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The Teva defendants¹ (“Teva”) seek partial summary judgment on the State’s claims under the Medicaid Fraud statute, § 49.49(4m), and the Deceptive Trade Practices Act, § 100.18, with respect to *some* of the AWP’s at issue for *part* of the relevant time period, asserting arguments that the Pharmacia jury rejected and that the rulings of the Wisconsin Supreme Court preclude. Teva also moves for judgment on two claims that the parties have stipulated to dismiss.

First, Teva argues that the AWP’s for drugs that Medicaid reimbursed at MAC are not “material” under § 49.49(4m). This Court held that AWP’s are “material” if they “were used by Wisconsin Medicaid in determining the amount of reimbursement to pharmacies.”² Contrary to Teva’s argument, this requirement is not an impediment to the State’s claims. As this Court has recognized, each time Medicaid reimburses for a generic drug, it “uses” the published AWP “in determining the amount of reimbursement” when it compares the MAC, U&C, and discounted AWP for the drug and pays the lowest figure. Thus, the AWP’s for Teva’s generic drugs that result in reimbursement at the MAC are “material.”

This is precisely what the Pharmacia jury found regarding Pharmacia’s generic drugs reimbursed at the MAC. And when the Supreme Court upheld the damages the jury awarded for these drugs, it explicitly recognized that when drugs were reimbursed at the MAC, the false AWP’s “played a ... role” in the reimbursement process and “harmed Medicaid” by causing overpayments. *State v. Abbott Labs.*, 2012 WI 62, ¶¶ 6, 78, 341 Wis. 2d 510, 816 N.W.2d 145.

Blatantly disregarding the Supreme Court’s holdings, Teva argues that AWP’s for generic drugs reimbursed at the MAC “played *no* role in” and had “*no* effect on” Medicaid reimbursement. (Teva Br. at 28) (emphasis added.) Teva asserts that this Court and the

¹ Defendants Teva Pharmaceuticals USA, Inc., IVAX Corporation, IVAX Pharmaceuticals, Inc., and Sicor, Inc.

² See Decision and Order on Remaining Forfeitures Issues, Sept. 30, 2009, at 4,

Supreme Court held that the *only way* Medicaid “used” or “relied on” an AWP in the reimbursement process was if the discounted AWP was the lowest of the three pricing metrics and the claim was paid at the discounted AWP.

Thus, according to Teva, this Court excluded the reporting of AWP for drugs that were reimbursed at the MAC when it counted violations for forfeiture against Pharmacia, and according to Teva, the Supreme Court affirmed that exclusion. A simple review of how the Court counted violations shows that this is pure fiction. Moreover a finding that reporting AWP for drugs that were reimbursed at the MAC did *not* constitute a violation would mean that the State was not entitled to damages for such drugs. But both this Court and Supreme Court found to the contrary. This latest version on the MAC argument should be rejected.

Second, Teva claims that the “SWP” moniker it used (just as Pharmacia did) for some of its drugs for the AWP it caused to be published after 2001 was neither “false” nor “deceptive” as a matter of law under § 49.49(4m) or § 100.18. The SWP argument is a straw man that mischaracterizes the State’s claim. What the State claims were “false” and “deceptive,” and the cause of its harm (with respect to FDB), were the inflated AWP Teva caused First DataBank (“FDB”) and Red Book to publish. As this Court found and the Supreme Court affirmed, a manufacturer violates § 49.49(4m) when it causes FDB to send false AWP to Medicaid, not when it provides AWP (or SWP) to FDB. 2012 WI 62 ¶¶ 106, 109. That *Teva* used a different label for its AWP in some communications is immaterial to the State’s claim.

Finally, Teva moves to dismiss the Trust and Monopolies Act claim and the Unjust Enrichment claim. As the parties have filed a stipulation to dismiss these claims with prejudice, these requests are moot.

Teva’s motion should be denied in its entirety.

RESPONSE TO TEVA'S CLAIMS

For the purposes of this motion, the State does not dispute Teva's description of the elements of the claims under § 100.18(11)(b)2 or under § 49.49(4m). Since the elements of the State's Trust and Monopolies Act and Unjust Enrichment claims are moot, the State will not address them here.

RESPONSE TO TEVA'S PROPOSED UNDISPUTED FACTS & WISCONSIN'S ADDITIONAL PROPOSED UNDISPUTED FACTS

Of the 75 facts set forth in Teva's Proposed Undisputed Facts section, 63 are not cited by Teva in support of any argument in its brief, despite the Court's directive in its Standing Order on summary judgment motions, that "all facts must be cited in the argument section" and that "[e]ach reference to a fact in the 'Argument' section must be supported by a cite to the paragraph number of the corresponding proposed undisputed fact (PUF)."³ Because the 63 facts appear to be immaterial to the motion and do not comply with the Court's Standing Order, the State will not respond to them and asks the Court to strike them.

Of the remaining 12 facts, Teva cites six in support of its request for summary judgment on the Trusts and Monopolies Act and Unjust Enrichment claims. (TAPUF ¶¶ 3, 70-74.) Since those requests are moot (as explained below in Section IV), the State will not address them either and they, too, should be stricken.

This leaves the six facts Teva cites in the sections of its brief regarding MACs and SWPs, to which the State responds as follows:

Teva's ¶ 21: Nearly 79% of the Medicaid claims involving the Teva drugs at issue in this litigation were reimbursed on the basis of MAC prices set by Wisconsin Medicaid.

³ Branch 9, Standing Order Regarding Contents of Motions for Summary Judgment, Responses to Motions for Summary Judgment, and Replies to Responses to Standing Order at 5.

Dyckman Rep. at 68, Exhibit 5, ¶ 143 (Ex. 11). Although Plaintiffs' damages expert, Dr. Thomas DiPrete, failed to calculate the exact percentage of Teva claims reimbursed based on MAC, he agreed that the "vast majority of claims were reimbursed on the basis of a state MAC price as opposed to some other pricing metric." Tr. of Dep. of Thomas A. DiPrete ("DiPrete Tr.") at 232:1-236:22 (Apr. 24, 2014) (excerpts attached as Ex. 24). *See also* Economic Damages Report of Thomas A. DiPrete ("DiPrete Rep.") at 21 (Apr. 1, 2014) (attached as Ex. 25).

State's Response to ¶21: Denied in part, admitted in part. The State denies that Teva's expert Dyckman calculated the percentage of Medicaid claims involving the Teva drugs at issue in this litigation that were reimbursed on the basis of MAC prices. Instead, Teva's expert "classified [claims] as [reimbursement at] MACs if the allowed amount was less than AWP-20 percent," and he found that the allowed amount was less than AWP-20 percent for nearly 79% of the Medicaid claims involving the Teva drugs at issue. (**Teva Ex. 11**, Dyckman Rep. at 67-68). The State admits that for the "vast majority of claims" at issue, the state MAC price was the lowest of the pricing metrics considered by Medicaid, and therefore the vast majority of claims at issue were reimbursed at the state MAC price.

Teva's ¶ 27. Wisconsin Medicaid does *not* use Average Wholesale Price to set MAC prices. Ted Collins, the pharmacy practices consultant responsible for setting MACs from 1979 to 1984 and 1999 to present day, confirmed that Wisconsin Medicaid has not used AWP to establish the level of MAC prices. Collins Tr. at 24:6-25:16; 38:21-39:2; 100:6-102:10, 131:22-132:22, 160:21-161:3 (Ex. 20); Collins 30(b)(6) Tr. at 20:6-24:20 (Ex. 26). Michael Boushon, who served as a pharmacy practices consultant for Wisconsin Medicaid from 1985 to 1995 and 2003 to 2004, similarly testified that he could not recall ever relying on an AWP price published by a generic manufacturer in setting MACs. Boushon Tr. at 18:14-21; 40:13-17; 197:14-17 (Ex. 28).

State's Response to ¶ 27: Denied in part, admitted in part. On occasions when the Wisconsin Medicaid pharmacy consultant had reason to believe that the brand and the generic versions of a product were available in the marketplace at a similar price, his practice was to "compare" and "make sure" "the price [he] would establish as the generic MAC ... wasn't higher than the reported price." (**Teva Ex. 20**, Collins Tr. at 102:2-14).

Teva’s ¶ 32. The amount of claims for Teva drugs reimbursed based on AWP was even lower than the amount based on U&C or FULs. Both parties’ experts agree that the percentage of Teva claims reimbursed based on AWP was less than 2.6%. *See, e.g.,* Dyckman Rep. at 68, Exhibit 5 (Ex. 11) (2.1% of claims for Teva drugs); DiPrete Rep. at 21 (Ex. 25) (only “2.3% of the Medicaid claims for Teva drugs” and only “2.54% of the Medicaid claims for Ivax drugs” were reimbursed “based on a discounted AWP”); DiPrete Tr. at 229:22-230:4; 233:11-15 (Ex. 24) (confirming these numbers). Thus, over 97% of claims for Teva’s and Ivax’s drugs were not reimbursed based on AWP. *Id.*

State’s Response to ¶ 32: Denied in part, admitted in part. The State admits that the percentage of claims for Teva drugs reimbursed at the discounted AWP was lower than the percentage at U&C or FULs, that the percentage of Teva claims reimbursed at a discounted AWP was less than 2.6%, and that over 97% of claims for Teva’s and Ivax’s drugs were not reimbursed at discounted AWP. As discussed *infra* in Section II.B.2, Teva bases its “MAC” argument on its assertion that the Court consistently used the phrase “reimbursed based on AWP” to mean “reimbursed at the discounted AWP” as opposed to a MAC or U&C. Although Teva uses that phrase in this Proposed Undisputed Fact, the State will address the meaning of the phrase in the Argument section, rather than in this Fact section.

Teva’s ¶ 50. Around 2001, Teva began using the phrase “Suggested Wholesale Price” (“SWP”) instead of AWP in order to provide states with “additional clarity as to what the figure represents.” Krauthauser Tr. at 49:10-16, 54:4-7 (Ex. 9); Letter from Teva to Roma Rowlands at WI-Prod-AWP-129542 (Sept. 18 2001) (attached as Ex. 43) (reporting SWP for new drug).

State’s Response to ¶ 50: Denied in part, admitted in part. With regard to defendant IVAX (included by defendant in the definition of “Teva,” *see* Teva Br. at 1), the State denies that defendant IVAX began using the phrase SWP around 2001. There is no record evidence to support this contention; instead, the record evidence shows that IVAX was still sending AWP to Medicaid as late as 2006. (*See, e.g.,* Ex. 1-2 to Eberle Aff., Jan. 16, 2006 & August 16, 2005 letters from IVAX to Bureau of Health Care Program Integrity, reporting AWP.) With regard to defendant Teva Pharmaceuticals USA, the State admits only that around 2001, Teva

Pharmaceuticals USA began using the phrase “Suggested Wholesale Price” (“SWP”) in some letters to Wisconsin Medicaid. The State denies that Teva Pharmaceuticals USA reported SWP “instead of AWP” because Teva Pharmaceuticals USA continued to use AWP in other letters as late as December 2004. (*See* **Ex. 3**, Dec. 9, 2004 Teva letter to Cardinal/Mail Order Preferred, reporting AWP; **Ex. 4**, Dec. 8, 2003 Teva letter to Cardinal/Publix Super Markets, reporting AWP; **Ex. 5**, Aug. 29, 2003 Teva letter to Cardinal/Access Extended, reporting an AWP.)

The State denies that any Teva defendant began using the phrase “Suggested Wholesale Price” (“SWP”) in place of “AWP” in order to provide states with “additional clarity as to what the figure represents.” Teva has previously admitted that the SWP was not a price at which it was “suggesting” that wholesalers sell its product. (*See* **Ex. 6**, Cioschi Dep., July 11, 2008, at 84:4-16; **Ex. 7**, Marth Dep., March 1, 2011, at 93:16-94:4; **Ex. 8**, Nase Dep., June 25, 2009, at 231:22-232:4.)

Teva’s ¶51. Teva’s communications to Wisconsin Medicaid accordingly began to include the following statement: “Suggested wholesale prices do not reflect the actual cost to the pharmacy or charge to the customer.” *See, e.g.*, Letter from Teva to Wisconsin Medicaid at WI-Prod-AWP-129526 (Aug. 2, 2001) (attached as Ex. 44); Letter from Teva to Roma Rowlands at WI-Prod-AWP-129542 (Sept. 18 2001) (Ex. 43); Letter from Teva to Roma Rowlands (Sept. 16, 2003) (attached as Ex. 45); Letter from Teva to Wisconsin Medicaid (Dec. 22, 2006) (attached as Ex. 46).

State’s Response to ¶ 51: Denied in part, admitted in part. In its brief, Teva defines “Teva” as including all defendants collectively, including defendant IVAX. (Teva Br. at 1.) There is no evidence that defendant IVAX’s communications to Wisconsin Medicaid included the statement: “Suggested wholesale prices do not reflect the actual cost to the pharmacy or charge to the customer,” and the record evidence is to the contrary. (*See, e.g.*, **Ex. 1**.) With respect to Teva Pharmaceuticals USA, the State denies that all communications to Wisconsin

Medicaid in which Teva Pharmaceuticals USA sent an SWP contained such a disclaimer. (*See, e.g., Ex. 9*, Teva letter to “Valued Customer,” Dec. 28, 2001.)

Teva’s ¶75. Although Dr. DiPrete purported to calculate the total number of Teva’s and Ivax’s drug NDCs reimbursed by Wisconsin during the damages period, these calculations do not include the number of times Wisconsin Medicaid actually relied on Teva’s AWPS for reimbursement. DiPrete Rep. at 20 (Ex. 25); DiPrete Tr. at 238:13-239:5 (Ext. 24) (this calculation is not “counting the number of claims that are reimbursed on the MAC as opposed to the AWP,” but is “counting whether an NDC was reimbursed in a given period”); *id.* at 237:18-238:2 (unable to say to what extent this calculation includes “reimbursements that were not paid based on an AWP minus formula”).

State’s Response to ¶ 75: Denied. This statement is not a proposed “fact,” but rather an argument as to what it means to have “relied on” (or “used”) Teva’s AWPs. Teva’s argument that Medicaid did not “rely on” or “use” Teva’s AWPs when it reimbursed drugs at the MAC is addressed below in Section II.B. Dr. DiPrete calculated the total number of Teva’s and Ivax’s drug NDCs that were reimbursed by Wisconsin at least once in a given period.

Wisconsin’s Additional Proposed Undisputed Facts

Additional Fact ¶ 1: When determining reimbursement for a drug, the State compares the (1) the published AWP minus a percentage plus the dispensing fee, (2) the MAC plus the dispensing fee, and (3) the usual and customary amount submitted by the pharmacy and pays the lowest of the three. (*See Ex. 10*, Trial Tr., Ted Collins, Feb. 9, 2009, at 61:6-15.)

Additional Fact ¶ 2: If the AWPs that were reported had been accurate, the Wisconsin pharmacy consultant would have used them to set the MAC. (*See id.* at 60:22-61:1.)

Additional Fact ¶ 3: Teva was “solely responsible for setting and publishing its own AWP.” (*See Ex. 6*, Dep. of Eugene Cioschi, Teva Manager of Generic Products Marketing, July 11, 2008, at 282:1-9.)

ARGUMENT

I. Teva's Request for Summary Judgment on a Subset of AWP's is Procedurally Improper.

Teva's motion for summary judgment under § 49.49(4m) and § 100.18 is limited to specific AWP's—namely, (1) AWP's of drugs reimbursed at the MAC, and (2) AWP's whose source was an SWP that Teva provided to pricing compendia. Even before reaching the merits, these requests for judgment on less than entire claims should be denied on procedural grounds.

First, Teva fails to identify the specific AWP's at issue in either request. The Court previously declined to grant summary judgment to the State in part because it failed to identify the specific drugs at issue, characterizing the request as an “advisory ruling.”⁴

Second, Teva fails to identify any authority allowing it to move for judgment on part of a claim. Wisconsin statutes provides for summary judgment on “any claim” and “on the issue of liability alone,” Wis. Stats. § 802.08(1) & (2), but not on part of a claim.

II. Teva's “MAC” Argument Has Been Rejected by a Jury and the Supreme Court.

Teva argues that for claims the State ultimately reimbursed at the MAC, the published AWP's were neither “material” nor “for use in determining rights” to a Medicaid payment within the meaning of § 49.49(4m). Without attempting to distinguish the facts from those of the Pharmacia trial, Teva fails to acknowledge that a jury has already found liability for such AWP's. It also ignores the rulings of this Court and the Wisconsin Supreme Court that such AWP's *harmed* Medicaid; a ruling that precludes Teva's arguments.

⁴ May 20, 2008, Decision and Order on Plaintiff's Motions for Partial Summary Judgment against Defs. Novartis, AZ, Sandoz, & J&J at 7.

Teva's argument to the contrary is based *solely*⁵ on its incorrect assertion that the Court excluded AWP's that resulted in payment at the MAC from the count of violations for forfeitures against Pharmacia because such AWP's were not "material." The Court made no such exclusion. Far from finding them immaterial, again, the Court found that such AWP's *harmed* Medicaid.

- A. The Supreme Court affirmed the evidentiary *and* legal basis for the jury's finding that reporting AWP's that result in payment at the MAC violates § 49.49(4m).

The record evidence shows that when determining reimbursement for a drug, Medicaid compares and considers the (1) the published AWP minus a percentage ("discounted AWP") plus the dispensing fee, (2) the MAC plus the dispensing fee, and (3) the usual and customary ("U&C") amount submitted by the pharmacy, and pays the lowest of the three.⁶ WAPUF ¶ 1. Thus, when a drug is reimbursed, regardless of whether the process results in payment at discounted AWP, MAC, or U&C, the AWP's are "used" in determining rights to a Medicaid payment and "material" within the meaning of § 49.49. A jury agreed with the State. So did the Wisconsin Supreme Court.

1. The Pharmacia jury found that false AWP's that resulted in reimbursement at the MAC were "material" and "for use in determining rights" to Medicaid payments.

As Teva admits, the State sought damages at the Pharmacia trial "both as to Pharmacia's *generic* and brand name drugs." (Teva Br. at 24) (emphasis added). The jury heard evidence

⁵ The State's damages expert Dr. DiPrete made no conclusions or "conce[ssions]" about what it means to "use" an AWP in determining reimbursement. (Teva Br. at 2, 22-23.) Teva's assertions that the State's damages expert Dr. DiPrete (1) "conceded" that he did not count the number of times Medicaid "relied" on Teva's AWP's (*Id.* at 26); (2) "conclu[ded]" that most of Teva's AWP's "played no role" in Wisconsin reimbursement (*id.* at 26-27); and (3) "concedes" that "most of the State's claims against" involve AWP "that have no effect on Medicaid reimbursement" (*id.* at 28) are simply fabrications.

⁶ Additionally, if the AWP's that were reported had been accurate, Medicaid consultant Ted Collins would have used them to set the MAC. *See* WAPUF ¶ 2.

that “MACs were [] central to the reimbursement process for generics,” and Ted Collins, “the consultant to DHS who established the [MACs], testified that he was forced to rely on his own research in the market because he knew AWP’s were substantially inflated.” 2012 WI 62, ¶¶ 73, 74 n.20. He further testified that “he would have used actual wholesale prices to set reimbursement rates for generic drugs had he been given them.” *Id.*, ¶ 73.

Having considered this evidence, the Pharmacia jury awarded the § 49.49(4m) damages the State requested, *id.*, ¶ 57, which included claims that were ultimately reimbursed at both the MAC and discounted AWP. *Id.*, ¶¶ 73-81. The jury thus had to have found that the false AWP’s for those generic drugs reimbursed at the MAC were both “material” and “for use in determining rights” to a Medicaid payment, as the jury instructions specifically required. (*See Ex. 11*, Jury Instruct., Wis. Stat. § 49.49 Claim, used in Pharmacia trial.) The Supreme Court affirmed the sufficiency of the evidence for damages based on reporting AWP’s that resulted in reimbursement at the MAC. 2012 WI 62, ¶ 80.

2. The Supreme Court held that AWP’s that resulted in reimbursements at MAC harmed the State.

Teva’s argument has, in fact, been precluded by holdings of the Supreme Court. The Supreme Court specifically rejected the argument that “because generics were not reimbursed on the basis of AWP’s, any damage award based on the inflation of AWP’s with respect to generics *must be* speculative.” *Id.*, ¶ 78. The bases for this holding establish, as a matter of law, that under the State’s theory, the AWP’s that result in reimbursement at MAC *are* both “for use in determining rights” to Medicaid payments and “material.”

The Supreme Court extensively analyzed the State’s theory regarding damages from generics reimbursed at MAC, and did so *separately* from its theory regarding brands reimbursed at a discounted AWP. *See* 2012 WI 62, ¶¶ 73-81. The Court concluded that the State’s theories

regarding damages for generics and brands “were *not* substantively different,” and that “AWP played a ... role in Wisconsin Medicaid’s reimbursement process” for both brands and generics. *Id.* ¶¶ 6, 78 (emphasis added). The Court concluded that “in *both* [brand and generic] contexts, the reporting of inflated AWP*s* harmed Medicaid, and in *both* the reporting of accurate AWP*s* would have saved Medicaid money.” *Id.* (emphasis added).

The Supreme Court rejected Pharmacia’s MAC argument holding that it incorrectly focused on “what *did* happen” given the false AWP*s*, as opposed to “what *would* have happened” if the published AWP*s* had not been false:

Simply put, calculation of damages focuses primarily on what *would* have happened absent the liable conduct, not what *did* happen with the liable conduct. Here, absent the liable conduct, Pharmacia would have reported actual wholesale prices, and the jury had credible evidence to support the inference that Medicaid would have reimbursed Pharmacia’s generic drugs consistently with such accurate prices.

Id., ¶ 79 (emphasis in original).

B. Contrary to Teva’s argument, the Court’s count of 4,578 violations did *not* exclude AWP*s* that resulted in reimbursements at the MAC.

Teva’s argument—that AWP*s* that resulted in reimbursements at MAC were *not* “for use in determining rights” to Medicaid payments and *not* “material”—is based solely on its incorrect assertion of what the Court did when it counted § 49.49(4m) violations against Pharmacia.

(Teva Br. at 22-30.) On this point, Teva asserts that the Court’s “post-trial recalculation of [§ 49.49(4m)] violations ... necessarily excludes all claims” that were paid at MAC because the Court found that such AWP*s* were not “material.” (*Id.* at 24-25.) This is simply wrong.

This Court made two findings relevant here: First, rejecting Pharmacia’s argument that the State did not rely on AWP*s* when it reimbursed at the MAC, it found—to the contrary—that misrepresented AWP*s* that resulted in reimbursements at the MAC “caused a pecuniary loss” to the State. (Decision and Order on Summary Judgment Motions relating to Defendant Pharmacia,

Jan. 21, 2009, at 1-2.) On materiality, it held that AWP's that "affected the amount of benefits or payments paid" were "material." (See Decision and Order on Remaining Forfeitures Issues, Sept. 30, 2009, at 6.) Since AWP's that resulted in reimbursement at the MAC "caused a pecuniary loss" to the State, they "affected the amount of benefits or payments paid," and are thus material. Accordingly, the Court counted as violations all false AWP's that resulted in reimbursements, regardless of whether the payment was at the MAC, U&C, or discounted AWP.

1. This Court held that false AWP's that resulted in reimbursement at the MAC "caused a pecuniary loss."

The Court's first ruling was made in response to Pharmacia's motion for summary judgment that argued that "in setting the MAC prices, the state *never relied* on any published prices of any kind," and thus "causation, ... and therefore the state's §100.18 claim, fail as a matter of law because the state cannot prove *reliance on* Pharmacia's claimed misrepresentations regarding AWP." (Jan. 21, 2009 Decision at 1) (emphasis added). The Court rejected the argument:

The state concedes that it did not directly use the misrepresented AWP as the benchmark for its reimbursement to providers, largely, it contends, because it could not determine an accurate value for AWP given the cloud of misinformation emanating from the pharmaceutical industry. Its evidence demonstrates that the misrepresented AWP nonetheless caused a pecuniary loss because the state was required to jettison the unreliable AWP as the standard, and had to employ a different benchmark which set a higher reimbursement rate than would have been the case had the true AWP been represented. This evidence is sufficient to get the causation case to a jury under §100.18.

(*Id.* at 2.) Put in terms that Teva uses in its motion: the Court found that even when the State "did not directly *use* the misrepresented AWP *as the benchmark for reimbursement*," the State *used* these AWP's in the *reimbursement process*, and they "caused a pecuniary loss." (*Id.*) This Court did *not* reverse this holding when it counted violations.

2. As an objective fact, the count of 4,578 violations did *not* exclude AWP that resulted in reimbursements at the MAC.

The Court's second decision was made in post-trial proceedings on forfeitures. The Court vacated the forfeiture verdict because it was improper to have counted each *claim* the State paid as a separate violation. (*See* Decision and Order on Remaining Forfeitures Issues, Sept. 30, 2009, at 2, 3, 7 n.5.) But the ruling had nothing to do with whether the State had paid the claims at the MAC or discounted AWP, as Teva confusingly implies.⁷ (*See, e.g.,* Teva Br. at 25.) Subsequently, in the proceedings to determine the proper count, the State argued that each false AWP that Pharmacia caused FDB to report to the State should be counted as a violation, *id.* at 2-3, whereas Pharmacia argued that the violations should be counted one step earlier in the AWP reporting process—each time Pharmacia “transmitted an inflated AWP to FDB.” 2012 WI 62, ¶ 106.

The Court agreed with the State about at which level of reporting a violation occurred, but held that in order for an AWP to be a statement of “material” fact, the State had to establish that the AWP “affected the amount of benefits or payments paid.” (Sept. 30, 2009 Decision at 6.) Thus, the Court counted as a violation only those AWP that “were *used* by Wisconsin Medicaid *in determining* the amount of reimbursement to pharmacies.” (*Id.* at 4) (emphasis added.) The materiality requirement had nothing to do with whether the reimbursement was at the MAC or discounted AWP.

To calculate the number of times “at least one pharmacy reimbursement claim was actually paid based upon” an AWP, the Court looked at “exhibits P436M and P436N,” which showed the State’s quarterly damages calculations, including the published AWP and actual

⁷ In fact, the State voluntarily limited the count of *claims* to those reimbursed at discounted AWP because 1,440,000 was more than enough.

acquisitions costs “for each Pharmacia drug NDC.” (*Id.* at 7.) The Court found that these exhibits “constitute[d] credible evidence that First DataBank published (i.e. ‘reported’) Pharmacia prices [at least] quarterly, and that Wisconsin Medicaid reimbursed pharmacies at least once for each of the reported quarterly AWP.” *Id.* These exhibits listed *both* brands and generics—*i.e.*, they included all drugs without distinction, whether reimbursed at the MAC, U&C, *or* discounted AWP. (*See, e.g.*, **Ex. 12**, select pages of Exhibit P436M, listing damages for generic Pharmacia drugs Spironolactone and Glyburide (second and third pages of Ex. 12) that were *not* reimbursed at the discounted AWP.) The Court concluded that “tallying up the quarterly AWP’s listed after June 3, 1994 in exhibits P436M and P436N yields a reasonable basis for establishing forfeitures under the credible evidence standard[;] [t]hat tally totals 4,578.” (Sept. 30, 2009 Forfeiture decision at 7.) Reimbursement at discounted AWP versus the MAC had nothing to do with it.

Teva’s assertion that the Court excluded AWP’s that resulted in reimbursement at the MAC from the forfeiture count appears to be based on its interpretation of the Court’s use of the phrase “paid based on [AWP’s].” Teva implies that when the Court said that an AWP was “material” only if at least one claim was “paid based upon each of these misrepresentations,” the Court really meant that that at least one claim had to have been paid based upon a *discounted* AWP—despite the fact that the Court explicitly used the phrase “paid based upon discounted AWP’s” in the footnote to the same sentence when it was referring to the jury’s verdict which *was* limited to claims paid at the discounted AWP:

[P]laintiff had the burden on this motion of demonstrating at least credible evidence establishing not only the number of misrepresentations Pharmacia made or caused to be made, but that at least one pharmacy reimbursement claim was actually *paid based upon each of these misrepresentations*.⁵

FN 5: Again, the jury's answer to Question No. 5 addressed neither. It simply measured claims *paid based upon discounted AWP*s, irrespective of the number of misrepresentations.

(*Id.* at 7 & n.5.) Teva points to the fact that Court at one point used the phrase “reimbursed ... based on ... published AWP” to refer to reimbursement at discounted AWP of “patent drugs; sometimes, but only rarely generics” in describing the evidence that supported (but was ultimately “insufficient” to sustain) the jury's answer the verdict question. (Teva Br. at 25 n.8). But any inconsistency in the Court's use of the phrase cannot overcome the Court's finding that AWP that resulted in reimbursement at the MAC “caused a pecuniary loss,” and the fact that it counted such AWP as “material” statements for forfeitures.

3. The Supreme Court's affirmation of the 4,587 violations leaves no room for argument.

The Supreme Court affirmed Judge Niess' method: “The circuit court chose the [following] approach [for calculating the number of violations], and we agree that it was the appropriate one”: “a violation occurred every time FDB transmitted an inflated AWP to Medicaid and Medicaid then relied on it at least once in the reimbursement of a pharmacy.” 2012 WI 62, ¶ 109. And it specifically affirmed this Court's 4,587 violations count. Despite this, Teva asks this Court to interpret the Supreme Court's use of the phrase “*relied upon* at least once in the *reimbursement process*” as implicitly excluding the AWP that resulted in reimbursement at the MAC that this Court included in the 4,587 count. (Teva Br. at 25-26.)

In addition to having no basis for suggesting that the Supreme Court intended a limitation not applied in the actual count, Teva's interpretation of “relied upon” cannot be reconciled with the Supreme Court's affirmation of damages for Pharmacia generic drugs reimbursed at the

MAC. As even Teva admits, the “materiality of Teva’s AWP’s for Wisconsin’s reimbursements is not a forfeiture-specific requirement, but rather a prerequisite to imposing liability under the Medical Assistance Fraud Act.” (Teva Br. at 29.) *See also id.* at 25 (citing 314 Wis. 2d at 542), and conceding that “the [Supreme Court] acknowledged that Medicaid fraud can be ‘substantiated only by proof that the false statement played *some* role in the state’s calculation of payments.’” (emphasis added)).

If the Supreme Court had intended to hold that AWP’s that resulted in reimbursement at the MAC were not “material” and thus did not constitute a violation, it would have overturned the jury’s verdict with respect to the State’s damages associated with the generic drugs it reimbursed at the MAC—no violation for generics, no damages for generics. Instead, as discussed above, the Court specifically rejected Pharmacia’s argument on this point and affirmed the entire verdict, holding that “AWP *played a ... role* in Wisconsin Medicaid’s *reimbursement process*” for generics and “harmed Medicaid.” *Id.*, ¶¶ 6, 73-81 (emphasis added). These holdings are dispositive and require denial of Teva’s motion as to this issue.

III. The Accuracy of Teva’s SWPs Is Immaterial.

Teva also seeks summary judgment on the basis that in 2001, letters it sent to Wisconsin Medicaid included SWPs (“Suggested Wholesale Prices”) instead of AWP’s for some of its drugs.⁸ (Teva Br. at 30-33.) Teva’s argument that the SWPs were not “false” or “deceptive”⁹ as a matter of law is a simply straw man.

⁸ Teva does not tell the Court that defendant IVAX continued to provide AWP’s when defendant Teva Pharmaceuticals USA provided SWPs. Moreover, after 2001, even Teva Pharmaceuticals USA sometimes provided AWP’s. *See State’s Response to TAPUF* ¶ 50.

⁹ As used here, “deceptive” includes “untrue, “deceptive,” and “misleading,” included in § 100.18(1).

The SWPs that Teva sent to Medicaid are not the subject of the State’s claims against Teva. Instead, the State claims that the false AWP’s that Teva published through FDB and Red Book are “false” and “deceptive,” and caused the State harm. The publications of those AWP’s continued unabated throughout the relevant time period.

Even if Teva’s *actual* argument is that Teva began sending SWPs to *FDB and Red Book* instead of AWP’s for some of its drugs in order to have its AWP’s published (a fact not included as a proposed undisputed fact), the argument is still a straw man because it addresses price reporting at the wrong level. As discussed above, the Supreme Court affirmed that the conduct that violates § 49.49(4m) is causing “FDB [to] transmit[] an inflated AWP to Medicaid” (which is then relied upon). 2012 WI 62, ¶ 109. It specifically rejected Pharmacia’s theory that the illegal conduct occurred when “[the manufacturer] transmitted an inflated AWP [or SWP] to FDB” in order to cause an AWP to be published.¹⁰ *Id.* ¶ 106. Teva ignores the Supreme Court’s ruling entirely—a ruling that renders the question of whether the SWPs that Teva provided to the pricing compendia are “false” or “deceptive” immaterial as a matter of law.¹¹

The (unproposed) fact that Teva provided SWPs to the pricing compendia for some of its drugs in order to have its AWP’s published is relevant only to the question of whether Teva *caused* its AWP’s to be published. Even if Teva had made the argument that no reasonable jury could find that its provision of SWPs to the pricing compendia *caused* the publication of the false

¹⁰ Similarly, the State alleges that Teva’s conduct in causing deceptive AWP’s to be published by FDB and Red Book—not providing deceptive pricing information to the compendia—violates § 100.18.

¹¹ In any event, the SWPs are, in fact, false and deceptive as Teva admitted that SWPs are not prices at which Teva “suggests” wholesalers sell their products. *See* Response to TAPUF ¶ 50. Moreover, Teva’s SWPs violate § 100.18 because they are wholesale prices that are “more than the price which retailers regularly pay for the merchandise.” Wis. Stats. § 100.18(10)(b).

AWPs, the argument would still fail. The Pharmacia jury has already found a manufacturer liable for AWP's that were provided to the pricing compendia as SWP's. That jury heard that from April 2003 through at least 2006, the generic unit of Pharmacia provided SWP's to FDB, which reported the number as an AWP, *see Ex. 13*, Kennally Trial Testimony, Clip Report, 117: 3-9, and found liability and awarded the damages for brand *and generics*. *See* 2012 WI 62, ¶ 57. Finally, Teva has already admitted that it is "solely responsible for setting and publishing its own AWP," WAPUF ¶ 3, so there can be no viable argument that it did not cause the publication of its false AWP's.

IV. The Parties Have Already Stipulated to the Dismissal of the State's Antitrust and Unjust Enrichment Counts so Teva's Requests regarding these Counts Are Moot.

Teva has moved to dismiss the Wisconsin Trust and Monopolies Act ("Antitrust") and Unjust Enrichment counts. This was entirely unnecessarily. As Teva points out, the Court dismissed the Antitrust count in litigating against Pharmacia, and the State voluntarily withdrew its Unjust Enrichment count. (Teva Br. at 33-34, 37.) In the pretrial preparations against Johnson & Johnson (prior to the stay in this case), the parties stipulated to the dismissal of these two counts. (*See* Nov. 2, 2009 Stipulation for dismissal of Counts 3 and 5 of third amended complaint against the Johnson & Johnson Group defendants.) Finally, when the State moved in 2010 to file its Fourth Amended Complaint, it explicitly stated that it had removed these counts. (*See Ex. 14*, Plaintiff State of Wisconsin's Motion for Leave to File Fourth Amended Complaint (leave was not granted), Sept. 30, 2010, Ex. 1 at 30 n.2.)

Despite *all this*, instead of simply asking the State if it intended to resurrect these counts, Teva's counsel unnecessarily briefed these counts in an eight-and-a-half page wasted effort. The State did *not* intend to resurrect these counts, and on September 18, 2014, the parties filed a stipulation to dismiss these counts with prejudice. Therefore, Teva's request is moot. (*See*

Ex. 15, Stipulation for Dismissal of Counts 3 and 5 of Third Amended Complaint against the Teva Defendants.)

REQUESTED RELIEF

For the foregoing reasons, the State request that the Court:

- 1) Strike Teva's 69 Proposed Undisputed Facts that were improperly included in its motion;
- 2) Deny Teva's request for summary judgment on § 49.49(4m) claims for the AWP's of Teva drugs that were reimbursed at the MAC;
- 3) Deny Teva's request for summary judgment on § 100.18 and § 49.49(4m) claims for Teva drugs for which it provided SWPs to Wisconsin Medicaid;
- 4) Deny Teva's request to dismiss the State's Wisconsin Trust and Monopolies Act and Unjust Enrichment claims as moot.

Dated this 18th day of September, 2014.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Plaintiff's Response to Motion for Partial Summary Judgment, Proposed Findings of Fact and Supporting Memorandum Filed by Defendants Teva Pharmaceuticals USA, Inc., IVAX Corporation, IVAX Pharmaceuticals, Inc., and Sicor, Inc. and the Affidavit of Betty Eberle and attached Appendix to be served upon all counsel of via LexisNexis File and Serve this 18th day of September, 2014.



Betty Eberle