

ATTORNEY GENERAL
STATE OF MONTANA

Steve Bullock
Attorney General



SENATE JUDICIARY
EXHIBIT NO. 16
DATE 1/23/09
BILL NO. SB 189

Department of Justice
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

TO: Honorable Members Senate Judiciary

FROM: Ali N. Bovingdon
Assistant Attorney General
Department of Justice *Ali Bovingdon*

DATE: January 21, 2009

RE: Consumer Settlement Agreement Example

In the hearing on Senate Bill 189, sponsored by Senator Balyeat, Senator Laslovich requested that I provide the Committee with an example of the language that is included by the Department in its settlement of consumer protection cases. I'm including a copy of a settlement in the AWP case I mentioned in my testimony. The settlement was entered in July of 2008. The relevant portion of the agreement is on Page 3, paragraph A.3.

The question was also raised regarding the Attorney General's authority to create an advisory council. Montana Code Annotated § 2-15-122(1)(c) grants the following authority: "The board of public education, the board of regents of higher education, the state board of education, *the attorney general*, the state auditor, the secretary of state, and the superintendent of public instruction may create advisory councils, which shall serve at their pleasure, without the approval of the governor. The creating authority shall file a record of each council created by it in the office of the governor and the office of the secretary of state in accordance with subsection (9)." (Emphasis added).

If the Committee would like additional information, please feel free to contact me at 444-9734.

SETTLEMENT AGREEMENT AND RELEASE

I. PARTIES

This Settlement Agreement ("the Agreement") is entered into between (i) the State of Montana (the "State"), through Mike McGrath, Attorney General of the State of Montana; and (ii) Abbott Laboratories, Abbott Laboratories, Inc., Aventis Pharmaceuticals Inc., Hoechst Marion Roussel, Inc., Baxter Healthcare Corporation, Baxter International Inc., Bayer Corporation, Fujisawa Healthcare, Inc., Fujisawa USA, Inc., Immunex Corporation, Pharmacia Corporation, Pharmacia & Upjohn LLC (f/k/a Pharmacia & Upjohn, Inc.), and ZLB Behring, L.L.C. (collectively, the "Settling Defendants"). The State and the Settling Defendants are hereinafter referred to as the "Parties."

II. PREAMBLE

A. On or about February 25, 2002, the State initiated a lawsuit against the Settling Defendants and other defendants, in the State of Montana First Judicial District Court, which lawsuit was subsequently removed to the United States District Court for the District of Montana and captioned *State of Montana v. Abbott Laboratories, Inc., et al.*, Case No. CV-02-09-H-DWM (the "State Lawsuit"). On or about May 15, 2002, the State filed an Amended Complaint in the State Lawsuit against the Settling Defendants and other defendants. On or about August 1, 2003, the State filed a Second Amended Complaint in the State Lawsuit against the Settling Defendants and other defendants. The Second Amended Complaint alleges the following claims: violations of Montana's Deceptive Trade Practices Act (Mont. Code Ann. § 30-14-101 et al.), Montana's Medicaid fraud statute (Mont. Code Ann. § 53-6-160), and Montana's False Claims Act (Mont. Code Ann. § 17-8-231), and a claim for punitive damages. The original Complaint also included a claim for breach of contract for alleged violation of defendants' rebate agreements with the Secretary of Health and Human Services, relating to the reporting of "Best Price." The Parties have been litigating the State Lawsuit.

B. The Second Amended Complaint makes certain allegations and claims concerning pharmaceutical prices for the Settling Defendants' products, including but not limited to claims that the Settling Defendants caused certain published "Average Wholesale Prices" ("AWPs") for the Settling Defendants' products to be artificially inflated, and that the Settling Defendants engaged in unfair, deceptive or unlawful use of AWPs in marketing their drugs. The State seeks various forms of relief against the defendants, including restitution, damages, injunctive relief, civil forfeiture, civil penalties, costs and/or attorneys' fees.

C. The Settling Defendants have asserted a number of defenses to the State's claims and have denied and continue to deny the State's allegations in the State Lawsuit and the Second Amended Complaint.

D. The State has determined that this Agreement is in the public interest.

E. To avoid the delay, expense, inconvenience and uncertainty of protracted litigation of the State's claims, the Parties mutually desire to reach a complete and final settlement, including a settlement and dismissal of the State Lawsuit, as set forth below.

F. The Parties agree that this Agreement shall not be deemed or construed as an admission or as evidence of any violation of any statute or law, or of any liability or wrongdoing by any of the Settling Defendants, or of the truth of any of the claims or allegations of the State, or as a waiver of any defenses thereto. The State agrees it will not urge or seek to admit this Agreement as evidence of any fault or liability of the Released Parties in any investigation, administrative claim, action, suit, or proceeding, or federal or state court or arbitration proceeding.

III. TERMS AND CONDITIONS

NOW THEREFORE, in reliance on the representations contained herein and in consideration of the mutual promises, covenants and obligations in this Agreement, and for good and valuable consideration, receipt of which is hereby acknowledged, the Parties agree as follows:

A. Settlement Amount/Confidentiality

1. In full and final settlement of the State's claims, Settling Defendants shall pay, in the aggregate, \$1,000,000 (one million dollars) (the "Settlement Amount"). This sum is intended to fully resolve all of the State's claims in the State Lawsuit (including any claim for attorneys' fees and litigation costs attributable to the litigation of those claims), as further explained in the section governing Releases below.

2. The United States is entitled to a portion of the Settlement Amount, and that allocation is to be handled separately between the State and the United States. The State expressly agrees to indemnify and hold the Released Parties harmless for any claim by the United States for any federal portion of the settlement of the State Lawsuit. The Settling Defendants are not a party to any such obligation, agreement or allocation and take no position on whether the allocation explained in III.A.3 below represents the appropriate allocation.

3. Of the Settlement Amount, \$180,000 is attributable to damages for Medicaid. The balance of the Settlement Amount is attributable to damages for non-Medicaid claims. The non-Medicaid amount shall be used for attorneys' fees and investigative costs, consumer education, public benefit or protection, consumer protection purposes or local consumer aid funds, or any other purpose permitted by state law at the sole discretion of the Attorney General.

4. The precise amount of each Settling Defendant's required contribution to the Settlement Amount shall be set forth in the confidential Final Settling Defendants' Document held by Peter W. Morgan at Dickstein Shapiro LLP. The Settling Defendants agreed to the contribution amounts on the condition of their remaining confidential. The State agrees to cooperate with the Settling Defendants to seek appropriate Court orders protecting this confidentiality.

5. Notwithstanding the above provision regarding confidentiality, in the event that a Settling Defendant defaults on its obligations to make monetary payments pursuant to this Agreement, the Parties may make reference to the precise amount of that Settling Defendant's required contribution in any sealed court filing or other sealed proceedings necessary to enforce

the provisions of this Agreement. In addition, nothing herein is intended to prevent any individual Settling Defendant from disclosing or referring to its individual contribution as it deems necessary.

B. Settlement Amount/Escrow Account

1. In full and final settlement of the State's claims, within fifteen (15) business days from the Effective Date of this Agreement, the Settling Defendants shall pay their respective, confidential shares of the Settlement Amount into an escrow account at the Frontier Bank Trust Department, 2825 Colby Avenue, Everett, Washington 98201-3512 (the "Escrow Agent").

Wire Instructions:

**Frontier Bank Everett
ABA #125107626**

Frontier Bank Trust Department Account # 3226000226

FFC: (State of Montana Settlement Escrow Fund/#62-5784)

2. The Escrow Agent shall keep the precise amount of each Settling Defendant's required contribution to the Settlement Amount confidential. Within twenty (20) business days from the Effective Date of this Agreement, the Escrow Agent shall pay the State the Settlement Amount by electronic transfer funds transfer pursuant to written instructions to be provided to the Escrow Agent at the time this Agreement is executed by the State.

3. The Settling Defendants are severally – not jointly – liable. If any Settling Defendant defaults on its obligations under this Agreement, only that individual Settling Defendant is in default and such default implicates no other Released Party. Each Settling Defendant is liable solely for its respective obligations under this Agreement.

C. Dismissal of Claims and Releases

1. Within three (3) business days following receipt by the State of the payment set forth in Paragraph III.A.1 above, the State will take all steps necessary to cause the prompt dismissal of claims against the Released Companies in the State Lawsuit with prejudice.

2. "Released Companies" means Abbott Laboratories, Abbott Laboratories, Inc., Aventis Pharmaceuticals Inc., Hoechst Marion Roussel, Inc., Sanofi-Synthelabo Inc., Baxter Healthcare Corporation, Baxter International Inc., Bayer Corporation, Bayer Pharmaceuticals Corporation, Bayer HealthCare LLC, Bayer HealthCare Pharmaceuticals Inc., Fujisawa Healthcare, Inc., Fujisawa USA, Inc., Immunex Corporation, Pfizer Inc., Pharmacia Corporation, Pharmacia & Upjohn LLC (f/ka/ Pharmacia & Upjohn, Inc.), Pharmacia & Upjohn Company LLC, The Upjohn Company, Monsanto Co., GD Searle LLC, Adria Labs, and ZLB Behring LLC, and any respective predecessor entities and past or present parents, subsidiaries, divisions, affiliates, successors and assigns.

3. "Released Parties" means (1) the Released Companies; and (2) their respective past or present officers, directors, managers, employees, agents, sales representatives, and insurers.

4. In consideration of this Agreement, at the time the State receives the payment set forth in Paragraph III.A.1 above, the State on behalf of itself, its officers, agents, agencies and departments shall release, forever discharge and covenant not to sue the Released Parties from any and all civil or administrative claims for restitution, compensatory damages, punitive damages, injunctive relief, civil forfeiture, civil penalties, fines, costs, attorneys' relief and other relief that the State of Montana has asserted, could have asserted, or may assert in the future against the Released Parties for conduct, events, transactions, or practices related to or arising from the claims set forth in the Second Amended Complaint of the State Lawsuit, including but not limited to any claims regarding any drug price published by any commercial price reporting service, or provided by any Released Party to any such commercial price reporting service (including, but not limited to, AWP, SLP, WAC, NWP, WPP and Direct Price) and / or any marketing activity relating to any such price, such as any reference to the difference between (1) a price paid and (2) any reported price or reimbursement rate based on such a reported price, or any claims relating to the submission of claims to the State for payment or reimbursement, for any drug manufactured, marketed, sold, or distributed by any Released Party (collectively the

"Released Claims"). To the extent that the State has or had or could have had civil claims against the Released Parties for conduct or practices alleged in the State Lawsuit, for any drug manufactured, marketed, sold, or distributed by any Released Party, from January 1, 1991, through the date this Agreement is executed by all Parties (such period is referred to as the "Relevant Period"), this Agreement applies to any and all such claims.

5. The only claims the State of Montana intends to release are those related to the State Lawsuit. In consideration of the obligations of the Settling Defendants set forth in this Agreement, conditioned upon the Settling Defendants' payment of the amount set forth in Paragraph III.A.1 above, the State of Montana agrees to release and refrain from instituting, directing or maintaining any administrative claim or any action seeking exclusion from the State of Montana's Medicaid program against any of the Released Companies related to the Released Claims.

6. Except as expressly provided for in this Agreement, the State of Montana specifically does not herein release the Settling Defendants, their subsidiaries, joint venture owners, corporate parents or affiliates, successors or assigns, or their current and former directors, officers, and employees from any and all of the following: (a) any potential criminal civil or administrative claims arising under State of Montana revenue codes; (b) any criminal liability; (c) any civil or administrative liability that the Settling Defendants have or may have under any state statute, regulation or rule not expressly covered by this release; (d) except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from the State of Montana's Medicaid program, (e) any liability to the State of Montana (or its agencies) for any conduct other than the conduct relating to the Released Claims; (f) any claims based upon such obligations as are created by this Agreement; (g) any express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services; (h) any claims for personal injury or property damage or for other consequential damage; (i) any claims based on a failure to deliver items or services due; (j) any claims (unrelated to the Best Price claims alleged in the State Lawsuit) for rebates to be paid to

the State of Montana under any federal or state health care program or any other law or contract; or (k) any other claims unrelated to the State Lawsuit, including but not limited to unrelated off-label marketing claims and unrelated fraud claims.

7. At the time the release set forth in Paragraph III.C.4 above becomes effective as to the Settling Defendants, the Settling Defendants shall release, forever discharge and covenant not to sue the State of Montana, its agencies, employees, servants, and agents from any claims (including attorneys' fees, costs, and expenses of any kind and however denominated) that the Settling Defendants have asserted, could have asserted, or may assert in the future against the State of Montana, its agencies, employees, servants, or agents that are related to or arising from the claims set forth in the Second Amended Complaint of the State Lawsuit.

8. The State agrees that if it chooses to issue any press release, the press release will mention each of the Settling Defendants by name (or none of the Settling Defendants by name) and in no portion of any press release will it limit its focus to some sub-set of the Settling Defendants for any reason.

D. Miscellaneous

1. Nothing in this Agreement, or the Parties' willingness to enter into this Agreement, shall be construed as an admission by any person or entity, any liability or wrongdoing of any Released Party, or of the truth of any allegations in the State Lawsuit or in any other AWP-related complaint against any Released Party. The Agreement shall not be admissible in evidence for any such purpose in any proceeding.

2. Notwithstanding the preceding Paragraph, this Agreement may be pleaded as a full and complete defense to any action, suit or other proceeding that has been or may be instituted, prosecuted or attempted with respect to any of the Released Claims, and may be filed, offered, and received into evidence, and otherwise used for such defense.

3. The undersigned representatives of the Settling Defendants represent that they are fully authorized to enter into and execute this Agreement on behalf of the Settling Defendants.

The undersigned State representatives represent that they are signing this Agreement in their official capacities and they are fully authorized to enter into and execute this Agreement on behalf of the State and on behalf of the State Medicaid Program.

4. None of the Parties to this Agreement shall be considered the drafter of this Agreement or any included provision for the purpose of any statute, case law or rule of construction that would or might cause any provision to be construed against the drafter.

5. This Agreement shall be governed by and interpreted according to the substantive laws of the State of Montana without regard to its choice of law or conflict of laws principles.

6. The parties consent to venue to enforce the terms of this Agreement in the United States District Court for the District of Montana or the United States District Court for the District of Massachusetts, or should these Courts decline jurisdiction for any reason, in any court of competent jurisdiction.

7. This Agreement shall be construed and interpreted to effectuate the Parties' intent, which is to resolve completely the Released Claims with respect to the Released Parties during the Relevant Period.

8. This Agreement constitutes the complete agreement between the Parties with regard to the settlement and dismissal of the State Lawsuit.

9. This Agreement shall not be modified in any respect except by a writing executed by all parties to this Agreement. The waiver of any rights conferred by this Agreement shall be effective only if made in writing by the waiving Party. The waiver by any Party of any breach of this Agreement shall not be deemed or construed as a waiver of any other breach, whether prior to, subsequent to, or contemporaneous with this Agreement.

10. This Agreement shall be binding on all successors, transferees, heirs and assigns of the Parties.

11. Each Party agrees to perform any further acts and to execute and deliver any further documents reasonably necessary to carry out this Agreement.

12. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which shall constitute one and the same Agreement. Facsimile or .PDF signatures shall be valid signatures as of the date thereof.

13. Nothing in this Agreement shall be construed to be a waiver of the sovereign immunity of the State.

14. Except as otherwise provided herein, each Party will bear its own legal and other costs incurred in connection with the State Lawsuit, including the preparation and performance of this Agreement.

15. This Agreement is effective on the date of signature of the last signatory to the Agreement.

FOR THE STATE OF MONTANA

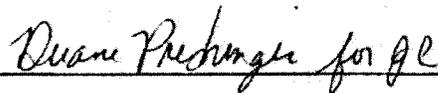
Office of the Attorney General

By: 

Date: 7/24/08

Mike McGrath, Attorney General of Montana

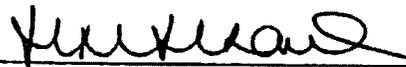
**FOR THE STATE OF MONTANA
MEDICAID PROGRAM**

By: 

Date: 7-28-08

John Chappuis, Director of Medicaid Services
Department of Public Health & Human
Services, Montana Medicaid

**ABBOTT LABORATORIES and
ABBOTT LABORATORIES, INC.**

By: 

Date: 6-19-08

Tina M. Tabacchi
Brian J. Murray
JONES DAY

**AVENTIS PHARMACEUTICALS INC.,
HOECHST MARION ROUSSEL, INC.,
and
ZLB BEHRING, L.L.C.**

By: _____

Date: _____

Michael L. Koon
James P. Muehlberger
SHOOK, HARDY & BACON, LLP

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FOR THE STATE OF MONTANA

Office of the Attorney General

By: 

Date: 7/27/08

Mike McGrath, Attorney General of Montana

**FOR THE STATE OF MONTANA
MEDICAID PROGRAM**

By: 

Date: 7/28/08

John Chappuis, Director of Medicaid Services
Department of Public Health & Human
Services, Montana Medicaid

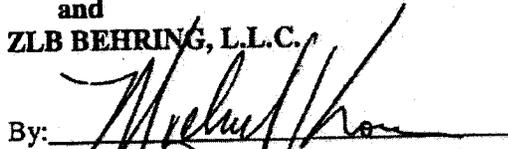
**ABBOTT LABORATORIES and
ABBOTT LABORATORIES, INC.**

By: _____

Date: _____

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Brian J. Murray
JONES DAY

**AVENTIS PHARMACEUTICALS INC.,
HOECHST MARION ROUSSEL, INC.,
and
ZLB BEHRING, L.L.C.**

By: 

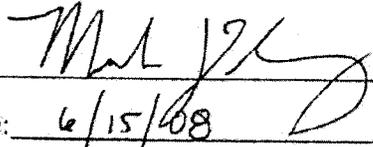
Date: June 18, 2008

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By: 

Date: 6/15/08

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ZLB Behring, LLC

BAYER CORPORATION

By: _____

Date: _____

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By: Richard D. Raskin

Date: June 16, 2003

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**FUJISAWA HEALTHCARE, INC. and
FUJISAWA USA, INC.**

By: Kathleen McGuan

Date: July 7, 2008

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IMMUNEX CORPORATION

By: _____

Date: _____

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Counsel for Immunex Corporation

**PHARMACIA CORPORATION,
(f/k/a Pharmacia & Upjohn, Inc.)
PHARMACIA & UPJOHN COMPANY
LLC**

By: _____

Date: _____

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**FUJISAWA HEALTHCARE, INC. and
FUJISAWA USA, INC.**

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Date: _____

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Douglas K. Spaulding
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IMMUNEX CORPORATION

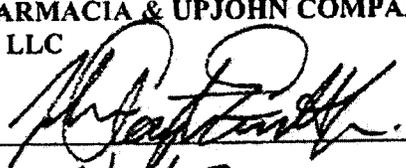
By: _____

Date: _____

David J. Burman
Kathleen M. O'Sullivan
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Counsel for Immunex Corporation

**PHARMACIA CORPORATION,
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PHARMACIA & UPJOHN COMPANY
LLC**

By:  _____

Date: 6/18/08 _____

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Counsel for Pharmacia Corporation,
Pharmacia & Upjohn Company LLC

**FUJISAWA HEALTHCARE, INC. and
FUJISAWA USA, INC.**

By: _____

Date: _____

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Douglas K. Spaulding
Andrew L. Hurst
REED SMITH LLP
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Counsel for Fujisawa Healthcare, Inc. and
Fujisawa USA, Inc.

IMMUNEX CORPORATION

By: Kath M. O'Sullivan

Date: 7/7/08

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Counsel for Immunex Corporation

**PHARMACIA CORPORATION,
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By: _____

Date: _____

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