

Jim Edwards
Gilead Staged Bidding War to Bribe MD's
August 6, 2011

HIV drug makers **Gilead** (GILD), **Pfizer** (PFE) and its subsidiary **Agouron** staged an illegal “bidding war” over bribes to doctors in Brooklyn, according to a whistleblower lawsuit [following] Prices reached \$100,000 per doctor and docs who didn't cooperate by increasing the prescriptions they wrote were described as “unflippable” and dropped from the scheme, former sales rep **David Moore** alleges.

Gilead Denies the Allegation and has asked a California federal court to sanction Moore because he allegedly wiped his computer hard drives clean on several occasions — thus destroying evidence — before and after filing the whistleblower suit against Gilead. Drug companies — including Gilead— are frequently accused of using kickback schemes to promote their products, by paying doctors as consultants or advisers, or giving them excessive honoraria for speaking at educational seminars in which they talk up certain drugs to other doctors.

Moore's complaint is different because it goes a step further: Gilead is an AIDS drug specialist company and as such its drugs — **Atripla** or **Truvada** — are generally the best, or standard, therapy for HIV, Moore says. When Pfizer and other competitors allegedly started linking their payments to doctors to whether they prescribed products or not, Gilead was forced to make payments of its own just to keep doctors using the standard therapies for AIDS, Moore claims.

The complaint suggests corrupt practices at one company can create instant incentives that force competing companies to respond in kind. Soon, an entire category can become engulfed in expensive, wasteful, unethical and illegal activity. Here's how Gilead was enveloped in the “bidding war”:

This “bidding war” was initiated by the companies that are selling drugs that the medical community considers to be “inferior” or “alternatives” to the “preferred” HIV medications. Those companies, which have included pharmaceutical companies Agouron and Pfizer, started paying financial inducements to doctors to persuade them to stray from the standard of care, and prescribe their products even when mandated by the patients' condition.

To counteract the corrupt marketing methods of other HIV/AIDS drug manufacturers, companies with preferred medications, such as Defendant Gilead, have had to pay inducements to persuade doctors to follow the standard of care notwithstanding the payments from the Defendants with non-preferred drugs.

“Unflippable”

The war soon got out of hand, Moore alleges, as illegal payments to doctors reached an average of \$10,000 a year. Doctors with large practices devoted to HIV could command even more. One physician, Dr. Leonard Berkowitz at Brooklyn Hospital, received an “unrestricted educational grant” of \$100,000, Moore alleges. In response, Berkowitz called that allegation “absolute nonsense.” He said he has sat on a Gilead advisory board every year or two when

new information comes out, and fees for that were \$1,000. He believes Moore is referring to a grant Gilead gave the hospital, which funds an HIV counselor in the emergency room.

The leverage worked both ways, Moore claims. If “unflippable” doctors didn’t increase their prescriptions, Gilead would drop them from the payment list. Moore alleges his supervisor, **Cliff Keeling**, came under pressure from management because another Brooklyn physician, Dr. Andre Brutus, did not increase his Truvada prescriptions:

Dr. Brutus once had the third largest HIV practice in the country and still has one of the largest practices in the country. Keeling said to Plaintiff: “We’re gonna have to cut programs to him. If he doesn’t start moving, I’m gonna get a lot of heat for continuing to use him.”

Moore claims that after he filed suit against the company, Gilead illegally retaliated by taking away his job.

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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10
11) CASE NO. 07-3850 SI
DAVID MOORE,)
12)
Plaintiff) **PLAINTIFF DAVID MOORE’S THIRD**
13) **AMENDED COMPLAINT FOR**
v.) **DAMAGES; DEMAND FOR A JURY**
14) **TRIAL**
GILEAD SCIENCES, INC.)
15) JUDGE: Hon. Susan Y. Illston
Defendant) COURTROOM: 10
16) TRIAL: November 7, 2011
17)

18 **INTRODUCTION**

19 1. This lawsuit is based upon the retaliation faced by Plaintiff David Moore (hereinafter
20 “Plaintiff” or “Moore”) from Defendant Gilead Science, Inc. (hereinafter “Defendant” or
21 “Gilead”) for various protected activities and Mr. Moore’s wrongful termination in violation of
22 public policy by Gilead. Mr. Moore was a highly regarded sales representative for Gilead in the
23 New York metropolitan area. Mr. Moore became aware of certain activities and directives of
24 Gilead that he believed, in good faith, were illegal and were defrauding of the United States of
25 America. Mr. Moore refused to undertake certain illegal activities as well as undertook actions in
26 furtherance of a *qui tam* claim on behalf of the United States of America. Mr. Moore also went on
27 a recognized disability leave of absence. Gilead, contrary to its obligations under both state and
28 federal law, refused to return Mr. Moore back to work and instead placed the burden of securing a

1 position at Gilead on Mr. Moore. When no one at Gilead would “re-hire” Mr. Moore from his
2 disability leave of absence, he was effectively terminated by Gilead Sciences. The actions of
3 Gilead as to Plaintiff Moore are in violation of state and federal laws. Mr. Moore brings this
4 action against Defendant Gilead Sciences, Inc. under the anti-retaliation provisions of the federal
5 False Claims Act, New York Finance Law Section 191, New York Labor Law Section 740 and
6 the common law. Mr. Moore alleges:

7
8 **JURISDICTION AND VENUE**

9 2. Count I of this Complaint is a civil action by Plaintiff David Moore against the
10 Defendant alleging that Gilead retaliated against Mr. Moore for his filing a qui tam action against
11 Gilead by discriminating against him in the terms and conditions of his employment in violation of
12 the federal False Claims Act, 31 U.S.C. § 3730(h).

13 3. Count II of this Complaint is a civil action by Plaintiff David Moore against the
14 Defendant alleging that Gilead retaliated against Mr. Moore for his filing a qui tam action against
15 Gilead by discriminating against him in the terms and conditions of his employment in violation of
16 New York Labor Law § 740.

17 4. Count III of this Complaint is a civil action by Plaintiff David Moore against the
18 Defendant alleging that Gilead retaliated against Mr. Moore for his filing a qui tam action against
19 Gilead by discriminating against him in the terms and conditions of his employment in violation of
20 the New York False Claims Act, New York Finance Law § 191.

21 5. Count IV of this Complaint is a civil action by Plaintiff David Moore against the
22 Defendant alleging that Gilead terminated Mr. Moore’s employment and otherwise discriminated
23 against him in the terms and conditions of his employment in violation of public policy, thereby
24 violating the common law.

25 6. This Court has personal jurisdiction over the Defendants pursuant to 31 U.S.C. §
26 3732(a), because the Defendant has regularly conducts business in the Northern District of
27 California, and many of the alleged acts occurred in this District. Moreover, the headquarters of
28 Defendant Gilead are in Foster City, California, in this judicial district.

PLAINTIFF'S PROTECTED ACTIVITY

1
2 11. Defendant employed Plaintiff as a Therapeutic Specialist, the company's term for its
3 sales representatives, for Gilead's Brooklyn, New York, sales territory, from February 2003
4 through 2008.

5 12. While at Gilead, Mr. Moore was a top performer in sales. During Gilead's launch of
6 its new HIV/AIDS drug Atripla in 2006, Moore's sales performance for Atripla was ranked
7 number ten (10) out of the seventy-five (75) sales representatives in the country, and number two
8 (2) out of the eight (8) sales representatives in the New York region. He finished the 2006 year
9 ranked number twenty (20) out of seventy-five (75) for all Gilead HIV/AIDS products.

10 13. As time went on, Mr. Moore became increasingly troubled by the illegal activities
11 mentioned above, as well as increasingly anxious about the pressure placed on him by Gilead
12 management to use speaker fees as a means to reward doctors who increased their prescriptions of
13 Gilead's medications. Plaintiff reported the matters to state and federal authorities in October
14 2006.

15 14. On November 15, 2006, Mr. Moore sued Gilead under the qui tam provisions of the
16 False Claims Act. Mr. Moore's qui tam claims, which were brought in this action, alleged that
17 Gilead was paying illegal remuneration to physicians to induce them to prescribe Gilead's
18 HIV/AIDS medications. Mr. Moore's complaint was filed under seal, without being served on
19 Defendant Gilead. It remained under seal until June 20, 2008, when the Court partially lifted the
20 seal to permit service of the Complaint on Gilead. Mr. Moore's complaint specifically complained
21 that:

22 A. The worldwide market for HIV drugs exceeds \$6.6 billion per year, with much
23 of that amount consisting of sales to Medicaid patients in the United States. The pharmaceutical
24 firms that develop and manufacture HIV drugs are in a fierce competition for that market. Many
25 of them are now engaged in a "bidding" war to acquire the business of those doctors in the United
26 States that have the largest HIV/AIDS practices.

27 B. This "bidding war" was initiated by the companies that are selling drugs that the
28 medical community considers to be "inferior" or "alternatives" to the "preferred" HIV medications.

1 Those companies, which have included pharmaceutical companies Agouron and Pfizer, started
2 paying financial inducements to doctors to persuade them to stray from the standard of care, and
3 prescribe their products even when mandated by the patients' condition.

4 C. The Federal Health Care Program Anti-Kickback Statute, enacted as Section
5 1128B(b) of the Social Security Act, 42 U.S.C. § 1320a-7b, prohibits persons from paying,
6 soliciting, or receiving illegal remunerations in order to induce business reimbursable under federal
7 or state health care programs. 42 U.S.C. § 1320a-7b(a). The types of remuneration covered
8 specifically include kickbacks and bribes, whether made directly or indirectly, overtly or covertly,
9 in cash or in kind. 42 U.S.C. § 1320a-7b(b). The prohibited conduct includes remuneration
10 intended to induce the prescription and ordering of HIV medications be paid for by federal or state
11 health care programs. *Id.* Several of the states contain analogous anti-kickback statutes. See,
12 e.g., Fla. Stat., Ch. 409.920(2)(e).

13 D. The federal anti-kickback statute contains a number of safe harbors, none of
14 which apply to the inducements alleged herein. See 42 U.S.C. § 13201-7b(b)(3)(A); 42 C.F.R. §
15 1001.952(h).

16 E. The so-called "Stark" law prohibits a provider from presenting, or causing
17 someone else to present, a claim under the Medicare statute for health care services, such as
18 outpatient prescription drugs, if a physician with a prohibited financial relationship with the
19 provider of the services, such as a compensation arrangement, made a referral to the provider for
20 the services. 42 U.S.C. § 1395nn.

21 F. The Stark statute and its implementing regulations contain a number of "safe
22 harbors," none of which apply to the inducements alleged herein. See 42 U.S.C. § 1395nn(b); 42
23 C.F.R. § 411 et seq.

24 G. Federal-state Medicaid programs reimburse the charges for pharmaceutical
25 drugs for certain indigent individuals who are beneficiaries of such programs. Federal and state
26 Medicaid rules condition such payment on the treatment being prescribed by a physician who has
27 determined that the treatment is medically necessary and/or reasonable for the patient. See, e.g.,
28 42 U.S.C. § 1396; 18 N.Y.C.R.R. §§ 360-1.3(b), 504.3, 525.2. Federal and state rules prohibit

1 providers from participating in the Medicaid program if they pay, solicit, or accept financial
2 inducements in exchange for an agreement to prescribe a drug to be paid for by Medicaid. See,
3 e.g., 42 U.S.C. § 1320a-7b(a); 18 N.Y.C.R.R. § 515.2.

4 H. Under certain conditions, the federal Medicare program reimburses the charges
5 for pharmaceutical drugs for individuals who are beneficiaries of that program. Federal rules
6 condition such payment on the treatment being prescribed by a physician who has determined that
7 the treatment is medically necessary and/or reasonable for the patient, and who has not solicited or
8 accepted financial inducements in exchange for prescribing the drug.

9 I. Through federal grants and state and local contributions, the AIDS Drug
10 Assistance Program covers HIV/AIDS treatment and other costs for uninsured and underinsured
11 individuals. 42 U.S.C. § 300ff-11 et seq.; see, e.g., 10 N.Y.C.R.R. § 43-2.1 et seq.

12 J. Gilead's drug Truvada consists of the components tenofovir, disoproxil, fumarate
13 (Teofavir DF) and emtricitabine. Truvada combines Gilead's drug Emtriva, which is
14 emtricitabine, and Gilead's drug Viread, which is tenofovir. Truvada is in the class of HIV drugs
15 called "Nucleoside Reverse Transcriptase Inhibitors" or "NRTIs." Truvada is a once-daily tablet
16 for the treatment of HIV. The FDA approved Atripla in July 2006. Atripla is a combination of
17 Truvada and Bristol-Myers Squibb's Transcriptase Inhibitor (NNRTI) drug Sustiva (generic name
18 "efavirenz"), and the first ever all-in-one combination pill for the treatment of HIV.

19 K. The standard of care for HIV treatment has been formulated by a blue ribbon
20 panel of scientific and medical practitioners and is reflected in clinical guidelines that are issued
21 and updated by HHS. These guidelines are called "Guidelines for the Use of Antiretroviral Agents
22 in HIV-1-Infected Adults and Adolescents" ("Guidelines"). The Guidelines are found on the Web
23 Site www.aidsinfo.nih.gov. HHS relies on clinical studies and the advice of a panel of leading
24 scientific and clinical experts in the field of HIV medicine in developing these Guidelines, which
25 are intended to "outline the current understanding of how clinicians should use antiretroviral agents
26 to treat adults and adolescents infected with HIV-1." (Guidelines at 3, October 10, 2006 ed.)

27 L. In the Guidelines, HHS designates some medications as "preferred," some as
28 "alternative," and some as "inferior," or "not recommended." HHS says: "[c]omponents are

1 designated as preferred for use in treatment-naïve patients when clinical trial data have
2 demonstrated optimal efficacy and durability with accepted tolerability and ease of use.
3 Alternative components refer to those for which clinical trial data show efficacy but also show
4 disadvantages compared with preferred components in terms of antiviral activity, durability,
5 tolerability, or ease of use.” (Guidelines at 11, Oct. 10, 2006 Ed.) Drugs are designated as
6 “inferior” when they “have inferior virologic efficacy or greater or more serious toxicities than the
7 preferred and alternative regimens.” (Id. at 12.)

8 M. HHS’s Guidelines recommend that clinicians place HIV patients on: (I) one
9 protease inhibitor (PI) drug or one non-nucleoside reverse transcriptase inhibitor (NNRTI) drug,
10 plus (ii) one dual nucleoside reverse transcriptase inhibitor (dual NRTI) drug. (Guidelines at
11 Table 6A, October 10, 2006 Ed.)

12 N. HHS’s Guidelines advise that several drugs should be considered “preferred” PI
13 or NNRTI drugs. Sustiva, a drug manufactured by Bristol-Myers Squibb, is one of the preferred
14 PIs. HHS’s Guidelines advise that just two drugs should be considered “preferred” dual NRTI
15 treatments: Truvada, a drug made by Defendant Gilead, and Combivir, a GlaxoSmithKline
16 product.

17 O. In order to increase sales, the manufacturers and marketers of non-preferred have
18 resorted to various illegal marketing methods. These illegal marketing methods include, for
19 example, payments or inducements to doctors to secure more prescriptions for these non-preferred
20 medications – even when these medications are not the appropriate standard of care for HIV/AIDS
21 patients.

22 P. To counteract the corrupt marketing methods of other HIV/AIDS drug
23 manufacturers, companies with preferred medications, such as Defendant Gilead, have had to pay
24 inducements to persuade doctors to follow the standard of care notwithstanding the payments from
25 the Defendants with non-preferred drugs. As set forth below, Defendants’ HIV medications
26 consequently are being falsely prescribed through a scheme of illegal payments, which has led to
27 the submission and payment of false claims by the United States and certain state and municipal
28 authorities.

1 Q. Gilead does not pay these inducements under an above-board, express agreement
2 whereby the company agrees to pay the physician a sum certain, and the physician agrees to write
3 a certain number of prescriptions. Instead, these payments are thinly disguised as payments for
4 something other than writing prescriptions. What is clearly understood by both the company and
5 the physician, however, is the linkage between the payment and the writing of prescriptions for the
6 company's medications. In other words, Gilead makes it clear to the doctor that the payments are
7 made in return for the doctor's prescribing Gilead's medications to a high percentage of the
8 doctor's HIV/AIDS patients.

9 R. Gilead generally induces the physicians to prescribe increased volumes of
10 Gilead's medications Truvada and Atripla by making excessive payments under the false pretext of
11 paying the physicians to perform valuable services. These illicit payments most commonly take
12 the form of: (1) excessive honoraria for conducting small patient or community programs,
13 participating in a round-table dinner, or speaking at a program attended by other professionals; (2)
14 unrestricted "educational grants" which the physician or a designee can spend, or not spend, as that
15 person chooses; and, (3) excessive payments for participating in meetings of an "advisory board"
16 or "key opinion leaders."

17 S. During the period of time that Plaintiff has been employed by Gilead, Gilead's
18 top management has encouraged and condoned large payments to high prescribers or potential
19 high prescribers of Gilead products around the country, making sure that its sales representatives
20 and mid-level managers had large marketing and sales budgets to spend at their discretion. These
21 programs are for ostensible "talks" or "speeches." Gilead's payments for these programs
22 substantially exceeds the market value of the physician time involved, and is expressly or
23 implicitly conditioned on the doctors prescribing Gilead's products at or above the national
24 average. When a doctor is hired for a community program, often the audience will consist of the
25 same patients month after month, who are provided a free lunch by Gilead to get them to show up.
26 Often the doctors hired to do round table discussions find themselves dining alone or just with the
27 Gilead sales representative.

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1 T. Gilead's top management has directed sales personnel to "cut off" from future
2 financial benefits those doctors prescribing Gilead HIV drugs at rates below the national average.
3 For example, in an August 2006 conversation with Dr. Joseph Exilhomme, a doctor with one of
4 the largest HIV practices in Brooklyn, Plaintiff's supervisor at Gilead, Cliff Keeling, questioned
5 Dr. Exhilhomme about his low rate of prescribing Truvada compared to a competing drug
6 Epzicom. Keeling told Dr. Exilhomme that he wanted to make him "number one in Brooklyn"
7 and asked whether there were "any programs that we could do?" That same day, Keeling
8 explained to Plaintiff that he was getting "heat" from Helen Harris, Gilead's Vice President of U.S.
9 Sales and National Accounts, and David Shepp, Gilead's Medical Science Liaison, about giving
10 programs to a different Brooklyn physician, Dr. Andre Brutus, who was not increasing his rate of
11 Truvada prescriptions. Dr. Brutus once had the third largest HIV practice in the country and still
12 has one of the largest practices in the country. Keeling said to Plaintiff: "We're gonna have to cut
13 programs to him. If he doesn't start moving, I'm gonna get a lot of heat for continuing to use
14 him." In this conversation, Mr. Moore ensured that his supervisor was aware of the illegal nature
15 of the programs provided doctors so that they would have an opportunity to correct the company's
16 illegal practices if they chose. Keeling admitted to Plaintiff that the programs provided doctors are
17 a "quid pro quo" that is totally illegal. Keeling later explained to Plaintiff that top management
18 want to cut off Dr. Brutus because they think he's "unflippable" since he has taken too long to
19 respond to the financial incentives he has received from Gilead programs by writing prescriptions
20 for Gilead products.

21 U. Gilead's National Accounts Manager Community Liaison, Don MacLeod, has
22 informed Plaintiff that MacLeod's job has two parts: I) increasing community demand for Gilead
23 products, and ii) keeping Plaintiff's speakers speaking and happy.

24 V. MacLeod further informed Plaintiff that Gilead had approved two unrestricted
25 educational grants, one in the amount of \$100,000 for Dr. Berkowitz at Brooklyn Hospital, and
26 one in the amount of \$ 25,000 for Dr. Carnivale of Lutheran Medical Center in Brooklyn. On
27 information and belief, these grants were paid as a quid pro quo for prescriptions of Gilead
28 products and grossly exceeded the market value of any services provided by the doctors.

1 W. Gilead's Global Medical Director, Dr. Bruce Olmsheid, advised Plaintiff that
2 paying physicians with big HIV practices \$10,000 per year to get them to prescribe Gilead
3 products "is not enough." Dr. Olmscheid also told Plaintiff that, for one physician, Plaintiff should
4 do three programs in six weeks.

5 X. Joe Cozzolino, Gilead's Director, Eastern Region, was informed that Dr.
6 Exilhomme, one of the physicians in Plaintiff's sales territory of Brooklyn, was a particularly large
7 prescriber of Gilead medications but only "as long as they keep the funding going." Cozzolino
8 responded by informing Plaintiff and Keeling that he had gotten an additional \$60,000 for the
9 region's sales and marketing budget that year, and that he planned to get the same funding next
10 year and would ask Keeling whether they needed any more.

11 Y. Plaintiff understands that Gilead pays physicians around the country to serve on
12 panels as consultants to Gilead called "Key Opinion Leaders." Plaintiff understands that the
13 payments to physicians for their consulting are: i) grossly in excess of the market value of their
14 services; and ii) an express or implicit quid pro quo for their high rate of prescribing Gilead HIV
15 drug products. For example, in either 2004 or 2005, at a national sales meeting, Plaintiff
16 informed Jim Myers, Gilead's Vice President for Commercial Operations, that one of the
17 physicians in Plaintiff's sales region, Dr. Andre Brutus, was prescribing less of Gilead's HIV
18 drugs than previously; Myers responded by stating that he would take the doctor off the list of
19 invitees for a renal panel that Gilead was convening. This meant that Dr. Brutus would not be
20 paid the sizeable consultant fee or be given the all expenses-paid trip to the resort location where
21 the panel would convene.

22 Z. As a direct result of the illegal inducements, the physicians and nurse named
23 herein, and unnamed others who also accepted illegal inducements from Defendant, have issued
24 prescriptions for Defendant's drugs, or referred patients to physicians receiving inducements to
25 prescribe Defendant's drugs to earn the kickbacks offered by Defendant. As a direct result of
26 these illegal inducements, these persons have abandoned their professional obligation to exercise
27 independent medical judgment for the benefit of their patients, and have knowingly directed a
28 course of treatment for their patients that could endanger them, and in some cases has exacerbated

1 the HIV infection. In short, the doctors and others issued these prescriptions or referred patients to
2 doctors without having made a legitimate determination of the medical necessity or
3 appropriateness of the care for the patient in question.

4 AA. The Defendant's illegal inducements caused the submission of false claims to
5 Medicaid, Medicare, the AIDS Drug Assistance program, and other health care programs. Once
6 Defendant's kickbacks or other illegal inducements caused the doctors to issue prescriptions for
7 Defendant's drugs, the prescriptions, in turn, led pharmacists to submit claims to Medicaid and
8 other government health programs for reimbursement of the drugs. The claims submitted by the
9 pharmacists to these programs, upon receipt of the physicians' prescriptions, were false. They
10 were false because the claims were tainted by illegal kickbacks and because Medicaid and the
11 other health programs do not pay for treatment unless it has been determined to be medically
12 necessary by a provider exercising independent, objective judgment. In New York, for example,
13 health care providers enrolling in Medicaid agree to submit claims only for medically necessary
14 care. Defendant, through payment to the doctors, knowingly caused the pharmacists to submit
15 these false claims to Medicaid and the other governmental health care programs. The purpose and
16 effect of Defendant's illegal inducements was to increase the amount of Medicaid and other
17 governmental program reimbursement for Defendant.

18 BB. Defendant caused false claims to be presented to the United States because the
19 contractors administering the Medicare program pay claims using federal funds, and because the
20 state agencies administering the federal/state Medicaid programs and AIDS Drug Assistant
21 Programs are reimbursed for a portion of their payment of the claims by federal funds, and/or use
22 restricted federal grant money to pay the claims.

23 15. After filing his qui tam action, Mr. Moore's preexisting anxiety about Gilead's illegal
24 activities was amplified by his fear that the company would fire him when it learned of his
25 reporting to law enforcement.

26 16. In January, 2008, while still working at Gilead, Mr. Moore first took steps to look for
27 a new job in which he would not be pressured to engage in illegal kickback activity, and in which
28 he would escape the anxiety of awaiting the retaliation he feared would follow when the company

1 learned that he was a whistleblower. To assist his job search, he asked his colleague, David H.
2 Shepp, MD, Gilead Medical Science Director to write him a letter of reference. Mr. Shepp on
3 January 16, 2008 provided Mr. Moore with a letter that states the following:

4 In my capacity as Regional Medical Director for Gilead Sciences in New York
5 City and Long Island, I have known and worked directly for David for nearly five
6 years. During this time, I have also worked directly with at least 15 different
7 Gilead sales representatives, and during my 16 years in clinical practice was called
8 on my [sic] innumerable others. David is one of the best I have had contact with.
9 He understands the business needs of our organization as well as the needs and
10 concerns of the health care providers he call on. He knows our products well and
11 he is adept at utilizing all the resources available within the organization to help him
12 achieve. He is mature, responsible, a hard worker, appropriately aggressive, and
13 always respectful in his relationships with co-workers and customers. He is
14 strongly motivated to succeed. Most importantly, his ethical standards are
15 impeccable.

16 17. Mr. Shepp's letter of recommendation noted also that Mr. Moore's impeccable ethics
17 were "especially noteworthy" because "he works in a territory where questionable sales practices
18 have been used by some of our competitors and are readily accepted (and even expected) by
19 certain unscrupulous practitioners."

20 18. In or about late February 2008, Mr. Moore met with his supervisor, Cliff Keeling, for
21 his annual performance review. Mr. Keeling noted that Mr. Moore's sales figures were relatively
22 low compared to the other sales representatives, and that, accordingly, Gilead had to give Mr.
23 Moore a score of "improvement needed." Mr. Moore reminded Mr. Keeling that his sales
24 numbers were low because he was playing on an "uneven playing field" due to the kickbacks paid
25 by other sales representatives to promote their drugs. Mr. Keeling acknowledged this was true,
26 but noted that Gilead management insisted on evaluating sales representatives strictly according to
27 their numerical ranking in sales performance regardless of extenuating circumstances, such as
28 whether kickbacks might be required to boost one's sales numbers.

19. On March 26, 2008, Mr. Moore took a medical leave of absence from the company
due to anxiety and insomnia that precluded him from working at Gilead without harm to his
physical and mental well being. He submitted physician orders to Gilead stating that he was
suffering from anxiety and insomnia that disabled him from working at Gilead. The company

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1 placed Mr. Moore on leave under the Family and Medical Leave Act until June 17, 2008. On
2 June 17, 2008, the company placed Mr. Moore on Gilead's Supplemental Medical Leave.

3 20. Mr. Moore looked for alternative employment while he was on disability leave. He
4 was unable to find alternative employment.

5 21. During 2007 and 2008, the United States openly and actively investigated allegations
6 by Mr. Moore and several other former Gilead employees that Gilead had paid and was paying
7 illegal kickbacks to promote its HIV/AIDS drugs. Among other things, the United States served a
8 subpoena upon Gilead seeking information about the company's marketing practices. Mr. Moore
9 was informed during the summer of 2008 that the United States would ask the court for permission
10 to provide Gilead's counsel with a copy of his complaint as part of an effort to try to resolve the
11 allegations without litigation.

12 22. On August 11, 2008, Mr. Moore's physician cleared Mr. Moore to return to work at
13 Gilead. On the same date, Mr. Moore sent Gilead a letter by facsimile in which he stated that he
14 was ready to return to work immediately. On August 12, 2008, Mr. Moore faxed Gilead the
15 physician's order clearing him to return to work.

16 23. On August 11, 2008, Mr. Moore still held the position of Therapeutic Specialist for
17 the Brooklyn, New York territory. Although Mr. Moore had been out on disability leave for
18 slightly over four months, the company on this date had not even posted this position as an open
19 position for which it was seeking applications.

20 24. On August 11, 2008, the United States Government provided Gilead with a redacted
21 version of the complaint that Mr. Moore filed in this action. The redacted complaint disclosed Mr.
22 Moore as the qui tam plaintiff. The Government did not redact Mr. Moore's name from the
23 redacted complaint provided to Gilead. Mr. Moore's activity of filing this lawsuit – now made
24 available to Gilead Sciences – and the actions he undertook to further this lawsuit were and are
25 protected activity and Mr. Moore has a right to be free from retaliation for engaging in this
26 protected activity under, 31 U.S.C. § 3730(h).

27 25. On August 18, 2008, Rochelle Haber-Loeffler, an employee within Gilead's Office of
28 Human Resources, left Mr. Moore a voice-mail informing him that he should not return to work as

1 he wished. She stated on the voice mail: “I received your fax and clearance for medical, at this
2 point however, you are still going to be considered on a leave of absence, so please do not work
3 on behalf of Gilead and we’ll be sending further communication to you by the end of this week.”
4 In effect, Gilead was refusing to return Mr. Moore to work as it is required to do following Mr.
5 Moore’s medical disability.

6 26. By letter dated August 21, 2008, Gilead confirmed that Mr. Moore could not return to
7 work in his own position. Gilead’s letter stated that Mr. Moore’s job position was in the process
8 of being filled, and that Gilead was placing Mr. Moore on Personal Leave. Gilead stated in this
9 letter that Personal Leave is “unpaid” and does not provide for health insurance benefits after “the
10 end of the month in which the unpaid portion of the leave begins.” Gilead further stated in the
11 letter stated that it was placing Mr. Moore on Personal Leave to permit him to search for positions
12 within Gilead. In short, Gilead was refusing to return Mr. Moore to work following his medical
13 disability – actions in violation of applicable federal and state law requiring an employer to
14 reasonably accommodate an employee with a disability with time off to take care of that disability
15 and further requiring an employer to return that employee to work either in the same or a
16 comparable position if available.

17 27. Gilead placed Plaintiff on compulsory Personal Leave for forty-five (45) days from
18 August 12, 2008 to September, 2005. Gilead then extended the period through October 16, 2008.
19 Mr. Moore was placed on this Personal Leave against his will. Plaintiff did not want to be on
20 Personal Leave, he wanted to return to work with Gilead – something Gilead refused to provide to
21 him.

22 28. During Plaintiff’s Personal Leave, he was neither paid a salary nor provided medical
23 benefits. In effect, Gilead placed Mr. Moore in a holding pattern compelling him to inquire about
24 and apply for positions at Gilead if he wanted to continue to remain employed by Defendant.

25 29. On September 3, 2008, Gilead Human Resources employee, Rochelle Haber-Loeffler,
26 sent Plaintiff an e-mail informing him that he was free to interview for his own position as
27 Therapeutic Specialist for the Brooklyn, New York territory. According to Ms. Haber-Loeffler,
28 his position was now “posted,” which meant it was open for applications by others but had not

1 been filled. In other words, Gilead was not going to return Mr. Moore to work in his previous
2 position – even though it was vacant and available. Gilead, despite Mr. Moore’s ability to return
3 to work from his disability leave, Mr. Moore was not being accommodated by Gilead but was,
4 instead, being forced to compete for his position in violation of applicable federal and state law.

5 30. On September 5, 2008, Moore applied for his former sales position at Gilead, as well
6 as for all Gilead Therapeutic Specialist positions posted as open on Gilead’s Careers website,
7 including positions in Minneapolis, Phoenix, Atlanta, the Bronx, Los Angeles and Richmond.

8 31. On September 15, 2008, Gilead sent Plaintiff a letter inviting him to interview for his
9 own position on September 17, 2008, with, among other Gilead officials, Mr. Joe Cozzalino. Mr.
10 Cozzalino, as Gilead knew full well, had been named by Mr. Moore in his qui tam complaint as a
11 manager who had encouraged Gilead’s illegal promotional activity. When Mr. Moore brought his
12 attorney to this interview on September 17, 2008 to protect his rights, the company refused to
13 interview him.

14 32. In light of the communications from Human Resources telling him not to return to
15 work at Gilead, Mr. Moore continued to look for alternative employment outside Gilead. Mr.
16 Moore’s former supervisor, Cliff Keeling, Gilead Regional Director for New York City/Long
17 Island, on September 26, 2008, wrote a recommendation letter for Mr. Moore in which he stated:

18 David is goal oriented and highly motivated to succeed. He consistently
19 demonstrated a strong work ethic, an ethical sales acumen and impeccable
20 organizational skills. He was one of the most talented sales professionals on my
21 team. He gets along well with colleagues and supervisors and has very strong
22 people skills. He is an honest and caring person.

23 33. On September 29, 2008, after rescheduling the interview, Gilead interviewed Plaintiff
24 for his own position at Gilead as Therapeutic Specialist for the Brooklyn sales territory. The
25 company prohibited Mr. Moore from bringing an attorney to the interview. At the interview, Mr.
26 Moore explained how he had been competing on an “uneven playing field” due to the payment of
27 kickbacks by other sales representatives promoting HIV/AIDS medications.

28 34. After the September 29, 2008, interview, Gilead refused to allow Mr. Moore to return
to his own position as Therapeutic Specialist for the Brooklyn sales territory. Moreover, Gilead

1 did not provide Mr. Moore with an opportunity to interview for any of the other Gilead positions
2 for which he had applied.

3 35. Mr. Moore's forced Personal Leave foisted upon him by Gilead expired on October
4 16, 2008. Mr. Moore's former position as Gilead sales representative for Brooklyn remained open
5 and unfilled throughout Mr. Moore's Personal Leave.

6 36. Gilead represented to Mr. Moore that he was an "employee" of Gilead through
7 October 16, 2008, and was "separated" from the company after that date since he had not found a
8 new position within the company.

9 37. On August 18 and 21, 2008, when Gilead refused to permit Plaintiff to return to his
10 position as Therapeutic Specialist for the Brooklyn sales territory, and placed him on unpaid leave,
11 Gilead acted in retaliation for the qui tam action Mr. Moore had filed against the company and in
12 violation of public policy. In addition, when Gilead refused to permit Plaintiff to return to his
13 position, Gilead acted in violation of federal and state law requiring the reasonable accommodation
14 of employees who are either disabled or regarded as being disabled.

15 38. On October 16, 2008, when Gilead refused to permit Plaintiff to return to his position
16 at Therapeutic Specialist for the Brooklyn sales territory, or any other position at Gilead, and
17 formally separated him from the company, Gilead acted in retaliation for the qui tam action he had
18 filed against the company and in violation of public policy. In addition, Gilead, in refusing to
19 permit Plaintiff to return to his position or any alternate position at Gilead and instead firing him,
20 acted in violation of federal and state law requiring the reasonable accommodation of employees
21 who are either disabled or regarded as being disabled.

22
23 **COUNT I**

24 (Federal False Claims Act – 31 U.S.C. § 3730(h))

25
26 39. Plaintiff realleges and incorporates by reference paragraphs 1 through 38 as though
27 fully set forth herein.

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COUNT III

(New York False Claims Act, New York Finance Law § 191)

46. Plaintiff religious and incorporates by reference paragraphs 1 through 38 as though fully set forth herein.

47. In violation of New York Finance Law § 191, Gilead has taken retaliatory personnel actions against David Moore for his having taken steps to file a qui tam action under the New York False Claims Act, New York Finance Law § 187, et seq.

48. Because of the Defendant Gilead’s conduct set forth in this Count, Mr. Moore has suffered actual damages, and anticipates that he will continue to suffer damages for a number of years into the future.

COUNT IV

(New York Common Law)

49. This is a civil action by plaintiff David Moore against the Defendant Gilead Sciences.

50. Plaintiff religious and incorporates by reference paragraphs 1 through 38 as though fully set forth herein.

51. In violation of the common law of the State of New York, Defendant Gilead Sciences has terminated Mr. Moore’s employment and otherwise discriminated against Mr. Moore in the terms and conditions of his employment in violation of public policy.

52. Because of the Defendant Gilead’s conduct set forth in this Count, Mr. Moore has suffered actual damages, and anticipates that he will continue to suffer damages for a number of years into the future.

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PRAYER FOR RELIEF

WHEREFORE, plaintiff David Moore prays for the following relief:

1. On Count I and II, all relief necessary to make Mr. Moore whole, including reinstatement with the same seniority status he would have had but for the discrimination, two times the amount of back pay, interest on the back pay, uncompensated health care costs, lost incentive payments including stock options, and compensation for the special damages he has sustained as a result of the discrimination;

2. On Count III, all relief necessary to make Mr. Moore whole, including reinstatement with the same seniority status he would have had but for the discrimination, lost wages, uncompensated health care costs, lost incentive payments including stock options, and compensation for the special damages he has sustained as a result of the discrimination;

3. On Count IV, all relief to make Mr. Moore whole under the common law;

4. On Counts I through IV, Mr. Moore's attorneys' fees, expenses, and costs of suit herein incurred and, as to Count II other disbursements; and

5. Any such other and further relief as the Court deems just and proper.

DATED: October 27, 2010

Respectfully submitted,

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DEMAND FOR JURY TRIAL

Plaintiff hereby demands that this matter be tried before a jury.

DATED: October 27, 2010

Respectfully submitted,

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