¶ 54) To state a claim for a tie-in that violates Section 1 of the Sherman Act, the States must allege: (i) a tying product; (ii) a tied product; (iii) facts which would establish actual coercion by the seller that forced the buyer to accept the tied produce; (iv) sufficient economic power in the tying market to coerce purchaser acceptance of the tied product; (v) anticompetitive effects in the tied market; and (vi) the involvement of a "'not

insubstantial' volume of commerce in the 'tied' market."

Gonzalez v. St. Margaret's Hospital Housing Development Fund Corp., 880 F.2d 1514, 1516-1517 (2d Cir. 1989) (emphasis added).

The States fail to state a claim for tying because they do not allege that "a substantial volume of commerce in the 'tied' product is restrained." Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608-09 (1953); see also Gonzalez, 880 F.2d at 1518 (2d Cir. 1989); ("Jefferson Parish¹² [requires] a plaintiff to prove . . . that the tie impairs competition in the tied market and forecloses a substantial volume of commerce in that market.")(emphasis added). The States do not allege any specific amount of commerce affected by the tie-in in the allegedly tied market--the market for blood drawing, case administration data base, dispensing and laboratory services. They certainly do not aver facts showing that the amount of commerce affected is substantial in any state.

In defining the market for the blood services which they contend constitutes the "tied" product, the States aver only that the "geographic market is normally the locality of the patient or treating physician." (Complaint ¶¶ 13, 14) They make no allegations at all about the degree or amount of the alleged tie's effect on the tied market. They set forth neither the size of the total market nor the percentage or amount tied. The Supreme Court defines "substantial" as "substantial enough in

¹² Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

terms of dollar-volume so as not to be merely de minimis...." Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 501 (1969); cf. Gonzalez, 880 F.2d at 1518 (calculation of effect on commerce must take into account the number of consumers who would stay with the original provider even absent the tie). This circuit requires that "[f]or purposes of determining substantiality, a court measures the total volume of sales tied by the "policy" under challenge, not merely the portion of this total accounted for by the particular plaintiff who brings suit." Gonzalez, 880 F.2d at 1518. While courts have permitted a range of dollar amounts, from \$60,800 to millions, to constitute "substantiality," a complete absence of specific facts supporting the "substantiality" element renders a claim deficient as a matter of law.¹³ This Court, however, is not called upon to assess whether the degree of commerce affected is "substantial" as a matter of fact. The Court need only look to the Complaints to perceive that the absence of factual allegations means that as a matter of law, the States cannot meet the substantiality element for a tying claim.

C. The States' Vertical Price Fixing Claims Fail as a Matter of Law

The States' vertical price fixing allegations are deficient for three reasons, each of which mandates dismissal. First, although they purport to state a claim for vertical price

¹³ The Complaints do not state, for example, how many of alleged competing service providers reside in each State, or how many others might compete absent the alleged tie.

fixing, the States fail to allege facts supporting the existence of a vertical distribution arrangement. Second, as described above, regardless of the existence of a vertical relationship, the States' allegations describe a relationship that is exempt from the prohibition on vertical price maintenance.¹⁴ Finally, under any characterization of the relationship, the States allege no facts to support their claim that Caremark agreed to adhere to the retail price suggested by Sandoz.

1. The States fail to allege the existence of a vertical distribution arrangement

In the Second Claim for Relief, the States assert that "Sandoz, Caremark, and their co-conspirators have continually engaged in a vertical price fixing agreement relating to the sale of the drug CLOZARIL[®], blood drawing, case administration, data base, dispensing, and laboratory services in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1." (Complaint ¶ 60)

To state a claim for vertical price fixing, the States must first allege a vertical relationship among the parties to the alleged agreement. Cf. DuPont Glove Forgan, Inc. v. American Telephone & Telegraph Co., 437 F. Supp. 1104 (S.D.N.Y. 1977), aff'd without opinion sub nom. American Telephone & Telegraph Co. v. United States, 578 F.2d 1366 (2d Cir.) and aff'd without

¹⁴ See discussion in Section II, subpart A. Regardless of the existence of an agency relationship, the states fail to allege facts that would support a reselling relationship vulnerable to a charge of vertical price fixing. See Medical Arts Pharmacy v. Blue Cross & Blue Shield, 518 F. Supp. 1100, 1107 (D. Conn. 1981), aff'd, 675 F.2d 502 (2d Cir. 1982).

opinion, 578 F.2d 1367 (2d Cir.), cert. denied, 439 U.S. 970 (1978). Vertical relationships are those among parties at different levels of the market structure (e.g., manufacturer-distributor, wholesaler-retailer).¹⁵ United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972); see, e.g., Albrecht v. The Herald Co., 390 U.S. 145 (1968); United States v. Parke, Davis & Co., 362 U.S. 29.

The States, however, allege facts showing that both Sandoz and Caremark operate at the same level. The States contend that "Sandoz has set the resale price," and "Caremark has agreed to Sandoz's resale price", "of the tied CLOZARIL®/CPMS package . . . at \$172 per week per patient." (Complaint ¶¶ 37, 61) They allege further that Sandoz manufactures CLOZARIL®, and that "Caremark provides blood drawing, case administration, data base, and dispensing services required for CPMS." (Complaint ¶ 40) Thus, the alleged CPMS "services" originate with Caremark.¹⁶

¹⁵ The term "manufacturer" refers to firms at the first level of the market structure regardless of whether they develop products or services. The term "distributor" refers to firms authorized by the "manufacturer" to distribute products or services at the second level of the market structure. ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intra-brand Competition (1977).

¹⁶ The States allege that "Caremark resells CLOZARIL® and CPMS . . ." (Complaint ¶ 61) However, this allegation is at odds with the States' other factual assertions that CPMS "services" originate with Caremark (Complaint ¶ 40) and that "Caremark receives a fee from Sandoz [not from CPMS purchasers] for its services under CPMS." (Complaint ¶ 41) (emphasis added) These assertions preclude the States from proving that Caremark is a reseller of CPMS.

Since Caremark cannot be a reseller of CPMS services, the States cannot establish a vertical arrangement that would be susceptible to a charge of price fixing. See Medical Arts Pharmacy, 518 F. Supp. at 1107.

Moreover, Sandoz and Caremark each contribute discrete components to CPMS; hence their functions are parallel, not vertical. Non-competing parties at the same market level are incapable of price fixing. Cf. Broadcast Music, Inc. v. Columbia Broadcasting, 441 U.S. 1, 23 (1979). ("Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price fixing schemes, where the agreement on price is necessary to market the product at all."). The States have failed to assert the existence of an agreement on price for any one product or service that flows vertically from Sandoz to Caremark.¹⁷ Accordingly, the States' Second Claim for Relief fails to state a cause of action for vertical price fixing under Section 1 of the Sherman Act.

2. The States fail to allege facts supporting the claim that Caremark agreed to adhere to Sandoz's suggested price

The States assert that Sandoz and Caremark "engaged in a vertical price fixing agreement relating to the sale of the drug CLOZARIL[®], blood drawing, case administration, data base,

¹⁷ By definition, vertical price fixing requires a vertical relationship. Caremark is aware of no court which has found a vertical price fixing violation in the absence a vertical distribution system.

dispensing, and laboratory services in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1." (Complaint ¶ 60) However, to sustain a claim for vertical price fixing, a plaintiff must demonstrate: (1) an express or implied agreement; or (2) the securing of actual adherence to prices by coercive means.

Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980). A supplier does not engage in vertical price fixing when it suggests or even encourages its dealers to follow suggested resale prices. United States v. Colgate & Co., 250 U.S. 300 (1919); Parke, Davis & Co., 362 U.S. 29 (1960); Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964). Moreover, a distributor is free to conform to a manufacturer's suggested price. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984); Sample Inc. v. Pendleton Woolen Mills, Inc., 704 F. Supp. 498, 501 (S.D.N.Y. 1989). Thus, to establish vertical price fixing, a plaintiff must demonstrate more than that the "distributor conformed to the suggested price"; the plaintiff must establish both "that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." Monsanto, 465 U.S. at 764 n.9.

The States assert only that: "Caremark has agreed to Sandoz's resale price . . ." (Complaint ¶ 61) "[T]o adequately state a vertical price fixing violation ([i.e.] 'resale price maintenance'), plaintiff must allege at least some facts which would support an inference that the parties have agreed that one will set the price at which the other will resell the product or

service to third parties."¹⁸ Cayman Exploration Corp. v. United Gas Pipe Line Corp., 1989-1 Trade Cas. (CCH) ¶ 68,552, 60,968 (10th Cir. 1989) (emphasis added). The States fail to allege a single fact that would support their conclusory allegation of an agreement on price. Accordingly, this Court must dismiss Count II of the Complaints.

III

THE STATES' THIRD CLAIM FOR RELIEF IS DIRECTED SOLELY AT SANDOZ

The States allege in their abbreviated Third Claim for Relief that Sandoz "monopolized the relevant market for the drug clozapine."¹⁹ They assert that "defendant Sandoz and others acting in concert with it" (Complaint ¶ 66) effected "Sandoz's monopolization" "by the means and overt acts described above."²⁰ (Complaint ¶¶ 66, 67) As is logical, since Sandoz and not Caremark holds the license for CLOZARIL[®], nowhere in the claim is Caremark mentioned or even included by implication.

¹⁸ Consideration of a motion to dismiss requires the court to accept all well pleaded facts as true. However, vague or conclusory allegations are entitled to no such assumption. Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984); see also Petroleum for Contractors, Inc. v. Mobil Oil Corp., 1978-2 Trade Cas. (CCH) ¶ 62,151, 75,082 (S.D.N.Y. 1978).

¹⁹ The States' other claims for relief are directed toward both Sandoz and Caremark. (Complaint ¶¶ 54, 60, and 73)

²⁰ To the extent that the States may contend that they have asserted a monopolization claim against Caremark as one of these unidentified "others," the claim fails for lack of specificity in identifying the parties, as set forth in Part I, supra, and Part IV, infra.

"[T]o state a claim for relief, actions brought against multiple defendants must clearly specify the claims with which each particular defendant is charged." Wright and Miller, Federal Practice & Procedure: Civil 2d § 1248 at 314 (1990); see also Mathews v. Kilroe, 170 F. Supp. 416, 417 (S.D.N.Y. 1959) (dismissing complaint that failed to "indicate clearly the defendants against whom relief [was] sought"). Since the States' monopolization claim is not directed at Caremark, this Court must dismiss the Third Claim for Relief as to Caremark.

IV

THE STATES' GENERAL RESTRAINT OF TRADE CLAIM ASSERTS NO INDEPENDENT BASIS FOR RELIEF AND IS VAGUE

The States' fourth claim alleging a "general restraint of trade" fails to enumerate any independent ground entitling plaintiffs to relief, and thus requires dismissal. Rule 8(a)(2) of the Federal Rules of Civil Procedure. The claim merely repeats and restates the allegations of the States' other defective Sherman Act claims.

Apart from its failure to allege any separate basis for relief, the vague, conclusory language of Count IV mandates dismissal.²¹ One cannot state a claim under the antitrust laws "by merely alleging a bare legal conclusion; if the facts 'do not at least outline or adumbrate' a violation of the Sherman Act,

²¹ See Associated General Contractors, 459 U.S. at 528 n.17 ("Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.")

the plaintiffs 'will get nowhere merely by dressing them up in the language of antitrust.'" Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (quoting Sutliff, Inc. v. Donovan Companies Inc., 727 F.2d 648, 654 (7th Cir. 1984)); see also Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972) ("a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal.").

V

THE FATAL DEFECTS IN THE STATE LAW ANTITRUST CLAIMS
ELIMINATE FEDERAL JURISDICTION OVER THESE ACTIONS

The doctrine of pendent jurisdiction requires dismissal of state claims if federal claims are dismissed before trial. United States Mineworkers v. Gibbs, 383 U.S. 715, 727 (1966). Since the federal claims herein require dismissal as a matter of law, this Court lacks jurisdiction over the state claims.

Moreover, the States' claims brought under state antitrust statutes are no less deficient than their parallel federal claims. Twenty states purport to allege claims under state versions of the Sherman Act.²² Three of these also assert violations of state versions of Section 3 of the Clayton Act, 15 U.S.C. § 14.²³ Five states²⁴ assert violations of state statutes

²² California, Colorado, Connecticut, Florida, Maine, Maryland, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wisconsin.

²³ California, Connecticut and Texas.

akin to the Federal Trade Commission ("F.T.C.") Act, 15 U.S.C.

§ 45. Washington and Iowa assert no state claims.

A. The State Claims, Like the Federal Ones, Are Deficient as a Matter of Antitrust Law

The defects in the States' federal claims are inherent in their (fatally flawed) state claims. Half of the States purport to allege pendent claims arising under state statutes²⁵ that track the language of Sherman Act Sections 1 and 2, 15 U.S.C. §§ 1, 2. The law of these states provides that these statutes be interpreted in light of analogous federal law.²⁶ Since the States' federal Sherman Act claims fail to state causes of action, the concomitant claims under the statutes of Connecticut, Florida, Maryland, New Hampshire, New Jersey, Oregon, South Dakota, Texas, Utah, Virginia, West Virginia and Wisconsin must be dismissed.

²⁴ California, Maine, Massachusetts, North Carolina and Pennsylvania.

²⁵ Conn. Gen. Stat. §§ 35-26 to 27; Fla. Stat. §§ 542.18 to .19; Md. Com. Law Code Ann. §§ 11-204(A)(1) to (2); N.H. Rev. Stat. Ann. §§ 356:2 to 3; N.J. Stat. Ann. §§ 56:9-3 to 4a; Or. Rev. Stat. §§ 646.725, 646.730; S.D. Codified Laws Ann. §§ 37-1-3.1 to .2; Tex. Bus. & Com. Code Ann. §§ 15.05(a) to (b); Utah Code Ann. § 76-10-914; Va. Code Ann. § 59.1-9.5; W. Va. Code §§ 47-18-3; Wis. Stat. §§ 133.03(1) to (2).

²⁶ Elida, Inc. v. Harmor Realty Corp., 177 Conn. 218, 413 A.2d 1226, 1230 (Conn. 1979); Fla. Stat. § 542.32; Md. Com. Law Code Ann. § 11-202(A)(2); N.H. Rev. Stat. Ann. § 356:14; N.J. Stat. Ann. § 56:9-18; Or. Rev. Stat. § 646.715(2); S.D. Codified. Laws. Ann. § 37-1-22; Tex. Bus. & Com. Code Ann. § 15.04; Utah Code Ann. § 76-10-926; Va. Code Ann. § 59.1-9.17; W. Va. Code § 47-18-16; John Mohr & Sons, Inc. v. Johnke, 55 Wis. 2d 402, 198 N.W.2d 363, 367-68 (1972).

The pendent claims of six other states allege violations of state antitrust laws that were patterned after the Sherman Act,²⁷ and are interpreted using Sherman Act precedent.²⁸ Since the States' federal Sherman Act claims fail to state a cause of action, the comparable claims under the statutes of California,²⁹ Colorado, Minnesota,³⁰ New York, North Carolina³¹ and Ohio must be dismissed.

²⁷ Cal. Bus. & Prof. Code §§ 16720, 16726; Colo. Rev. Stat. § 6-4-101; Minn. Stat. §§ 325D.51-52; N.C. Gen. Stat. §§ 75-1 to 2, 75-5(b)(7); N.Y. Gen. Bus. Law § 340; Ohio Rev. Code Ann. §§ 1331.01 to .04.

²⁸ See State v. Duluth Bd. of Trade, 107 Minn. 506, 121 N.W. 395, 399 (1909), limited by Campbell v. Motion Picture Operators' Union, 151 Minn. 220, 186 N.W. 781 (1922); Anheuser-Busch, Inc. v. Abrams, 71 N.Y. 2d 327, 525 N.Y.S.2d 816, 820 (N.Y. 1988); C. K. & J. K., Inc. v. Fairview Shopping Center, 63 Ohio St. 2d 201, 407 N.E.2d 507, 509 (Ohio 1980); People v. North Ave. Furniture & Appliance, Inc., 645 P.2d 1291, 1294-96 (Colo. 1982); Cameron v. New Hanover Memorial Hospital, Inc., 58 N.C. App. 414, 293 S.E.2d 901, 918 (N.C. App.) appeal dismissed, petition denied, 307 N.C. 127, 297 S.E.2d 399 (1982); Madison Cablevision v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200, 213 (N.C. 1989). Chicago Title Ins. Co. v. Great Western Fin. Corp., 69 Cal. 2d 305, 444 P.2d 481, 487 (Cal. 1968); Marin County Bd. of Realtors, Inc. v. Palsson, 15 Cal. 2d 920-25, 549 P.2d 833 (Cal. 1976).

²⁹ In California, a pleading fails to state a claim under the Cartwright Act absent an allegation of a purpose to restrain trade and of an injury to plaintiff's business traceable to defendant's actions in furtherance of that purpose. Jones v. H. F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464, 479 (Cal. 1969). California's Complaint fails to allege that Caremark or Sandoz had such a purpose to restrain trade through their alleged tying arrangement. Furthermore, California alleges no injury to its "business." Thus, California's Complaint is fatally deficient.

³⁰ Although Minnesota names Caremark in its "monopoly" claim it fails to plead any substantive elements of

Finally, although no court has interpreted the antitrust statutes of Maine or Tennessee, Maine Revised Statutes Annotated Title 10, §§ 1101³² and 1102³³ and Tennessee Code Annotated § 47-25-101 closely resemble the Sherman Act, and the claims brought under them must be dismissed because the States' Sherman Act claims are legally deficient.

monopolization or attempted monopolization as against Caremark.

³¹ North Carolina's Attorney General also alleges that defendants' activities are "contrary to North Carolina Constitution, Art. I, Sec. 34 . . ." (North Carolina Complaint ¶ 79) Article I of the North Carolina constitution provides that: "[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." If this was intended to constitute a separate basis for relief, it does not. No North Carolina authority exists to establish the Constitutional prohibition on restraints of trade as a basis for relief separate from the state antitrust laws. Moreover, in support of this "monopolization" claim, North Carolina relies only on the allegations in its claim for monopolization against Sandoz. Since that claim is directed solely at Sandoz, North Carolina's concomitant state claim must be dismissed as to Caremark.

³² Maine describes its state claims as "Mini-Sherman Act" claims. (Maine Complaint, Fifth Claim for Relief). The statute reads in relevant part: "Every contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce in this State is declared to be illegal. . . ."

³³ The statute reads in relevant part: "Whoever shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce of this State"

B. The States' Pendent Claims Under Statutes Analogous to the FTC Act Must Also be Dismissed

Five States assert pendent claims under state statutes³⁴ patterned after Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.³⁵ State law provides that each

³⁴ Cal. Bus. & Prof. Code §§ 17200, 17203, 17206; Me. Rev. Stat. Ann. tit. 5, § 207; Mass. Gen. L. ch. 93A, § 2; N.C. Gen. Stat. § 75-1.1.

³⁵ Pennsylvania alleges violations of "the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 207-3 [sic] . . ." (Pennsylvania Complaint ¶ 77.) The Pennsylvania Attorney General appears to have intended to cite 73 Pa. Cons. Stat. §§ 201-1 to 3 which instruct that "[e]ngaging in any other fraudulent conduct which creates a likelihood of confusion or an unfair or deceptive practice or act." See Chatham Racquet Club v. Commonwealth, 116 Pa. Commw. 55, 60, 541 A.2d 51, 53 (1988), later appealed, 127 Pa. Commw. 209, 561 A.2d 354 (1989). To state a claim under this section requires establishment of these essential elements of fraudulent conduct:

- (i) a false representation of an existing factor;
- (ii) if the misrepresentation is innocently made, then it is actionable only if it relates to a matter material to the transaction involved; while if the misrepresentation is knowingly made or involves a nonprivileged failure to disclose, materiality is not a requisite to the action;
- (iii) scienter, which may be either actual knowledge of a truth or falsity of the matter, or mere false information where a duty is imposed on a person by reason of special circumstances; (iv) reliance, which must be justifiable, so that common prudence or diligence could not have ascertained the truth; and (v) damage to the person relying thereon.

127 Pa. Commw. at 209, 561 A.2d at 356.

The Pennsylvania Complaint repeats the language of the statute without asserting the necessary elements required to demonstrate fraudulent conduct. Accordingly, Pennsylvania's claim under its Unfair and Deceptive Trade Practices and Consumer Protection Law must be dismissed.

of these statutes should be construed in light of Section 5 precedent developed under the Federal Trade Commission Act.³⁶ Section 5 of the Federal Trade Commission Act ("F.T.C. Act") purports to proscribe certain conduct beyond the scope of the Sherman and Clayton Acts' prohibitions. However, courts have interpreted the FTC Act not to reach conduct if "the complained-of conduct is similar to conduct that has survived an antitrust challenge." Von Kalinowski, Antitrust Laws and Trade Regulation, § 121.04 (Matthew Bender 1990); see also Russell Stover Candies v. FTC, 718 F.2d 256 (2d Cir. 1983) (resale price suggestions and unilateral refusal to deal with price cutter cannot be unlawful under the FTC Act because such conduct is lawful under the Sherman Act); Official Airlines Guide v. FTC, 630 F.2d 920 (2d Cir. 1980).

The States allege under the "little FTC Acts" no "type" of conduct different from that asserted in their Sherman Act claims. Since their Sherman Act claims fail as a matter of law, their identical claims made under the "little FTC Acts" must also be dismissed.

C. The Pendent State "Tying" Claims Must be Dismissed

The Attorneys General of California, Connecticut and Texas allege tying arrangements purportedly violating their

³⁶ People v. National Research Company of California, 201 Cal. App. 2d 765, 20 Cal. Rptr. 516, 522 (Cal. App. 3d Dist. 1962); Me. Rev. Stat. Ann. Tit. 5, § 207(1); Mass. Gen. Laws ch. 93A, § 2(b); Hardy v. Toler, 218 S.E.2d 342, 345 (N.C. 1975); Commonwealth v. Flick, 33 Pa. Commw. 553, 382 A.2d 762, 765 (Pa. Commw. 1978). (N.C. 1975).

respective versions of Section 3 of the Clayton Act, 15 U.S.C. § 14.³⁷ However, under Section 3 of the Clayton Act, both the alleged tying and the allegedly tied products must be "goods"; neither may be a service. Reisner v. General Motors Corp., 511 F. Supp. 1167, 1176-77 (S.D.N.Y. 1981), aff'd, 671 F.2d 91 (2d Cir.), cert. denied, 459 U.S. 858 (1982); Capital Temporaries Inc. v. Olsten Corp., 1974-2 Trade Cas. (CCH) ¶ 75,303 (2d Cir. 1974). The States define CPMS to include only "services" as the tied product. (Complaint ¶ 33) Neither Section 3 of the Clayton Act nor the mirroring state statutes, therefore, could apply to the arrangement alleged.³⁸

CONCLUSION

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

³⁷ Cal. Bus. & Prof. Code § 16727; Conn. Gen. Stat. §35-29; Tex. Bus. & Com. Code Ann. §15.05(c).

³⁸ Connecticut's Attorney General purports to allege a violation of § 35-29, which, unlike section 3 of the Clayton Act prohibits tying arrangements involving services as well as goods. Nevertheless, the Attorney General's claim under § 35 must be dismissed for failure to allege facts sufficient to support it: tying claims under both the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. § 14, require as an essential element "an anticompetitive effect on a not insubstantial amount of commerce." Reisner, 511 F. Supp. at 1175 n.16. As set forth in section II.B. above, the States here failed to meet this pleading requirement. Accordingly, Connecticut's Attorney General's claim under Section 35-29 of the Connecticut Antitrust Act must be dismissed.

Dated this 28th day of January, 1991.

Respectfully submitted,

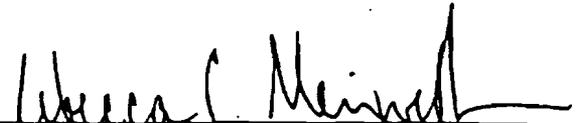
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Defendant Caremark, Inc.'s Notice of Motion, Motion to Dismiss and Memorandum of Points and Authorities has been served this date upon the all parties on the attached service list by depositing same in the United States Mail, first class postage prepaid, this 28th day of January, 1991.


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SCHEDULE OF ACTIONS

STATE	NAME OF CASE	DOCKET NUMBER
California	State of California John K. Van de Kamp, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8060
Colorado	State of Colorado Duane Woodard, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8079
Connecticut	State of Connecticut Clarine Nardi Riddle, Attorney General v. Sandoz Pharmaceuticals Corporation. and Caremark Incorporated	90 CIV 8062
Florida	State of Florida Robert A. Butterworth, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8063
Iowa	State of Iowa Tom Miller, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8064
Maine	State of Maine James E. Tierney, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8065

Maryland	State of Maryland J. Joseph Curran, Jr., Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8067
Massachusetts	State of Massachusetts James M. Shannon, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8069
Minnesota	State of Minnesota Hubert H. Humphrey, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8055
New Hampshire	State of New Hampshire John P. Arnold, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8071
New Jersey	State of New Jersey Robert J. Del Tufo, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8073
New York	State of New York Robert Adams, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8074
North Carolina	State of North Carolina Lacy H. Thornburg, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8092

Ohio	State of Ohio Anthony J. Celebrezze, Jr., Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8075
Oregon	State of Oregon Dave Frohnmayer, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8076
Pennsylvania	State of Pennsylvania Ernest D. Preate, Jr., Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8077
South Dakota	State of South Dakota Mark Barnett, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	91 CIV 0244
Tennessee	State of Tennessee Charles W. Burson, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8080
Texas	State of Texas Jim Mattox, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8081
Utah	State of Utah Paul Van Dam, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8082

Virginia	State of Virginia Mary Sue Terry, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8084
Washington	State of Washington Kenneth O. Eikenberry, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8086
West Virginia	State of West Virginia Roger W. Tomkins, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8087
Wisconsin	State of Wisconsin Don Hanaway, Attorney General v. Sandoz Pharmaceuticals Corporation, and Caremark Incorporated	90 CIV 8089

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RECEIVED
APR 17 1991
ANTITRUST BUREAU

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In re: Clozapine Antitrust
Litigation : 90 Civ. 8055, 8060, 8062-8065,
8067, 8069, 8071, 8073-8077,
8079-8082, 8084, 8086, 8087,
8089, 8092; 91 Civ. 244, 0921,
1043, 1165, 1219, 1220, 1673,
1813, 1814, 91 Civ. 1392 (JFK)
:
: (See Attached Schedule of
: Actions)
:
: Return Date: April 16, 1991

----- X

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

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

PRELIMINARY STATEMENT

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

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

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

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

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

ARGUMENT

I

THE STATES HAVE FAILED TO ALLEGE CONCERTED ACTION

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

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

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

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

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

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

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

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

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

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

^{3/} Contrary to the States' assertion, the McKenzie court never states that "the 'conspiracy' or 'agreement' element of a Section 1 tying claim is usually inferred from the coerced 'agreement' between the entity imposing the tie and the purchaser who unwittingly facilitates the illegal tie by purchasing the bundle." (Response at 19) Rather, the court in McKenzie "rejected the position . . . that the acquiescence of the victim of a tying arrangement may establish the needed contract or combination." W. Holmes, Antitrust Law Handbook § RD-5, p. 30 (1990).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 62,277 (emphasis added).

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

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

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

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

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

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

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

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

II

THE STATES HAVE NOT PLEADED A MONOPOLIZATION CLAIM AGAINST CAREMARK

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

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

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

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

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

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

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

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

III

THE STATES LACK STANDING TO BRING THESE ACTIONS

A. The States Have No Standing as Parentes Patriarum

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

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

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

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

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

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

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

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

that they "purchase health care goods and services" neither establishes that they purchased CLOZARIL® therapy directly, nor that these purchases caused them antitrust injury. (Response at 9) The only other allegation that the States can point to states that "the purchasers of Clozaril, including plaintiff and persons represented by plaintiff, are always charged the same price" (Response at 9, citing Complaint ¶ 5) This allegation is equally infirm and does not remedy the States' failure to allege facts establishing that they are in fact direct purchasers of CLOZARIL® therapy.^{15/} The States simply conclude that they are "direct purchasers of CLOZARIL®" (Response at 10) and assume that this unsupported assertion remedies the deficiencies in their Complaint and otherwise satisfies the standing factors enunciated by the Supreme Court in Blue Shield of Virginia v. McCready, supra, and Associated General Contractors v. California State Council of Carpenters, supra.^{16/}

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated this 5th day of April, 1991.

Respectfully submitted,

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SCHEDULE OF ACTIONS

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

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

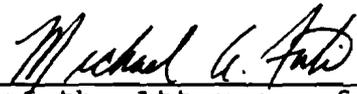
<u>STATE</u>	<u>NAME OF CASE</u>	<u>DOCKET NUMBER</u>
Minnesota	State of Minnesota Hubert H. Humphrey, III, Attorney General v. Sandoz Pharmaceuticals Corporation and Caremark Incorporated	90 CIV 8055
Missouri	State of Missouri William L. Webster, Attorney General v. Sandoz Pharmaceuticals Corporation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

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

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

CERTIFICATE OF SERVICE

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



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under MDL Docket No. 874. This memorandum supplements Caremark's two memoranda previously filed in the U.S. District Court for the Southern District of New York on January 28, 1991, and April 5, 1991, with relevant case authority decided by this Court and the U.S. Court of Appeals for the Seventh Circuit.

PRELIMINARY STATEMENT

The States attempt in their First and Second Claims for Relief to implicate Caremark in tying and price fixing conspiracies in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, based upon Caremark's participation in Sandoz' CLOZARIL® Patient Management Systemsm ("CPMS").^{2/} Because a plain reading of the States' allegations is that Caremark is merely Sandoz' agent, the States' complaints fail to aver a cognizable antitrust conspiracy between Sandoz and Caremark. Recognizing this defect, the States attempt to salvage at least their tying claim by suggesting an illegal agreement among Sandoz and CLOZARIL® patients. The States' most recent theory, however, is as flawed as the original; purported victims of an alleged restraint of trade cannot satisfy the concerted action requirement of a Section 1 claim. The States' Third Claim for Relief, which purports to allege a Section 2 monopolization claim, also should be dismissed as to Caremark because this claim is against Sandoz alone. For these reasons,

^{2/} For a more thorough discussion of the factual background of this litigation, Caremark refers the Court to its Memorandum of Points and Authorities Supporting Its Motion to Dismiss the States' Actions ("Opening Mem.") filed on January 28, 1991, in the United States District Court for the Southern District of New York and its Preliminary Report filed with this Court on April 30, 1991.

and for the reasons discussed in the memoranda previously filed by Caremark, this Court should dismiss the States' complaints.^{3/}

ARGUMENT

I

THE STATES FAIL TO PLEAD THE THRESHOLD REQUIREMENTS FOR A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT

The States allege that Sandoz and Caremark have "illegally tied the sale of the drug clozapine (tying product) to blood drawing, case administration, data base, dispensing, and laboratory services (tied products)" and have "engaged in a vertical price fixing agreement relating to the sale of the drug Clozaril, blood drawing, case administration, data base, dispensing, and laboratory services in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1." (Compl. ¶¶ 54 and 60)^{4/} Caremark's argument for dismissal developed fully in its prior memoranda is straightforward: (1) Section 1 of the Sherman Act proscribes only

^{3/} The States are incorrect in their assertion that the Federal Rules of Civil Procedure merely require "that the complaint give the defendant 'fair notice of what the plaintiff's claim is'" (States' Response to Caremark's Motion to Dismiss ("States' Response") at 3) This Court has held that "[a] complaint must contain direct or inferential allegations of every material element necessary to state a legal theory of relief." Devilbiss v. Arvid C. Walberg & Co., No. 83 C 1133, slip op. at 3 (N.D. Ill. 1986) (Leinenweber, J.) (citing Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985)), attached hereto as Exhibit 1. Moreover, on a motion to dismiss, a court is not bound by the legal characterizations that a plaintiff attributes to the facts. Republic Steel Corp. v. Pennsylvania Engineering Corp., 785 F.2d 174, 182-83 (7th Cir. 1986).

^{4/} All citations are to the complaint filed by the State of Minnesota.

those restraints of trade achieved through concerted conduct; (2) under the Sherman Act, an agent is incapable of engaging in illegal concerted action with its principal; (3) the States' allegations establish that Caremark is an agent of Sandoz with respect to the sale and distribution of CLOZARIL®; and therefore, (4) Caremark's participation in CPMS cannot as a matter of law violate Section 1 of the Sherman Act. (See Caremark's Opening Mem. at 15-18; Caremark's Reply Memorandum In Support of Its Motion to Dismiss ("Reply Mem.") at 2-9)

The States alternative theory -- that CLOZARIL® patients are parties to a purportedly unlawful agreement -- also fails because the victim of an alleged restraint of trade cannot be a co-conspirator to such a restraint. Moreover, the tying claim fails for the independent reason that the States do not allege that there is a substantial danger that either Caremark or Sandoz will attain market power in the "tied" services, a necessary allegation according to the well-established precedent of this Circuit. Finally, the States' price fixing claim fails for the additional reason that the States do not allege that Caremark agreed to adhere to Sandoz' suggested price or that Sandoz sought such an agreement.

A. The States' Allegations Establish That Caremark Is Sandoz' Agent and Incapable of Conspiring With Sandoz Within the Meaning of the Sherman Act

The States' complaints fail under Section 1 of the Sherman Act because Caremark, as Sandoz' agent, is incapable of engaging in an antitrust conspiracy. See Morrison v. Murray

Biscuit Co., 797 F.2d 1430, 1436-38 (7th Cir. 1986); Illinois Corporate Travel, Inc. v. American Airlines, Inc., No. 85 C 07079, slip op. at 5 (N.D. Ill.), aff'd, 806 F.2d 722 (7th Cir. 1986), attached hereto as Exhibit 2. ("[R]estraints imposed on individuals who do not possess entrepreneurial indicia [e.g., agents] are outside the scope of Section 1."). Because the States fail to plead concerted action, their Section 1 claims must be dismissed. (See also Opening Mem. at 16-18; Reply Mem. at 7-9)

Although the States argue that "Sandoz and Caremark are two separate entities that unreasonably restrained trade" (States' Response at 20), their conduct is "concerted" within the meaning of Section 1 only if their relationship is one of independence, rather than agency. Thus, to claim that Caremark engaged in illegal concerted action under Section 1 of the Sherman Act, the States must allege facts which establish that Caremark is truly independent from Sandoz and entrepreneurial with respect to the distribution of CLOZARIL®. See Illinois Corporate Travel, Inc. v. American Airlines, Inc., supra, No. 85 C 07079, slip op. at 5 ("[W]hile [a firm may] operat[e] as an independent business entity generally, it [may] not possess sufficient independence with respect to the sale[s] [at issue] to qualify as a reseller under antitrust analysis.").

In Illinois Corporate Travel, Inc. v. American Airlines, Inc., 806 F.2d 722 (7th Cir. 1986), the Seventh Circuit affirmed the order of the district court denying a preliminary injunction and held that this requisite independence did not exist between a travel agency company and an airline. The Court held that with

respect to the sale of airline tickets for major airlines, the travel agency was not an independent actor but merely an "agent" whose prices could lawfully be fixed by the airlines. Id. at 725. The Court reasoned that the "relation [between the plaintiff and the airline] is a genuine agency [because] [t]ravel service operators do not resell air travel." Id.

Here, as in Illinois Corporate Travel, an agency relationship exists between Sandoz and Caremark. The necessary independence found lacking in Illinois Corporate Travel would exist between Sandoz and Caremark only if Caremark were a reseller of CLOZARIL®. The States' pleadings, however, clearly establish that Caremark is not a reseller of CLOZARIL®. The States acknowledge that Caremark merely "receives a fee from Sandoz for its services under CPMS." (Compl. ¶ 41) It is Sandoz and not Caremark who retains the purchase price and the attendant profits of CPMS. (Compl. ¶ 40) Because the States admit that Sandoz reimburses Caremark for its CPMS services and that Caremark does not retain the purchase price for the sale of CLOZARIL® therapy, Caremark is not a reseller.^{5/} Consequently, as in Illinois Corporate Travel, Sandoz and Caremark are not economically independent actors capable of engaging in concerted action that violates Section 1 of the Sherman Act. Because the States plead an

^{5/} As Caremark argued in its opening and reply memoranda, retention of receipts and profits is a clear indicia of agency. See Ally Gargano/MCA Advertising, Ltd. v. Cooke Properties, 1989-2 Trade Cas. (CCH) ¶ 68,817, 62,277 (S.D.N.Y.) ("In view of the retention of profits provision it is difficult to characterize MCA's role with respect to subleasing as remotely that of 'entrepreneur' or 'independent businessman.'") (See Caremark's Reply Mem. at 8)

agency relationship that is immune from antitrust liability under Section 1 of the Sherman Act, this Court should dismiss the States' First and Second Claims for Relief.^{6/}

B. Patient Participation In CPMS Does Not Constitute an "Agreement" Under Section One of the Sherman Act

Recognizing their pleading infirmities, the States retreat from their reliance on Caremark as a "co-conspirator." (See Caremark's Reply Mem. at 2, citing the States' Response at 18-19) Instead, the States concoct an alternative theory of antitrust conspiracy claiming that CLOZARIL® patients themselves and Sandoz form the requisite contract, combination or conspiracy. The States now assert that the concerted action "requirement is met when a patient (or payor) agreed [sic] to the purchase of CPMS." (States' Response at 19) As Caremark urged in its reply memorandum, this theory is not tenable in law or in logic. The action of a single entity imposing a tying arrangement on its customers is not proscribed by Section 1 of the Sherman Act. McKenzie v. Mercy Hospital of Independence, 854 F.2d 365, 368 (10th Cir. 1988). (See Caremark's Reply Mem. at 4) That "the buyer took both products in a package against his will negates the existence of a 'contract, combination, or conspiracy.'" Will v.

^{6/} As Caremark argued in its reply memorandum, dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper because the States' pleadings establish that Caremark is Sandoz' agent. (Caremark's Reply Mem. at 9, citing North American Produce v. Nick Penachio Co., 705 F. Supp. 746, 750 (E.D.N.Y. 1988) (Dismissal of Section 1 claim under Federal Rule of Civil Procedure 12(b)(6) was proper because "from plaintiff's own allegations th[is] [c]ourt conclude[d] that for antitrust purposes, plaintiff was defendant's agent.") (emphasis added).

Comprehensive Accounting Corp., 776 F.2d 665, 669 (7th Cir. 1985), cert. denied, 475 U.S. 1129 (1986).^{2/} See generally United States v. Nasser, 476 F.2d 1111, 1118-20 (7th Cir. 1973) (alleged victim cannot be co-conspirator unless victim is subject to liability under the statute at issue). Because the States have failed to allege concerted action between parties capable of an antitrust conspiracy, this Court should dismiss their claims under Section 1.

C. The Proscription on Vertical Price Restraints Does Not Apply to the Sandoz-Caremark Relationship

The States' recognition that Caremark is Sandoz' agent similarly defeats their Section 1 price fixing claim. The prohibition on vertical price agreements does not apply to restrictions on the price to be charged by one who is in reality an agent of, not a buyer from, the manufacturer. Morrison v. Murray Biscuits, supra, 797 F.2d at 1426 (citing United States v. General Electric Co., 272 U.S. 476 (1926)). Accordingly, as Sandoz' agent in the distribution of CLOZARIL[®], Caremark is legally incapable of conspiring to maintain resale prices. (See also Caremark's Opening Mem. at 20-22 and Reply Mem. at 6-9)

^{2/} To the extent that the Seventh Circuit's decision in Will v. Comprehensive Accounting Corp., supra, cites Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), overruled in part, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), for the principle that "unwilling compliance" satisfies the joint actions requirement of Section 1, that holding has been effectively overruled by Fisher v. City of Berkeley, 475 U.S. 260, 267 (1986) ("[A] restraint imposed unilaterally . . . does not become concerted action within the meaning of [Section 1 of the Sherman Act] simply because it has a coercive effect upon the parties who must obey.").

D. The States Have Failed to Allege That a Substantial Danger Exists That Either Sandoz or Caremark Will Acquire Market Power in the Alleged Tied Service Markets

As Caremark argued in its other memoranda, to state a claim for tying, the States must allege that the tie forecloses a substantial volume of commerce in the market for the tied product. (See Caremark's Opening Mem. at 18-20; Caremark's Reply Mem. at 6 n.5) The case authority established by this Circuit, however, places an even greater burden on plaintiffs alleging an unlawful tying arrangement: "One of the threshold criteria the plaintiff must satisfy . . . is that there is a substantial danger that the tying seller will acquire market power in the tied product market." Will v. Comprehensive Accounting Co., *supra*, 776 F.2d at 674 (emphasis added) (quoting Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Development Co., 758 F.2d 203, 210 (7th Cir. 1985)). Accordingly, the States must allege facts which establish a substantial danger that either Sandoz or Caremark will acquire market power in the alleged tied services. The States merely conclude that "[t]he Clozaril/CPMS tie forecloses competition in the markets for blood drawing, case administration, data base, dispensing, or laboratory services." (Compl. ¶ 46) The States fail to allege that either Sandoz or Caremark currently has or will acquire market power in any of those services. Because the States fail to meet this threshold pleading requirement, this Court should dismiss their tying claims.

E. The States Fail to Plead Facts to Support Their Vertical Price Fixing Claim

The Seventh Circuit adheres, as it must, to the Supreme Court doctrine that a manufacturer may suggest a resale price and that a distributor may freely conform to such price. See, e.g., Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698 (7th Cir.), cert. denied, 469 U.S. 1018 (1984); Skokie Gold Standard Liquor v. Joseph E. Seagram & Sons, 661 F. Supp. 1311 (N.D. Ill. 1986). Thus, to state a claim for resale price maintenance under Section 1 of the Sherman Act, the States must allege something more than Sandoz' suggestion of a "resale" price and Caremark's adherence to such a price. The States must allege facts which would exclude the possibility that Sandoz and Caremark were acting independently. Id. at 1318; Magid Manufacturing Co. v. U.S.D. Corp., 654 F. Supp. 325, 328 (N.D. Ill. 1987). The States merely conclude that "Sandoz sets the resale price." (States' Response at 25) The States' complaints allege no facts which would establish that Caremark communicated its acquiescence or agreement to a resale price, and that such agreement was sought by Sandoz. Accordingly, the States' price fixing allegations should be dismissed.^{8/} (See Reply Mem. at 9-10)

^{8/} Dismissal of the resale price fixing claim is proper under Federal Rule of Civil Procedure 12(b)(6). See Char Crews, Inc. v. Christoffe Silver, Inc., No. 81 C 3940, slip op. at 2 (N.D. Ill. 1982), attached hereto as Exhibit 3. ("General allegations that defendants conspired together . . . are not sufficient to state a cause of action [for resale price maintenance.] . . . [G]eneral allegations of conspiracy are merely legal conclusions, and must be supported with allegations of some specific facts tending to show the existence of the alleged conspiracy.") (emphasis added). See also Cayman Exploration Corp. v. United Gas Pipe Line Corp., 873 F.2d 1357, 1360 (10th Cir. 1989) ("To adequately state a vertical price fixing violation ('resale price maintenance'),

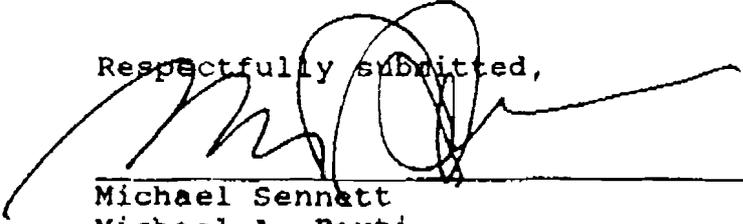
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CONCLUSION

For these reasons, and for all the reasons set forth in its opening and reply memoranda, Caremark respectfully moves this Court for an order dismissing the States' complaints, and each of them, for failure to state a claim upon which relief can be granted.

Dated this 3rd day of June, 1991.

Respectfully submitted,



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II

THE STATES HAVE NOT PLEADED A
MONOPOLIZATION CLAIM AGAINST CAREMARK

The States' monopolization claim is against Sandoz and Sandoz alone:

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

(Compl. ¶ 67; emphasis added) The States have failed to name Caremark as a monopolist and have not alleged that Caremark engaged in any monopolistic conduct.^{2/} Because it "alleges no specific act or conduct on the part of" Caremark, the States' Third Claim for Relief should be dismissed as to Caremark. See Potter v. Clark, 497 F.2d 1206, 1207 (7th Cir. 1974).

plaintiff must allege at least some facts which would support an inference that the parties have agreed that one will set the price at which the other will resell the product or service to third parties." (emphasis added in part).

^{2/} Confronted with this obvious deficiency, the States advance an entirely new claim against Caremark. For the first time in their Response, they contend that "Caremark has conspired with Sandoz to monopolize the market for clozapine." (States' Response at 25) This covert attempt by the States to amend their complaints must fail. This Court has held that "[i]f a complaint is insufficient it may not be amended by briefs in opposition to the motion to dismiss." Devilbiss v. Arvid C. Walberg & Co., supra, No. 83 C 1133, slip op. at 3; see also Car Carriers, Inc. v. Ford Motor Co., supra, 745 F.2d at 1107 ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.").

Exhibit 1

THE DEVILBISS COMPANY, a Division of Champion Spark Plug Company, a Delaware Corporation, Plaintiff, v. ARVID C. WALBERG & CO., an Illinois Corporation, Defendant

NO. 83 C 1133

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Slip Opinion

February 27, 1986

OPINION BY: LEINENWEBER

OPINION: MEMORANDUM OF OPINION AND ORDER

HARRY D. LEINENWEBER, Judge

Counter/plaintiff, Arvid C. Walberg & Co. ("Walberg"), filed an amended counterclaim Count I seeking \$8000 for engineering time it was forced to expend as a result of the inferior construction of two spray booths it had purchased from counter/defendant, The Devilbiss Company ("Devilbiss"), for a customer under its purchase order No. 04127.

Devilbiss has moved for summary judgment supported by the deposition of Arvid C. Walberg, a principal of Walberg, taken on December 14, 1983, and a series of letters between the parties identified in the deposition.

This same issue was previously before the court on a motion for summary judgment which was denied on August 30, 1983. The basis of that ruling was the existence at that time of a question of fact whether the parties had intended an agreement to split customer's back charges of \$7319.30 to encompass the \$8000 Walberg seeks.

Exhibits A, B and C indicate that during the spring of 1982 Walberg and Devilbiss had a dispute over back charges being made against Walberg by its customer. At that time, Walberg was claiming \$7319.30 reimbursement while Devilbiss was offering \$1580.25.

Apparently, through negotiations over the telephone in August, 1983, the parties agreed that they would "equally share the responsibility in the matter" and accept the sum of \$3659.65 each. (Ex. D correspondence between Devilbiss and Walberg, dated 9/7/82) Devilbiss' share was passed on to Walberg in the form of a credit to its account with Devilbiss, leaving a balance due of \$14,316.35. To remove any doubt that Walberg understood this, it wrote Devilbiss on September 17, 1982 (Ex. E) acknowledging Devilbiss' letter of September 7, 1982 and indicating payment of the account was delayed because Walberg "was a little short of cash." The balance was not disputed.

Walberg proceeded to make a "payment on account" of \$1000 on December 9, 1982. (Ex. F)

On January 19, 1983, Devilbiss sent Walberg a dunning letter clearly referring to Walberg's purchase order No. 04127 and an "unpaid balance on



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[this] account in the amount of \$13,316.35." (Ex. G) Walberg responded on January 26, 1983 apologetically advising that it had "not been able to raise funds as yet to clear up our old obligations." (Ex. H)

DeVilbiss contends, inter alia, on the basis of the foregoing, an account stated was created between the parties which forecloses Walberg's claim of \$8000 credit on this same account.

Walberg contends first, that the court order of September 30, 1983 was final and appealable because of an order, dated September 14, 1983, finding the judgment in favor of DeVilbiss of \$13,316.25 final and appealable; second, that DeVilbiss' raising of account stated is not timely; and third, in any event, it is a question of fact. More importantly, Walberg has not disputed any of the deposition references or exhibits and has supplied no additional references or exhibits.

In Counts III and IV of the counterclaim, Walberg alleges that DeVilbiss and Champion Spark Plug commenced a direct attack against Walberg to drive it into bankruptcy and out of business. Allegedly, the attack was executed through the following acts: (1) manufacturing substandard exhaust plenum chambers for use by Walberg as a component part of a process bearing Walberg's name; (2) publication through its agents of slander; (3) breach of an agreement to test a Walberg product; and (4) sale of competing products to mutual distributors and customers at unfairly low prices. Count III alleges that these acts constitute "unfair trade and unfair competition" and cause irreparable damage. Count IV alleges these acts were in restraint of trade and thereby violated Secs. 1 and 2 of the Sherman Act, 15 U.S.C. 51 and 2, and Secs. 4, 7 and 16 of the Clayton Act, 15 U.S.C. 51, 18 and 26A. DeVilbiss has moved to dismiss on the ground that Counts III and IV fail to state any claim upon which relief could be granted.

DISCUSSION

I. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNT I OF THE COUNTERCLAIM

The order of September 14, 1983 rendered only the judgment in favor of DeVilbiss for \$13,316 final. The balance of the case under Rule 54(b), Fed.R.Civ.P., including Walberg's counterclaim, (which was subsequently amended), is not final and is subject to revision at any time prior to final adjudication.

DeVilbiss' motion for summary judgment was in response to plaintiff's amended counterclaim and DeVilbiss is within its rights to raise any defense it might have at the time the pleading is filed. Rule 56, Fed.R.Civ.P. Even if Walberg had not filed an amended counterclaim, where there is an expanded record such as is the case here, a party may renew its motion for summary judgment. Kirby v. P. R. Mallory & Co., Inc., 489 F.2d 904, 913 (7th Cir. 1973).

Lastly, Walberg claims that account stated is a question of fact. However, the existence of an account stated is a question of fact like any other factual issue. Under some circumstances its existence or absence can be one of law.

An "account stated" is an agreement between parties to previous transactions that the account representing the balance due is correct, with a promise, express or implied, that the debtor shall pay the full amount of the agreed balance. LaGrange Metal Products V. Pettibone Mulliken, 106 Ill.App.3d 1046,

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436, N.E.2d 645, 651, 62 Ill. Dec. 619, 625 (1st Dist. 1982). Here, Walberg acknowledged in writing on two occasions that DeVilbiss' claim of balance due on its purchase order No. 04127 was correct. (Exs. E & H) In addition, he made "payment on account" of \$1000 on December 9, 1982. (Ex. F)

Since all of Walberg's engineering work was done on account No. 04127 and was completed prior to January 18, 1982 (Ex. C, p.4, enumerated P11), Walberg obviously had knowledge of its potential claim at the time it wrote Exhibits E & H and made the payment. (Ex. F) Therefore, there are no issues of fact over the existence of the account stated.

Walberg has not sought to dispute any of the foregoing, being content to rest on its legal arguments.

Accordingly, DeVilbiss' motion for summary judgment on Count I of the counterclaim is granted.

II. PLAINTIFF'S MOTION TO DISMISS COUNTS III and IV OF THE COUNTERCLAIM

For the reasons stated herein, DeVilbiss' motion to dismiss is granted. A complaint will not be dismissed for failure to state a claim unless it appears that the plaintiff could not prove any set of facts which would entitle him to relief. *Brillhart v. Mutual Medical Ins., Inc.*, 768 F.2d 196, 199 (7th Cir. 1985); *Zapp v. United Transportation Union*, 727 F.2d 617, 627 (7th Cir. 1984). A complaint must contain direct or inferential allegations of every material element necessary to state a legal theory of relief. *Carl Sandburg Village Condo. Assn. No. 1 v. First Condo Develop. Co.*, 758 F.2d 203, 207 (7th Cir. 1985), *Sutliff, Inc. v. Donovan Co., Inc.*, 727, F.2d 648, 655 (7th Cir. 1984). A court can grant a motion to dismiss "if there is no reasonable prospect that the plaintiff can make out a cause of action from the events narrated in the complaint." *Carl Sandburg Village*, 758 F.2d, at 207; *Brillhart*, 768 F.2d, at 198. Defendant is correct in asserting in his reply that if a complaint is insufficient it may not be amended by briefs in opposition to the motion to dismiss. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984). Counts III and IV of the counterclaim fail to state any claim upon which relief may be granted. Count III fails to set forth, either directly or indirectly, allegations necessary to state a cause of action for "unfair trade" or "unfair competition". This court and the counter/defendant can only guess at the manner in which the activities set forth in Count III constitute unfair trade or unfair competition. If Walberg is alleging that they constitute commercial disparagement, it has failed to allege the appropriate elements. See, e.g., *Smith-Victor Corp. v. Sylvania Electric Products, Inc.*, 242 F. Supp. 302, 307 (N.D. Ill. 1965).

If Walberg is alleging wrongful interference with a prospective business advantage, it did not set forth the necessary elements. See, e.g., *Crinkley v. Dow Jones & Co.*, 67 Ill.App.3d 869, 878; N.E.2d 714 (1st Dist. 1979). To the extent that the facts set forth in Count III may give rise to a cause of action for defamation, as was noted by Judge Grady in his Memorandum Opinion of September 30, 1983 regarding Count II, Count III only duplicates Count II. See, e.g., *Chicago Heights Venture v. Dynamite Nobel of America, Inc.*, No. 84-3087, slip op. at 15 (7th Cir. 1/28/86).

Count IV also fails to state any claim upon which relief could be granted. Count IV is totally devoid of allegations necessary for a violation of Sec. 1

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of the Sherman Act, 15 U.S.C. §1. See, generally, *Copperweld Corp. v. Independence Tube Corp.*, -U.S.-, 104 S.Ct. 2731 (1984); *Carriers*, 745 F.2d 1101. Count IV also lacks any allegations of facts regarding a violation of Sec. 2 of the Sherman Act, 15 U.S.C. §2, such as a threatened actual monopoly, market power, or relevant product or geographic markets. See, generally, *Copperweld*, 104 S.Ct. 2731. Similarly, there are no allegations of facts supporting a violation of Sec. 7 of the Clayton Act, 15 U.S.C. §18, such as those regarding the illegal acquisition of a business enterprise and a corresponding lessening of competition. See, generally, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

Accordingly, since the counter/plaintiff has not and apparently could not allege the necessary legal or factual elements of any legal theory for which this court could grant relief, Counts III and IV of the amended counterclaim are dismissed.

IT IS SO ORDERED.

Exhibit 2

ILLINOIS CORPORATE TRAVEL, INC. d/b/a McTRAVEL TRAVEL
SERVICES, Plaintiff, v. AMERICAN AIRLINES, INC., Defendant

No. 85 C 07079

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION

Slip Opinion

January 8, 1986

OPINION BY: GETZENDANNER

OPINION: MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This antitrust case is before the court on the plaintiff's motion to reconsider and set aside the court's September 16, 1985 memorandum opinion and order denying plaintiff's motion for a preliminary injunction. Although the case has now been reassigned to Judge Brian Duff, I offered to rule on the motion in order to avoid the necessity of reconvening any evidentiary hearings, and Judge Duff agreed by order dated December 6, 1985. Plaintiff raises two arguments: 1) that the court erred in balancing the hardships to the parties; and 2) that the court improperly applied common law agency principles to plaintiff's allegations of resale price maintenance.

1. Balance of Hardships

Plaintiff raises two distinct arguments concerning the balance of hardships. First is that the court erred in characterizing plaintiff's estimates of harm as "conclusory." Second is that the court unfairly relied on American's claims of harm to its distribution system when plaintiff was precluded from investigating and exposing the weaknesses of those claims at the preliminary injunction hearing. Neither argument seems to the court persuasive grounds for reconsideration.

Plaintiff's evidence of irreparable harm consists almost entirely of opinion evidence from its president Richard Dickieson not that it will go out of business, but that it will be prevented from opening a number of additional McTravel offices through use of an admittedly novel pricing and advertising system. As Dickieson set forth in his affidavit, McTravel is both a "recent entrant into the travel agency business" and the "first" travel agency to promote the discount travel concept. (Dickieson Aff. PP 26-27). While current losses due to delays in this strategy are clearly difficult to quantify, the fact remains that what McTravel seeks by an injunction is not a preservation of the status quo, under which American's travel agencies are not allowed to advertise rebates, but a chance to capitalize on a newly competitive market. Thus, while McTravel's injuries are "irreparable" in the sense that they are difficult to quantify, the chief losses of which McTravel complains involve benefits not presently enjoyed.

Plaintiff vigorously argues that granting an injunction would preserve rather than alter the status quo since McTravel, while not an authorized American

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agent, was nonetheless authorized under its ARC agreement to issue American tickets by using the imprint plates of other carriers with which American has a bilateral ticketing arrangement. The flaw in this argument is that at no time until just before this suit did McTravel make national efforts to promote its rebating policies. (A chief example would be the promotional spots on "Good Morning America.") While permitting McTravel to continue issuing American tickets would in part preserve the status quo, permitting McTravel to issue such tickets while pursuing an aggressive marketing strategy would greatly alter the status quo.

For similar reasons, the court rejects plaintiff's contention that reliance on American's harm was erroneous. In weighing the relative hardships between American and McTravel, the court was not opining that the injunction would economically diminish American's business. Had the court done so, plaintiff would be correct to complain that evidentiary rulings impaired its ability to refute American's claims. My point, however, was that any legitimate interest American had in maintaining its distribution system would be irreparably lost were McTravel allowed to pursue its aggressive new strategies. The court's use of the word "harm" was apparently misleading, but was based on McTravel's claims that its new marketing would revolutionize the travel agency business. Taking those claims of success as correct, to grant the preliminary injunction would, as a practical matter, moot the entire controversy by requiring American to change its distribution system whether that system is lawful or not. The court therefore adheres to its conclusions about the relative balance of hardships, absent a stronger showing of success on the merits.

2. Probability of Success

Plaintiff makes two related arguments in favor of reconsidering the court's assessment on the merits of the case: first that the court erroneously found McTravel to be an "agent" of American under common-law principles and second that common-law agency analysis is in any event inappropriate for antitrust analysis. In support of the first argument, plaintiff cites two cases, both presented to the court for the first time on this motion, which hold that a travel agency is not an "agent" of the airline for bankruptcy related purposes. In *In re Shulman Transport Enterprises, Inc.*, 744 F.2d 293 (2d Cir. 1984), Pan American Airlines attempted to assert a priority over proceeds held by an international freight forwarder which had filed for Chapter 11 protection. The court rejected the argument that the debtor held the proceeds of the air space sales in the fiduciary capacity of an agent, and thus held that the debtor's secured lender had priority over the airline to the funds. The court laid particular stress on the airline's lack of control over the debtor's collection of funds. *Id.* at 295.

The other case, *In re Morales Travel Agency*, 667 F.2d 1069 (1st Cir. 1981), involved a similar situation: Eastern Airlines attempted to claim immediate possession of funds held by a bankrupt travel agent on the ground that the funds represented proceeds of its sales. Notwithstanding language in the governing trade agreement that such proceeds were property of the airline to be held in trust, the court noted that the travel agent nowhere segregated the proceeds of airline sales from its general funds, and held the relationship to be one of debtor-creditor rather than one of trust. *Id.* at 1071-72.

Assuming that the facts in *Shulman* and *Morales* are fully applicable here, it still does not follow as a matter of law that defendant's ban on the

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advertising of rebates is per se illegal. Both Shulman and Morales were concerned with the ostensible ownership problems created when a travel agent commingles funds collected for particular carriers in its general accounts. Those cases theoretically have little application to the agency inquiry under antitrust law, which is couched in terms of whether a given consignment masks an unlawful resale price maintenance scheme. Here, the function of travel agents is to act as mere conduits through whom American sells directly to customers, not resellers, and the agency inquiry holds.

n1 The Airlines Reporting Corporation (ARC) agreement which governs American's relations with plaintiff provides at Section VII-B that ICT shall designate a bank account for the benefit of ARC and the carrier to hold the proceeds from sales of air transportation. The court has assumed that this language does not require ICT to designate separate bank accounts for each carrier. If this assumption is erroneous, however, Shulman and Morales might be factually distinguishable.

Plaintiff secondly argues that application of common-law agency principles was in any event improper. Plaintiff relies in its brief chiefly on *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), in which the Supreme Court made clear that the formalities of consignment relationships, such as passage of title, may not be used to avoid antitrust liability for an otherwise unlawful resale price maintenance scheme. Plaintiff interprets *Simpson* to require a finding that the agent lacks independence and is in effect little more than an employee before a court can find an agent's lack of pricing authority to be a lawful attribute of a true consignment relationship.

Plaintiff's interpretation is borne out in many cases which stress an agent-plaintiff's lack of entrepreneurial independence as one basis for finding no resale price maintenance in a particular fixed price consignment. See, e.g., *Holter v. Moore & Co.*, 702 F.2d 854 (10th Cir.), cert. denied, 464 U.S. 937 (1983); *Hardwick v. Nu-Way Oil Co., Inc.*, 589 F.2d 806, 810 (5th Cir.), cert. denied, 444 U.S. 836 (1979); *American Oil Co. v. McMullin*, 508 F.2d 1345, 1351 (5th Cir. 1975); *Laurence J. Gordon, Inc. v. Brandt, Inc.*, 554 F.Supp. 1144, 1150 (W.D. Wash. 1983). However, the above courts have also interpreted *Simpson* not to invalidate all fixed price consignment relationships, but simply to require courts to examine the substance of a purported consignment relation in determining whether the consignment is bona fide or not. This examination involves many factors, particularly whether the agent bears the risks of the distribution process. See, e.g., *Mesirov v. Pepperidge Farm, Inc.*, 703 F.2d 339, 343 (9th Cir.), cert. denied, 464 U.S. 820 (1983); *Hardwick*, 589 F.2d at 809; *Pogue v. International Industries, Inc.*, 524 F.2d 342, 345 (6th Cir. 1975); *Greene v. General Foods Corp.*, 517 F.2d 635, 653 (5th Cir. 1975), cert. denied, 424 U.S. 942 (1976); *Laurence J. Gordon, Inc.*, 554 F.Supp. at 1150. Travel agents assume no risk of loss due to unsold air space, and the court relied chiefly on that lack of risk in finding a true consignment relationship to exist.

Even assuming that entrepreneurial independence is the true litmus test for vertical price restraints under *Simpson*, plaintiff's status as an independent business entity does not control the question of its agency status with respect to the purchase and sale of American tickets. Just as a so-called agent may act in that capacity as to some matters but not others, *In re Shulman Transport Enterprises, Inc.*, 744 F.2d 293, 295 (2d Cir. 1984), so may an otherwise independent business entity be a mere agent with respect to certain

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activities. See, e.g., *Hardwick*, 589 F.2d at 809-810 (store owner, although an independent operator in many respects, held an agent with respect to sale of gasoline from pump outside store).

Application of this principle to the present case produces mixed results. McTravel, while clearly not an "employee" of American, does not bear the indicia of an entrepreneur in selling defendant's tickets: plaintiff can only negotiate a sale after checking with American that a flight seat is in fact available, does not assume the risk of unsold seats, never purchases the tickets for resale, and is not a party to the contract for the sale of the flight, which is executed as if between the airline and the customer. These factors strongly support the court's earlier analysis.

On the other hand, the customer remits payment to the travel agency in the latter's name, and the contract between American and its agents does not specify how funds should be collected. While this risk can be minimized through accepting only cash or approved credit cards, the risk of nonpayment due to customer default nonetheless remains with McTravel, not American. Unlike the risks incurred by the plaintiff in *Simpson*, however, this risk does not attach until after the customer agrees to purchase an airline ticket. The court therefore assumed that American's interest in price regulation of airline tickets would be justified by the fact that the risk of unsold tickets remains with American throughout the sales process, despite its use of outside agents instead of employees as salespeople. n2

n2 McTravel has also argued that the court erred in finding no true competition between the airline and the agent. While American collects less money on tickets sold by agents than tickets sold through American salespeople, it also incurs less expenses on those sales. Even assuming, however, that American has an interest in maximizing the number of sales it makes through its own offices, any competition between travel agents and sales personnel reflects the fact that the travel agents function as salesmen and not as independent distributors who purchase for resale to third parties.

Plaintiff finally argues that the distinction between sales and consignment transactions has been specifically discredited for antitrust purposes in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977). In *Sylvania*, the Supreme Court reversed its earlier decision in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), and held that vertical nonprice restrictions should be invalidated only under a rule-of-reason standard based on demonstrable economic effect. The court's language overruling *Schwinn* is instructive. In *Schwinn*, the court had ruled that vertical nonprice restrictions should be held per se unlawful where a manufacturer seeks to "restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." 388 U.S. at 379, quoted in *Sylvania*, 433 U.S. at 44. But the *Schwinn* court went on to state that the rule of reason governs when "the manufacturer retains title, dominion, and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer." 388 U.S. at 380, quoted in *Sylvania*, 433 U.S. at 44-45.

The *Schwinn* decision was the subject of numerous scholarly critiques, many of them arguing that its distinction between sale and consignment transactions was essentially formalistic and unrelated to any relevant economic impact. See Baker, *Vertical Restraints in Times of Change: From White to Schwinn to*

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Where?, 44 Antitrust L.J. 537, 537 (1975); Comanor, Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath, 81 Harv. L. Rev. 1419, 1422 (1968); McLaren, Territorial & Customer Restrictions, Consignments, Suggested Resale Prices and Refusals to Deal, 37 Antitrust L.J. 137, 145 (1978); Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 288-89 (1975); Note, Vertical Territorial & Customer Restrictions in the Franchising Industry, 10 Colum. J. Law & Soc. Problems 497, 503 (1974). The Sylvania Court acknowledged the weight of this collective scholarship, noted that Schwinn provided "no analytical support" for distinguishing between sale and nonsale restrictions, and concluded that Schwinn's exemption of nonsale transactions from the per se rule was due to the Court's unexplained belief that a complete per se prohibition of vertical restraints would be inflexible. 433 U.S. at 54. The Court concluded "that the distinction drawn in Schwinn between sale and nonsale transactions is not sufficient to justify the application of a per se rule in one situation and a rule of reason in the other." 433 U.S. at 57. The Court then concluded that the per se rule stated in Schwinn for nonprice restrictions, instead of being expanded to include non-sale transactions, should be abandoned in favor of a reasonableness analysis. *Id.*

Plaintiff's extrapolations from Sylvania can be summarized as follows. Because sale and nonsale transactions cannot be distinguished in terms of economic effect, the Supreme Court's continued per se condemnation of vertical price fixing must be adhered to regardless of the form in which American runs its distribution system. This argument is certainly not without force. Sylvania, however, concerned the distinction between consignments and sales as systems of distribution, and did not address the continued vitality of the rule that a retailer is entitled to determine the price at which it sells its own products directly to consumers even though negotiated through outside agents. In this court's opinion, Sylvania's logic should not be extended to hold per se unlawful an agency type sales network similar to those upheld by other courts, even after Sylvania, under the rule of Simpson and General Electric. See, *supra*, pages 5-6.

Significantly, none of the post-Sylvania cases addressing the continued vitality of the "agency" exception articulated in Simpson have considered the argument put forward by plaintiff. The only case to discuss Sylvania at all, *Laurence J. Gordon, Inc. v. Brandt, Inc.*, 554 F.Supp. 1144 (W.D. Wash. 1983), expressly reaffirms the teaching of Simpson that restraints imposed on individuals who do not possess entrepreneurial indicia are outside the scope of Section 1. *Id.* at 1151. In this case, while plaintiff operates as an independent business entity generally, it does not possess sufficient independence with respect to the sale of airline tickets to qualify as a reseller under antitrust analysis. The court adds, however, that this conclusion is based on the record of the preliminary injunction hearing, and is not meant to foreclose a different result after a fuller hearing on the merits.

American argues that Sylvania is inapt since the Court in that case actually relaxed the rules under the Sherman Act with regard to vertical restrictions, and thereby offers justification for American's prohibition of rebate advertising. While there is some cogency to this argument, and scholarly support as well, see, e.g., Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L.Rev. 6, 9 (1981), the Court in Sylvania expressly declined to call into question the long standing prohibition on resale price maintenance. 433 U.S. at 51 n.18. That position has since been reaffirmed. *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct.

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Exhibit 3

CHAR CREWS, INC., Plaintiff, vs CHRISTOFLE SILVER, INC.,
et al., Defendants.

No. 81 C 3940

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION

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February 8, 1982

OPINION BY: DECKER

OPINION: MEMORANDUM OPINION AND ORDER

Plaintiff, Char Crews, Inc., brought this action against defendants, Christofle Silver, Inc., Baccarat, Inc., and Richard Kaplan, alleging that they had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by attempting to force plaintiff to engage in retail price maintenance. Pending are motions to dismiss from all defendants.

Plaintiff alleges the following in its complaint, which, for the purposes of the instant motions, must be taken as true. Prior to March 1981, defendant Baccarat was the sole United States distributor of Christofle silverplate tableware and other items, which are manufactured in France. As part of its distribution duties, Baccarat provided retailers with lists of suggested retail prices for the silverplate. Beginning in March of 1980, plaintiff began to purchase silverplate from Baccarat for retail. Plaintiff is in the business of selling at a discount china, crystal, stainless steel tableware and silverplate. Char Crews resold the Christofle silverplate at a discount of twenty percent from the suggested retail prices provided by Baccarat.

According to the complaint, Baccarat began to put pressure on Char Crews to stop discounting the Christofle silverplate. The "coercion" began by conversations with Baccarat's sales representative, David Armstrong, and escalated to Baccarat's refusal to fill Char Crews' orders on a timely basis and to provide the customary display and promotional materials to Char Crews. Those actions were allegedly carried out at the direction of defendant Kaplan, who was an employee of Baccarat and in charge of the distribution of Christofle silverplate. It seems, however, that through March 1981, Char Crews continued to sell Christofle silverplate.

In March 1981, Baccarat ceased its business of selling Christofle silverplate to retailers, and Christofle Silver succeeded it as the sole distributor of the silverplate to retailers in the United States. Christofle Silver was organized as a corporation in 1958, but it had remained dormant until it undertook the distribution duties in March 1981. Plaintiff alleges that the change in distributors was done so that the new distributor could refuse to sell to retailers who were offering the silverplate at discount prices. When the change was made, Kaplan resigned from Baccarat and accepted employment with Christofle Silver, where he remained in charge of distributing Christofle silverplate.

On March 31, 1981, Char Crews sent an order for silverplate to Christofle Silver. Christofle Silver refused to fill the order, and in April 1981,

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Informed Char Crews that Christofle Silver would no longer sell silverplate to it. Plaintiff alleges that that action was taken because it refused to comply with defendants' list of suggested retail prices.

Plaintiff claims that the above acts, effectively terminating it as a retailer of Christofle silverplate, were part of a conspiracy between the defendants to engage in unlawful resale price maintenance. Plaintiff also alleges that other retailers of Christofle silverplate also conspired with defendants to commit the per se violations of Section 1 of the Sherman Act.

Defendants have filed two separate motions to dismiss the claims against them, one motion filed by defendant Baccarat, and one filed jointly by defendants Christofle Silver and Kaplan. Several issues have been raised by the various defendants, however, because the court finds that one issue is dispositive as to all defendants, only it will be discussed below.

One of the basic elements necessary to state a cause of action under Section 1 is the presence of a conspiracy. The Seventh Circuit Court of Appeals recently stated:

"Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies unreasonably restraining trade or commerce. The fundamental prerequisite is unlawful conduct by two or more parties pursuant to an agreement, explicit or implied. Solely unilateral conduct, regardless of its anti-competitive effects, is not prohibited by Section 1. Rather, to establish an unlawful combination or conspiracy, there must be evidence that two or more parties have knowingly participated in a common scheme or design to accomplish an anti-competitive purpose."

Contractor Utility Sales Co. v. Certain-teed Products Corp., 638 F.2d 1061, 1074 (7th Cir. 1981). Even a per se antitrust violation like resale price maintenance is not prohibited if done unilaterally by the manufacturer or distributor. See United States v. Colgate & Co., 250 U.S. 300 (1919).

The allegations of plaintiff's complaint fail to adequately set forth that element of a Section 1 claim. Initially, the court notes that the general allegations that defendants conspired together, either among themselves or with retailers other than plaintiff, are not sufficient to state a cause of action. General allegations of conspiracy are merely legal conclusions, and must be supported with allegations of some specific facts tending to show the existence of the alleged conspiracy. See McCleneghan v. Union Stock Yards Co. of Omaha, 298 F.2d 659 (8th Cir. 1962). That rule applies, even recognizing the liberal notice pleading allowed by the Federal Rules of Civil Procedure. Sims v. Mack Truck Corp., 488 F.Supp. 592 (E.D.Pa. 1980).

It is evident, then, that the only facts alleged in plaintiff's complaint, which could potentially show a conspiracy to violate the antitrust laws, involve the actions taken by the named defendants to eliminate Char Crews as a dealer of Christofle silverplate. However, the facts, as stated, show as a matter of law that such a conspiracy was not possible.

Plaintiff alleges that Baccarat was the sole U.S. distributor of Christofle silverplate until March 1981. At that time, Baccarat ceased being the distributor. No allegations of the complaint suggest that Baccarat had any further interaction with plaintiff after that date, nor do any allegations

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suggest that Baccarat had any contacts with the new distributor, Christofle Silver. Plaintiff has not alleged any facts showing any conspiracy between the corporate defendants after March 1981.

Nor could the corporate defendants have conspired before that date either. The complaint states that Christofle Silver was a dormant corporation until it undertook the distribution duties on March 1981. Plaintiff has suggested no way, nor is the court able to imagine one, that a dormant corporation, without employees or business, can conspire with anyone about anything.

Finally, plaintiff's complaint is not saved by the allegations that the individual defendant, Richard Kaplan, conspired with the two corporate defendants to violate the antitrust laws. Plaintiff alleged that at all times relevant to this suit, Mr. Kaplan was an employee of one or the other of the two successive distributors. It is a general rule of antitrust law that a corporation cannot conspire with one of its own employees. *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978). An exception to that rule exists for those rare occasions where the employee has an independent personal stake in achieving the object of the conspiracy. *Id.* No allegation has been made that that is the case here.

The court therefore holds that plaintiff has failed to state a cause of action. The conclusory allegations that the named defendants conspired with retail sellers other than plaintiff are insufficient as a matter of law. In addition, the facts pleaded in the complaint show that a conspiracy between the named defendants was impossible.

For the reasons stated above, defendants Baccarat, Christofle Silver, and Kaplan's motions to dismiss are granted. This action is hereby ordered dismissed.

CERTIFICATE OF SERVICE

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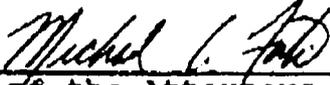
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