IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01659

THE STATE OF MISSISSIPPI

Appellant

v.

**BAYER CORPORATION,
BAYER PHARMACEUTICALS CORPORATION,
and BAYER HEALTHCARE, LLC**

Appellees

REPLY BRIEF FOR APPELLANT

***ON APPEAL FROM THE HINDS CHANCERY COURT,
FIRST JUDICIAL DISTRICT***

ORAL ARGUMENT REQUESTED

Of Counsel:

JIM HOOD, Attorney General
George W. Neville (#[redacted])
Special Assistant Att'y General
Office of the Attorney General
550 High Street, Suite 1200
Jackson, Mississippi 39201
Telephone: (601) 359-3908
Facsimile: (601) 359-2003

J. Leray McNamara[redacted]
Ronnie Musgrove (#[redacted])
Frank Kolb (# 101092)
Copeland, Cook, Taylor & Bush, P.A.
Post Office Box 6020
Ridgeland, Mississippi 39158
Telephone: (601) 856-7200
Facsimile: (601) 856-7626

Clinton C. Carter (#[redacted])
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.
Post Office Box 4160
Montgomery, Alabama 36103
Telephone: (334) 269-2343
Facsimile: (334) 954-7555

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STATEMENT REGARDING ORAL ARGUMENT

The present appeal is from the dismissal with prejudice of claims brought by the State of Mississippi on behalf of its Medicaid program, alleging the fraudulent overcharging of that program in amounts thought to reach hundreds of thousands, if not millions, of dollars. The importance of this suit to the taxpayers of Mississippi strongly favors, in the State's opinion, a grant of oral argument, unless the grounds for reversal of the chancery court are sufficiently evident that no such argument appears necessary to this honorable Court.

The present case may also afford this Court the opportunity to clarify the procedure by which a Rule 12 motion is converted to a Rule 56 motion (see note 2, *infra*), and that too may favor a grant of oral argument.

REBUTTAL ARGUMENT

Bayer spends a great deal of space on its issues I and II, addressing claims regarding the Qui Tam Drugs (issue I) and post-settlement Non-Qui Tam Drugs (issue II). This Court need not trouble itself with Bayer's issues I and II, because the relief sought against Bayer in the present case pertains *only* to *pre*-settlement claims regarding the *Non*-Qui Tam Drugs. Bayer saved its weakest issues — the ones actually before the Court! — for last.[1]

I. The 2001 Settlement Agreement Did Not Justify Imposing a Heightened Pleading Standard.

Bayer's issues III.A and III.B.1 have little to distinguish them, and we treat them together here. The issue is whether the State was required to plead specific facts regarding the Settlement Agreement in lodging its claims against Bayer. As argued in the State's principal brief, there was no such requirement.

For tactical reasons best appreciated by itself, Bayer chooses the novel position of arguing that its previous irregularities with regard to the six Qui Tam Drugs, the sole subject of the 2001 Settlement Agreement, now places its pricing of other drugs beyond reproach. Past irregularities — to use no stronger word — are a strange proof of present probity.

Regardless, Bayer somehow convinced the lower court that the State's previous investigation on the Qui Tam Drugs means that Bayer committed no wrong concerning any Non-Qui Tam Drugs. With all due respect to the special masters and the chancery court, no such facts appear in the record. We have merely the special masters' notion that the federal

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[1] Bayer's lengthy statement of facts is filled with errors, but they are not relevant to the disposition of a Rule 12 motion on which the facts alleged by the complaint must be taken as true. One ventures to suspect that any lower-court opinion which requires this Court to consider so many alleged "facts" must not have met this Rule 12 standard.

and state investigation was "comprehensive." That is not proof that any drugs besides the Qui Tam Drugs were investigated. That is not proof that Bayer committed no wrongdoing concerning other drugs. That is not proof that the Settlement Agreement exonerated Bayer as to any Non-Qui Tam Drugs. Indeed, the mere opinion of the special master that the investigation was "comprehensive" is not proof of anything at all, and is certainly not the kind of evidence that the special masters, or the chancery court, should have entertained on a Rule 12 motion to dismiss.

Bayer argues that, because of its special position as a settling party required to submit pricing reports to the State, the State was somehow required by Rule 9(b) to "plead around" those pricing reports in its First Amended Complaint. Bayer at 19. But again, Bayer cannot rely on its allegation that the State's claims are "simply untrue." Bayer at 21. The present issue before this Court is *the legal sufficiency of the First Amended Complaint*, not the factual merits, which Bayer should have the opportunity to test in discovery. Did Bayer in fact submit *accurate* ASP reports to the State? Were Bayer's charges to the State reflective of those ASPs? These are not issues to be decided on the pleadings; they are fact-intensive issues to be tested in discovery. Bayer's assertion of alleged defenses to the First Amended Complaint are not a sufficient basis for dismissal of the complaint without discovery.

Bayer's voluminous citations to case law on the duty to conduct a pre-complaint investigation are premised on the notion that no such investigation was made, an allegation which Bayer cannot support. Despite its fog of citations, Bayer offers no authority for its implicit proposition that a complaint fails to plead with particularity when it fails to address (that is, to anticipate) the affirmative defenses claimed by a defendant — which is what all of Bayer's arguments about ASPs and the Settlement Agreement ultimately amount to.

Instead, we find such allegations as "*Presumably*, had problems emerged with the price reporting for Non-Qui Tam Drugs, they would have been included in the settlement." Bayer at 19. Bayer is free to "presume" what it likes, but the court on a Rule 12 motion is not likewise "free" to make presumptions against the plaintiff. "The allegations in the complaint must be taken as true, and there must be no set of facts that would allow the plaintiff to prevail" if the Rule 12 motion is to be granted. *Wilbourn v. Equitable Life Assur. Soc.*, 998 So. 2d 430, 435 (Miss. 2008) (quoting *Rose v. Tullos*, 994 So. 2d 734, 737 (Miss. 2008)).

As for Bayer's citation to *Howard v. Estate of Harper*, in which this Court required the dismissal of fraud claims against nursing-home administrators, the point regarding claims against "the collective defendants (not each defendant specifically)" was that the Howards, by the nature of their positions as administrators and licensees, stood in a legally different position from the owner or operator of the facility; this issue had been thoroughly discussed by that point in the opinion. 947 So. 2d 854, 861 (Miss. 2006). Moreover, in the present case, the amended Complaint provides specific allegations regarding which drugs Bayer overcharged for, which goes beyond the generalized nature of the allegations in *Howard*.

Although Bayer claims that allegations regarding an "industry practice" somehow fail to meet Rule 9(b), the federal case Bayer cites, *Ambrosia Coal*, does not even use that term. The "lumping together" referred to in *Ambrosia Coal* was evidently of such a nature that it did not "inform each defendant of the nature of his alleged participation in the fraud." *Ambrosia Coal & Constr. Co. v. Pages Morales*, 482 F.3d 1309, 1317 (11th Cir. 2007) (quoting *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1380-81 (11th Cir. 1997)). As just stated, in the present case, Bayer has been advised of what drugs it overcharged for, and while Bayer claims that its participation in the investigation of its

previous frauds requires the inference that the State already knew what Bayer was doing with regard to the Non-Qui Tam Drugs, that inference is not one for the trial court to accept on a Rule 12 motion to dismiss, where "allegations in the complaint must be taken as true," *Wilbourn*, 998 So. 2d at 432 n.1 (citation omitted). Bayer *nowhere* demonstrates that, taking those allegations as true, the State cannot state a claim against Bayer; at most, Bayer relies on assuming the validity of affirmative defenses that are not proper objects of consideration on a Rule 12 motion, which is confined to the complaint itself.

At III.B.1, Bayer recites federal (again) case law that, where a plaintiff is supposed to have had unusual access to information ordinarily known only to the defendant, Rule 9(b) is not relaxed. However, the alleged access to such information is, once again, "proved" only by Bayer's mere assertions in pleadings, and by the legally inappropriate assumptions made by the special masters. What information was provided by Bayer to the State, whether that information was accurate, and how that information related to Bayer's drug pricing, are all matters that Bayer could understandably choose to explore in discovery; but they simply cannot form the basis of a Rule 12 motion to dismiss. To the extent that any federal courts have held otherwise — somehow managing to resolve such factual issues at the Rule 12 stage — the State would respectfully submit that those courts' misapplication of Rule 9(b) should not be imitated by this Court.

II. The Trial Court Improperly Exceeded the Scope of Rule 12(b)(6).

Contrary to Bayer's argument, this Court has recently reaffirmed the necessity of formal notice to the parties if the trial court wishes to convert a Rule 12 motion into a Rule 56 motion: "Furthermore, this Court has stated that '[w]here a Rule 12(b)(6) motion is

converted into one for summary judgment, ... the trial court *must* give ten days' notice for such a hearing....' " *Wilbourn*, 998 So. 2d at 435 (quoting *Jones v. Regency Toyota, Inc.*, 798 So. 2d 474, 476 (Miss. 2001)) (emphasis added in *Wilbourn*). The mere passage of time between submission of extraneous materials and the order of dismissal with prejudice does not constitute a valid Rule 12 conversion:

> A successful summary judgment motion results in a final adjudication of the merits of a case. Therefore, it is an absolute necessity that the trial court **inform the parties of its intent** to convert a Rule 12(b)(6) motion to a Rule 56 motion for summary judgment, and give the parties the opportunity to submit materials in opposition to the motion.

Peavey Elec. Corp. v. Baan U.S.A. Inc., 10 So. 3d 945, 956 (Miss. Ct. App. 2009) (quoting *Palmer v. Biloxi Reg'l Med. Ctr.*, 649 So. 2d 179, 183-84 (Miss. 1994)) (internal citations omitted & emphasis added). *Accord, Huff-Cook, Inc. v. Dale*, 913 So. 2d 988, 992 (Miss. 2005) ("it is important for the trial court to give the parties notice of the changed status"; reversing conversion of Rule 12(c) motion into Rule 56 motion). The federal case law relied upon in *Palmer* seems clear that a positive act of "communication" is required: "before a motion to dismiss may be converted to one for summary judgment the court must first communicate its intention to the parties to so treat the motion." *Jones v. Auto. Ins. Co. of Hartford, Conn.*, 917 F.2d 1528, 1532 (11th Cir. 1990) (quoting *Marine Coatings of Ala., Inc. v. United States*, 792 F.2d 1565, 1568 (11th Cir. 1986)); *cf. Palmer*, 649 So. 2d at 183 (citing *Jones*).

Bayer cites case law for the rule that the Settlement Agreement could be considered by the trial court because its contents were known to the State when it framed the Complaint and relied upon therein. However, "the introduction of matter extrinsic to the pleadings, but used in formulating the pleadings, does not automatically convert a Rule 12(b)(6) motion

into a Rule 56 motion." *Russell v. Williford*, 907 So. 2d 362, 364 (Miss. Ct. App. 2004). Unlike where such matter was deemed "central and necessary to Plaintiff's cause of action," *Sennett v. U.S. Fid. & Guar. Co.*, 757 So. 2d 206, 210 (Miss. 2000) (citation omitted), the Settlement Agreement is not "central and necessary to" the State's case against Bayer, however indispensable Bayer may profess to find it for Bayer's defenses against that case.

Regardless, as seen repeatedly in Bayer's brief, not to mention the State's initial brief (at 18-19), the special masters and, evidently, the chancery court relied upon much more than the Agreement itself; they also formed opinions about, for instance, the "comprehensive" nature of the pre-settlement investigation, and about what it would be "logical" to "assume" was covered by the investigation, that simply could not be justified on a Rule 12 standard.

Furthermore, as demonstrated in the State's initial brief, the special masters and the chancery court went outside the four corners of the Agreement itself when they considered its relevance to *Non*-Qui Tam Drugs — that is, to drugs which, by definition, were not the subject of the Agreement and did not fall within its scope. Thus, the issue here is not merely *whether* the chancery court should have considered the Agreement, but *what use* the chancery court made of it: a use which far exceeded the permissible scope of inference on a Rule 12 motion.

Finally, saving its weakest argument for last, Bayer argues that the State "knew" that the chancery court would convert the Rule 12 motion to a Rule 56 motion. But that argument does not fit the facts of this case, where the special masters certainly went outside their proper scope in addressing the Settlement Agreement, but where the chancery court gave no indication that it would consider those matters until *it* issued its order dismissing the

case. *Cf. Huff-Cook, Inc.*, 913 So. 2d at 992 ("Claimants were not aware of the trial judge's intention until he issued his order granting summary judgment on February 4, 2004.").

How was the State "actually aware that the court intend[ed] to rely on matters outside the pleadings" (Bayer at 27)? Bayer presents no authority that a special master is functionally identical to the trial court for purposes of Rule 12 conversion into a Rule 56 motion, and the State could not have been on notice of any such nonexistent authority. No one knew that the chancery court would entertain issuing a dismissal *with prejudice* until that order was entered. Had the State been given such notice, it could have filed a Rule 56(f) motion seeking the opportunity for discovery; as it happened, the State had no such notice, and thus no such opportunity.[2]

The present case involves serious issues of fraud against the State program which provides the most necessary medical care to the most needy of our relatives and neighbors. The State is entitled as a matter of law to pursue those issue in court, and to enjoy the same

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[2]Given the enormous difference between dismissal *without* prejudice under Rule 12(b)(6), and dismissal *with* prejudice under Rule 56, this Court may wish to take the opportunity to reaffirm a bright-line rule that trial courts *must* expressly communicate to the parties any conversion to a Rule 56 motion, allowing 10 days thereafter for additional evidence or Rule 56(f) motions. "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action," M.R.C.P. 1, and a "gotcha" provision for conversion *sub silentio* does not serve those purposes.

This Court's docket would also benefit, perhaps, from being spared the fact-intensive inquiry of whether a given party "had notice" of a conversion or not. Cases which have held that a party "had notice" because the trial court received evidence outside the pleadings, have not taken sufficient notice of the language of Rule 12(b), which allows for conversion where "matters outside the pleading are presented to *and not excluded by* the court." There is *no way for a party to know* whether the trial court will or won't "exclude" such matters until the order dismissing the case is entered. A bright-line rule for the trial court to give express notice to the parties can prejudice neither parties nor courts, and simplifies the inquiry whether a given motion was properly converted or not — thus promoting both justice and judicial economy.

right as any other plaintiff not to have its suit dismissed *with prejudice* without having had the opportunity to test those well-pleaded claims in discovery. For the chancery court to bar the State's claims at the Rule 12 stage, on the basis of the previous investigation and settlement of prior fraud by Bayer and of the inferences, assumptions, and suppositions urged by Bayer with regard to its past misdeeds, was mistaken. This Court should reverse the chancery court and allow this case to proceed. If Bayer's affirmative defenses have merit, they will form the subject of a properly supported Rule 56 motion, after *both* parties have had the opportunity for discovery. Dismissal of the case was premature and erroneous as a matter of law, and requires reversal and remand for further proceedings.

CERTIFICATE OF SERVICE

The undersigned counsel for Appellant hereby certifies that he has on this date caused to be delivered via United States mail (postage prepaid), a true and correct copy of the foregoing to:

The Honorable William Singletary
HINDS CHANCERY COURT
Post Office Box 686
Jackson, Mississippi 39205-0686

William F. Goodman, III, Esq.
Steven D. Orlansky, Esq.
WATKINS & EAGER
Post Office Box 650
Jackson, Mississippi 39205-0650

Richard D. Raskin, Esq.
Michael P. Doss, Esq.
Ben J. Keith, Esq.
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603

This the ***10th*** day of August, 2009.

J. Leray McNamara