

STATE OF WISCONSIN,

)

Plaintiff,

)

Case No.: 04 CV 1709

v.

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ABBOTT LABORATORIES, *et. al.*,

)

Defendants.

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)

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR
PROTECTIVE ORDER BARRING DEFENDANTS FROM REQUIRING
WISCONSIN TO SEARCH ITS ELECTRONIC FILES FOR WHAT
DEFENDANTS CALL GOVERNMENT KNOWLEDGE DOCUMENTS**

Plaintiff's "Motion For a Protective Order Barring Defendants From Requiring Wisconsin To Search Its Electronic Files For What Defendants Call Government Knowledge Documents" (the "Motion") seeks to prevent Defendants from pursuing discovery that has and will continue to prove fatal to Plaintiff's case. This discovery has, and will further, expose the truth that underlies this action—that for over 25 years, the State of Wisconsin has made a conscious, informed and intentional decision to reimburse providers participating in its Medicaid program not only at a rate that covers providers' costs, but further provides them a profit, in order to ensure their continued participation in the Medicaid program so that Medicaid recipients can receive federally mandated equal access to care.¹ Plaintiff itself placed this very topic at issue through, for example, its allegation that "it has never been [Wisconsin Medicaid's] intention to pay more for a drug than the cost of that drug to a provider."²

¹ Wisconsin's reimbursement must be "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area[.]" 42 U.S.C. § 1396a(a)(30)(A).

² Second Amended Complaint ("Complaint") ¶ 36.

Plaintiff's Motion is another in a series of attempts to prevent Defendants from obtaining discovery of relevant information to respond to Plaintiff's pending summary judgment motions, to adequately prepare their own summary judgment motions and to prepare for trial.³ Knowing that Defendants have discovered information harmful to its case and that directly contradicts its core claims,⁴ Plaintiff is fighting tooth and nail to prevent Defendants from uncovering additional such evidence. Defendants have already uncovered substantial evidence revealing, for instance, that Plaintiff has known for over 25 years that First DataBank's ("FDB") AWP's do not represent actual averages of wholesale prices for drugs; that it relied upon this knowledge in setting reimbursement rates; that it considered but rejected alternatives to AWP-based reimbursement, despite potentially significant cost savings if it did so; and, that it was influenced by Wisconsin's pharmacy lobby in setting its reimbursement rate.

Plaintiff refers to this discovery as "government knowledge" evidence, but the relevant information Defendants seek actually encompasses much more—Defendants are

³ Plaintiff has attempted to thwart Defendants discovery efforts by, among other things: (a) refusing to designate a representative to testify to the State's understanding of relevant pricing terms, *see* Plaintiff's Response To Defendants' Notice of Section 804.05(2)(e) Deposition at 3 (June 18, 2007) (attached as Exhibit 1); (b) moving to quash the deposition of third-party wholesalers in similar AWP-related cases pending in other states against some Defendants, *see* Motion to Quash Defendants' Notice of Deposition of AmeriSource Bergen (filed Aug. 23, 2007); (c) categorically refusing to search the State's e-mail databases for any relevant information, *see* Defendants' Motion to Compel the Production of Email at 1-5 (filed Sept. 14, 2007); (d) moving to quash Defendants' deposition notice requesting a designee to testify about the State's e-mail system, *see* Motion to Quash Defendants' Notice of Section 804.05(2)(E) Deposition to State of Wisconsin Concerning Electronic Mail Messages (filed Sept. 5, 2007); (e) attempting to prevent Defendants from deposing Legislative Fiscal Bureau Analysts involved in drafting reports regarding DHFS's budget proposals relating to reimbursement changes, *see* Motion to Quash Defendants' Notice of Deposition of Wisconsin's Legislature's Fiscal Bureau Budget Analysts Marlia Moore, Rachel Carabell, and Amie Goldman (filed Oct. 18, 2007); and, concurrent to the filing of the present Motion, (f) moving the Court to prohibit Defendants from using an e-mail containing relevant information on the basis of privilege, despite the fact that the State has known about its production for eleven months, *see* Plaintiff's Motion for a Protective Order Pertaining to the Electronic Communication Between Attorney Neil Gebhart and Robert Blaine.

⁴ *See, e.g.*, E-mail from N. Gebhart to R. Blaine (Jan. 6, 2005 12:34 pm) (attached as Exhibit 2).

seeking evidence that Plaintiff made a conscious *choice* to reimburse as it did in order to adequately compensate providers for the cost of obtaining and dispensing drugs under the Medicaid program (“Government Choice Evidence”). This evidence is relevant to disproving the allegations and claims in Plaintiff’s Complaint, as well as supporting a number of Defendants’ potential affirmative defenses. Plaintiff’s attempt to prevent the discovery of this information is unfounded and flies in the face of Wisconsin’s liberal discovery rules which are designed to “facilitate the ascertainment of truth.”⁵

The Court’s decision regarding Plaintiff’s Motion is simple. It does not require consideration of the bulk of Plaintiff’s arguments, which go to the merits of the action. Rather, it hinges solely on whether the State’s electronic files are likely to contain information relevant to the subject matter of the present action and thus discoverable.⁶ They do, and Plaintiff’s motion should be denied.

A. Government Choice Evidence is Discoverable.

Defendants are entitled to obtain discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party...”⁷ The Wisconsin rules endorse a principle of liberal and open pretrial discovery⁸ in order to allow parties to “formulate, define and narrow the issues to be tried,” to ascertain workable claims and defenses, to explore good arguments and relinquish the bad, and to

⁵ *Alt v. Cline*, 195 Wis. 2d 679, 538 N.W.2d 860 at *3 (Wis. Ct. App. 1995) (citing various Wisconsin and federal cases).

⁶ It should be noted that Plaintiff has not asserted in its present Motion an argument that Defendants’ requests are overly-burdensome, but has confined its discussion to the relevancy of the information sought by Defendants.

⁷ Wis. Stat. § 804.01(2)(a).

⁸ See *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 576 (1967); see also *Ranft v. Lyons*, 163 Wis. 2d 282, 290 (Wis. Ct. App. 1991) (“[Rule § 804.01(2)(a)] is a broad charter, consistent with the underlying purpose of pretrial discovery, which, among other things, is ‘designed to formulate, define and narrow the issues to be tried.’”).

gauge the strengths and weaknesses of each.⁹ Wisconsin courts broadly construe relevance in this context, stating that information should be regarded as “relevant to the subject matter” if it “might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement of the case. This is true even if the information would not be relevant to the actual questions addressed to the court.”¹⁰

The discovery standard, therefore, is not dependent, as Plaintiff seems to believe, on the viability of potential defenses for which discovery may be sought.¹¹ Rather, discovery is a tool used by litigants to gauge the viability of various claims and defenses,¹² and is dependent upon nothing more than the relevancy of the sought-after discovery to the subject matter of the pending action. Defendants are entitled to discover all relevant evidence in order to prepare their case, decide what evidence to present, what arguments to make, and how best to make those arguments. It is only at the close of the discovery process, after having seen all the available relevant evidence, that Defendants will be in a position to gauge how best to proceed, including what defenses they may raise, how they will raise them, and what evidence they will use in support of them.

Consideration of some, but certainly not all, of the arguments on the merits of claims and defenses involved in the action will be addressed by Judge Niess, who has already set a schedule for the briefing of Plaintiff’s pending summary judgment motions. This schedule

⁹ See, e.g. *Dudek*, 34 Wis. 2d at 576.

¹⁰ 8 Wis. Prac., Civil Discovery § 1:12 (2d ed. 2007); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389 (1978) (noting that because discovery is intended to help define and clarify issues, discovery is not even limited to issues raised by the pleadings).

¹¹ Wisconsin has adopted “notice pleading,” see Wis. Stat. § 802.02, such that “litigants are allowed to “plead generally and discover the precise factual basis for the claim through equally liberal...discovery procedures.”” *State ex rel. Adell v. Smith*, 247 Wis. 2d 260, 266 (Wis. Ct. App. 2001) (quoting *Morrison v. City of Baton Rouge*, 761 F.2d 242, 244 (5th Cir. 1985)).

¹² See *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 388-89 (1947) (pre-trial discovery serves “as a device ... to narrow and clarify the basic issues between the parties, and ... [to ascertain] the facts, or information as to the existence or whereabouts of facts, relative to those issues.”)

was established with an eye towards allowing ample time for discovery to prepare for summary judgment arguments.¹³ In fact, Judge Niess' schedule specifically allotted Defendants extra time in which to undertake the very Government Choice discovery Plaintiff now opposes in its Motion. And, Defendants are entitled to relevant Government Choice discovery for more than just preparing for approaching summary judgment filings, but for the broader purpose of preparing, measuring and shaping their cases as a whole.

More to the point, Plaintiff's motion puts the cart before the horse. Granting Plaintiff's motion barring discovery of this evidence risks depriving Defendants of access to information that is potentially relevant and admissible *before* it can be properly gathered and presented to the Court for consideration as part of the merits of the case. Even if Plaintiff were correct in its arguments that this evidence does not defeat its claims (which it is not), it is entirely inappropriate to prevent Defendants at this stage from obtaining discovery of this evidence and presenting it to the Court when it makes that determination.

There also is a very real practical dilemma presented by Plaintiff's motion. Plaintiff seeks to prevent discovery of considerable information. This means that, if Plaintiff prevails on its motion and that ruling is later found to have been incorrect, in addition to depriving Defendants of the opportunity to marshal and present relevant evidence to the Court, such a ruling will unnecessarily set this case back substantially – something Judge Niess expressly cautioned against in allowing Defendants time to undertake this discovery before responding to the pending summary judgment motions.¹⁴

¹³ See Order Following July 23 Status Conference (Aug. 23, 2007); Transcript of July 23 Status Conference (attached as Exhibit 3).

¹⁴ See Transcript of July 23 Status Conference at 44:13-20 (Ex. 3) (“I am concerned about making a fatal misstep right at the outset by limiting discovery on a material position that will only turn this case into complete turmoil because either there will be a reversal down the line because I failed to allow the defense the due process they're entitled to in meeting these summary judgment motions”).

B. Government Choice Evidence is Relevant to Plaintiff's Allegations and Claims.

Although Plaintiff does not address the relevancy of Government Choice Evidence to the allegations and claims Plaintiff has asserted against Defendants – choosing instead to focus on arguing the merits of Defendants’ potential affirmative defenses – Government Choice Evidence is undeniably relevant to Plaintiff’s allegations and claims, and is therefore discoverable.

1. Government Choice Evidence Is Relevant To Rebutting Plaintiff's Factual Allegations and Arguments.

Defendants are entitled to evidence that helps to disprove the allegations asserted in Plaintiff’s Second Amended Complaint (“Complaint”), as well as other arguments raised by Plaintiff.¹⁵ For example, in its Complaint, Plaintiff alleges, among other things, that: “it has never been [Wisconsin Medicaid’s] intention to pay more for a drug than the cost of that drug to a provider”;¹⁶ it understood the published AWP’s for drugs to reflect the actual average prices that providers paid to wholesalers;¹⁷ and these AWP’s deprived it of pricing information it needed to estimate accurately the acquisition costs of Defendants’ drugs.¹⁸

Plaintiff seeks to prevent Defendants from discovering evidence that will directly challenge these and other allegations and prove, among other things, that Plaintiff intended to compensate providers for more than the cost of drugs, to maintain federally-mandated access to care by allowing providers to profit from participation in the Medicaid program.¹⁹ In fact, evidence obtained to date shows that Wisconsin knowingly and

¹⁵ Wis. Stat. §804.01(2)(a).

¹⁶ Complaint ¶ 36.

¹⁷ Complaint ¶¶ 36, 59.

¹⁸ Complaint ¶ 34.

¹⁹ See Transcript of Deposition of James Vavra (“Vavra Deposition”) at 77:5-14 (Aug. 16, Sept. 26-27, 2007) (excerpts attached as Exhibit 4) (“Again, most of the work we had done in setting pharmacy rates were based on the Federal principle of estimated acquisition cost close to what the pharmacist obtained the [drugs] at plus a reasonable dispensing fee ... which included some

intentionally pays in excess of acquisition costs for most generic drugs and physician-administered drugs. Wisconsin reimburses most generic drugs based on actual acquisition cost of the drugs -- information it obtains from wholesalers, various internet sources and provider invoices -- plus a markup.²⁰ Likewise, Wisconsin reimburses for physician-administered drugs at their Average Sales Price (ASP), a figure defined by statute²¹ and reported by manufacturers, plus an additional 6%.²²

The Government Choice Evidence collected to date also shows that despite knowing for over 25 years that its AWP-based reimbursement overestimates the acquisition costs providers pay for drugs,²³ Plaintiff nonetheless continued to use AWP as a reimbursement benchmark.²⁴ This decision appears to be due, in part, to Wisconsin's influential pharmacy lobby, which has repeatedly argued that pharmacies need to be reimbursed at an amount that exceeds the ingredient cost because the dispensing fees paid by Wisconsin Medicaid

profit margin, yes."); *see also* Governor's Commission on Pharmacy Reimbursement, Final Report at 7 (Mar. 30, 2006) (attached as Exhibit 5) (noting that the Commission "sought to balance the interests of various stakeholders," including pharmacists' interest "to be provided with sufficient reimbursement to cover their costs of doing business, i.e., the cost of the drug (ingredient cost), and the costs of dispensing *and some profit margin.*") (emphasis added); Letter from Wisconsin Lt. Gov. Martin Schreiber to FDA, HEW (Feb. 7, 1975) (attached as Exhibit 6) ("Pharmacists, of course, must be allowed reasonable profits in their Medicaid business."); E-mail from T. Collins to C. Gray (Feb. 26, 2003, 4:25 pm) (attached as Exhibit 7) (setting the MAC for a particular drug at \$.60, despite the fact that prices currently ranged from \$.37 to \$.49, and noting that "we let them make a few bucks").

²⁰ Governor's Pharmacy Reimbursement Commission, Briefing Papers at 7 (Nov. 17, 2005) (excerpt attached as Exhibit 8); Transcript of Deposition of Theodore Collins ("Collins Deposition") at 72, 74-76 (Oct. 30, 2007)(excerpts attached as Exhibit 9).

²¹ *See* 42 U.S.C. § 1395w-3a(c).

²² *See* Vavra Deposition at 137:22-138:14 (Ex. 4).

²³ *See, e.g.,* 2/7/1975 Schreiber Letter (Ex. 6) (noting that AWP methodology "may allow for excess expenditures of public money."); Letter from Wisconsin Lt. Gov. Martin Schreiber to Members of the Task Force on Medicaid Pharmacy Reimbursement (Dec. 18, 1975) (attached as Exhibit 19) ("once again pegging reimbursements to the highly-suspect AWP figure published in trade publications . . . will result in increased Medicaid expenditures and will fail as long-term management techniques.").

²⁴ *See* Vavra Deposition at 452:12-15 (Ex. 4); DHFS 2005-2007 Budget Issue Summary at 2 (attached as Exhibit 20).

are inadequate.²⁵ The Government Choice evidence also shows that, contrary to Plaintiff's allegations, Plaintiff did not rely on FDB's AWP's as representing actual averages of wholesale prices;²⁶ that it had access to actual cost information that it could have used to estimate the acquisition cost of drugs;²⁷ and that it did not use AWP's in setting

²⁵ See e.g., Memorandum from Christine Nye, Director, Bureau of Health Care Financing ("BHCF") to George MacKenzie, Administrator, Division of Health (June 26, 1989) (attached as Exhibit 21) ("BHCF acknowledges that AWP is inflated, but argues that total payments are not excessive because dispensing fees are artificially low and off-set the over allowance."); Legislative Fiscal Bureau ("LFB") Paper #474, Reimbursement Rates for Prescription Drugs (June 4, 2001) (attached as Exhibit 22) ("The margin between the acquisition cost and the reimbursement rate, together with the dispensing fee, represents the pharmacies' total reimbursement for service costs."); LFB Paper #389, Prescription Drug Reimbursement Rates at 4-5 (May 21, 2003) (attached as Exhibit 23) (examining reimbursement for product cost and dispensing cost together, and noting that the Pharmacy Society of Wisconsin has argued that dispensing fees are insufficient); LFB Paper #371, Prescription Drug Reimbursement Rates, May 26, 2005 (attached as Exhibit 24) (same); Vavra Deposition at 331-37 (Ex. 4) (noting that LFB is "looking at the reimbursement as a whole"); Letter from L. Reivitz to B. Gagel, HCFA (June 10, 1985) (attached as Exhibit 25) (noting that "Wisconsin's dispensing fee is too low if actual drug cost is used[,] and that "[s]ome other states have lower dispensing fees, but their more generous use of AWP based pricing may offset this"); Memorandum from C. Nye to G. Mackenzie (Nov. 18, 1988) (attached as Exhibit 26) ("Since drug reimbursement consists of the sum of two parts, and HCFA is currently reviewing and reducing only the allowed drug cost portion, an imbalance is introduced if the dispensing fee portion is not evaluated at the same time. ... Additionally, implementation of an additional HCFA required rate cut regarding allowed cost, without a corresponding adjustment to dispensing fees, will not be acceptable to pharmacy providers.").

²⁶ See Gray Deposition at 112-113 (Ex. 11); See also, 1/6/2005 Gebhart Email (Ex. 2); E-mail from T. Collins to A. White (Feb. 24, 1998, 3:07 pm) (attached as Exhibit 10) ("referring to AWP as "ain't what's paid"); Collins Deposition at 165-66 (Ex. 9) (stating that "ain't what's paid" was "commonly used" in connection with AWP within Wisconsin Medicaid since at least 1998). Tellingly, Wisconsin has reimbursed at a percentage below AWP since 1990, and currently reimburses at AWP- 13%. See Vavra Deposition at 394:16-21, 452:12-15 (Ex. 4). If Wisconsin truly believed that FDB's AWP's represented actual average prices for drugs, and believed what it claims in its Motion, it currently would be reimbursing providers on average 13 % below the "price generally and currently paid by providers for a drug," and thus (according to Plaintiff) would be in violation of a federal regulation.

²⁷ See Transcript of Deposition of Carrie Gray ("Gray Deposition") at 53:9-16, 54-60, 82-84 (Sept. 27, 2007) (excerpts attached as Exhibit 11) (indicating that DHFS had access to pricing information from wholesalers such as Cardinal, McKesson and F. Dohmen; internet sources such as IPC and VetNet; and invoices submitted directly by providers); Collins Deposition at 63:19-64:3 (Ex. 9).

reimbursement amounts for most generic drugs precisely because it understood that FDB's AWP's did not represent an actual average of drug prices.²⁸

In addition to the allegations in its Complaint, Plaintiff makes a number of factual misstatements in its Motion, further underscoring the need for discovery that will enable Defendants to rebut these, and other, incorrect factual assertions. For example, Plaintiff asserts that Wisconsin Medicaid employees were "buffaloed by defendants' phony prices," when the limited evidence collected so far clearly demonstrates that Wisconsin Medicaid had access to a variety of pricing information for Defendants' drugs showing actual prices paid by providers.²⁹ Plaintiff also claims that Defendants "assuredly never" disclosed that FDB's AWP's did not represent actual prices,³⁰ when the evidence collected to date shows otherwise.³¹

2. Government Choice Evidence Is Relevant To Disproving Plaintiff's Claims.

Government Choice Evidence also is relevant to Plaintiff's claims alleging violations of Wisconsin Statutes §§ 100.18, 133.05, 49.49, as well as its claim of unjust enrichment.

Evidence that would tend to prove or disprove any of the elements of these claims is

²⁸ Collins Deposition at 160-65 (Ex. 9); Wisconsin Pharmacy Cost Containment, Maximum Allowable Cost (MAC) Program at 2 n.2 (attached as Exhibit 12) ("Wisconsin MAC prices are, on average, approximately 65% below AWP").

²⁹ See, e.g., Gray Deposition at 53:9-16, 54-60, 82-84 (Ex. 11) (indicating that DHFS had access to pricing information from wholesalers such as Cardinal, McKesson and F. Dohmen; internet sources such as IPC and VetNet; and invoices submitted directly by providers); see also 2/24/1998 Collins E-mail (Ex. 10) (indicating that F. Dohmen was selling a particular drug at "a small fraction of the AWP"); E-mail from T. Collins to C. Gray (Aug. 28, 2000, 4:55 pm) (attached as Exhibit 13) (indicating that the WAC price for a particular drug was "seven times the IPC price," and that DHFS had access to pricing data from McKesson).

³⁰ Plaintiff's Brief at 16.

³¹ See, e.g., Letter from Novartis to Roma Rowlands (Oct. 28, 1999) (attached as Exhibit 14); Letter from Bristol-Meyers Squib to Roma Rowlands (Mar. 14, 2000) (attached as Exhibit 15); Letter from Amgen to Roma Rowlands (Mar. 28, 2002) (attached as Exhibit 16); Letter from Schering Plough to Roma Rowlands (Oct. 3, 2002) (attached as Exhibit 17); Memorandum from P. Handrich to M. Gajewski, (Dec. 13, 2002) (attached as Exhibit 18) (enclosing letters from Genzyme and Baxter expressing "concerns related to the determination of Average Wholesale Pricing (AWP) from FDB").

relevant under the Wisconsin discovery standard, and therefore discoverable. Below, Defendants set forth examples of these elements, and discuss evidence that would be relevant to disproving them, demonstrating that the Government Choice Evidence Plaintiff wishes to preclude by its Motion is manifestly relevant to the case at hand.

a. Deceptive Trade Practice Claims—Wis. Stat. § 100.18(1)

Government Choice Evidence is relevant to Plaintiff's Wis. Stat. § 100.18(1) claim, which requires Plaintiff to prove, in part, that any alleged representation "materially induced" Plaintiff to purchase Defendants' drugs, and that Plaintiff would have acted differently if not for Defendants' representations.³² Consequently, Plaintiff needs to prove, among other things, that it relied on Defendants' representations;³³ that the published AWP for Defendants' drugs influenced Plaintiff's decision to reimburse providers for those drugs; and that it would have acted differently but for Defendants' alleged misrepresentations.³⁴ Defendants are entitled to discover evidence that disproves each of these points and Government Choice Evidence is relevant to all of them.

In addition to evidence suggesting that Plaintiff did not rely on FDB's AWP, evidence concerning the reasonableness of Plaintiff's alleged reliance also is relevant to

³² *K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, ¶¶ 35-37 (2007) (internal citations omitted) (finding that "proving causation in the context of §100.18(1) requires a showing of material inducement" and explaining that "the test is whether (plaintiff) would have acted in [the misrepresentation's] absence.") (quoting Wis. Jury Instr. 2418, attached as Exhibit 27).

³³ Although the case cited by Plaintiff – a New Mexico Court of Appeals case interpreting a New Mexico consumer protection statute – holds that reliance is not required, numerous Wisconsin courts, including the Wisconsin Supreme Court, have held otherwise. *See, e.g., K&S Tool & Die Corp.*, 2007 WI 70, ¶ 36 ("the reasonableness of a plaintiff's reliance may be relevant in considering whether the representation materially induced the plaintiff's pecuniary loss"); *Werner v. Pittway Corp.*, 90 F. Supp.2d 1018, 1034 (W.D. Wis. 2000) (dismissing a §100.18 claim on the grounds that plaintiffs "did not rely on any statements from defendants regarding" a defective carbon monoxide detector); *Ball v. Sony Electronics, Inc.*, No. 05-C-307-S, 2005 WL 2406145 at *3 (W.D. Wis. Sept. 28, 2005) (plaintiff must demonstrate reliance to satisfy § 100.18).

³⁴ Significantly, Wisconsin continues to reimburse brand name drugs based on a percentage from AWP. *See* Vavra Deposition at 394:16-21, 452:12-15 (Ex. 4).

Plaintiff's § 100.18 claim. The Wisconsin Court of Appeals has held that although "reasonable reliance" is not an element of a § 100.18 claim, the reasonableness of purchaser's reliance may "be considered by a jury in determining whether 'the purchaser in fact relied' on the seller's representation."³⁵ Government Choice Evidence concerning the reasonableness of Plaintiff's reliance, thus, is appropriate to discover and present to the Court (or a jury) in deciding whether Plaintiff in fact relied on FDB's AWP's at all, as it alleges.

Moreover, the Wisconsin Supreme Court recently accepted review of a Court of Appeals decision on the issue of whether "reasonable reliance" is a required element of a § 100.18 claim.³⁶ Because that case leaves open the possibility that this Court (or a jury) could examine whether Plaintiff reasonably relied on FDB's AWP's in determining liability on a § 100.18 claim, Government Choice Evidence concerning whether Plaintiff relied on published prices, and whether such reliance was reasonable given the plethora of information suggesting otherwise, is clearly relevant, and therefore discoverable. Certainly, the Court would not want to bar discovery of "reasonable reliance" evidence now while the Wisconsin Supreme Court is currently considering whether "reasonable reliance" is required under § 100.18. Were the Court to do so and be incorrect in predicting the outcome of that case, Defendants would be compelled to seek this discovery at a later date, unnecessarily delaying the case.

Government Choice Evidence also is relevant to disproving the other elements necessary to establish liability under § 100.18(1), including establishing that Defendants

³⁵ *Malzewski v. Rapkin*, 2006 WI App 183, ¶ 24, Dissent ¶ 28 (citing *K&S Tool & Die Corp.*, 2006 WI App. 148, ¶¶ 39-45).

³⁶ *Novell v. Migliacco*, No. 2005AP2852 (Wis. Ct. App. October 17, 2006) (quoting *Malzewski v. Rapkin*, 296 Wis. 2d 98, 116-17 (Wis. Ct. App. 2006)).

did not represent, as Plaintiff's claims, that FDB's AWP represented actual average wholesale prices and that FDB's AWP's were. "untrue, deceptive, or misleading."³⁷

b. Secret Rebate Claim—Wis. Stat. § 133.05

Government Choice Evidence also is relevant to Plaintiff's claim that Defendants violated Wis. Stat. § 133.05, which provides that:

"The secret payment or allowance of rebates, refunds, commissions, or unearned discounts . . . injuring or tending to injure a competitor or destroying or tending to destroy a competitor, is an unfair trade practice and is prohibited."

The statute covers only "secret rebates," and not "rebates" of which Plaintiff has knowledge yet chooses to disregard.³⁸ The Wisconsin Court of Appeals has defined "secret" to mean that which is "kept from knowledge or view; concealed, hidden."³⁹ Government Choice Evidence is relevant to whether rebates and discounts from FDB's AWP's were kept from Plaintiff's knowledge and thus, "secret."

Discovery obtained thus far shows that Plaintiff, in fact, was aware of rebates and discounts given to Medicaid providers. Plaintiff received and reviewed numerous federal reports, some as far back as 1984, consistently concluding that the published AWP's did not reflect the rebates and discounts providers were receiving.⁴⁰ In 1995, Plaintiff reviewed a publication by its Department of Agriculture and Consumer Protection, which discusses in detail the availability of rebates, discounts and chargebacks to pharmaceutical providers.⁴¹ In 2001, Plaintiff commissioned Dr. David Kreling to determine the estimated acquisition

³⁷ *K&S Tool & Die Corp.*, 2006 WI App. 148, ¶ 29 (Wis. Ct. App. 2006) (internal citations omitted). See also, *Tietsworth v. Harley-Davidson Inc.*, 270 Wis. 2d 146, 170 (2004) ("[s]ilence – an omission to speak – is insufficient to support a claim under Wis. Stat. § 100.18(1)").

³⁸ *Jauquet Lumber Co. v. Kolbe & Kolbe Millwork Co.*, 164 Wis.2d 689, 698 (Wis. Ct. App. 1991)

³⁹ *Id.*

⁴⁰ Vavra Deposition at 474, 479, 482-515 (Ex. 4) (noting that these reports, and others, were received and reviewed by DHFS).

⁴¹ See Wisconsin Department of Agriculture, Trade and Consumer Protection Division, *Wholesale Pricing of Prescription Drugs In Wisconsin*, July 28, 1995 at 20-21 (attached as Exhibit 28); Vavra Deposition at 131-32 (Ex. 4).

costs for drugs by Wisconsin providers.⁴² Dr. Kreling concluded that the estimated acquisition costs for drugs, taking into account rebates and discounts, was approximately 17.54% to 17.58% below AWP for brand name drugs and 74.44% to 76.16% below AWP for generic drugs.⁴³ Additional discovery taken by Defendants suggests that Plaintiff has had access to actual cost information (either directly from the providers or through a wholesaler) over the years,⁴⁴ demonstrating it had knowledge of discounts and rebates. Clearly, Government Choice Evidence is relevant to disproving this claim and thus discoverable.

c. *Medical Assistance Fraud Claim—Wis. Stat. § 49.49(4m)(a)(2)*

Government Choice Evidence also is relevant to disproving a number of elements of Plaintiff's claims that Defendants have violated Wis. Stat. § 49.49(4m)(a)(2), which prohibits any person, "in connection with a medical assistance program" from:

"Knowingly mak[ing] or caus[ing] to be made any false statement or representation of a material fact for use in determining rights to such [medical assistance] benefit or payment."

Government Choice Evidence is relevant, for example, to disproving that Defendants made "false" statements. Courts construing the "falsity" requirement under analogous federal and state statutes have noted that "imprecise statements or differences in interpretation growing out of a disputed legal question are [] not false."⁴⁵ Thus, evidence reflecting Plaintiff's understanding of AWP is relevant to determining whether, at the very least, there are reasonable differences in the parties' understanding of "AWP."

⁴² DAVID H. KRELING, PHARMACY COST OF DISPENSING/ACQUISITION COST STUDY at 4 (Mar. 6, 2002) (attached as Exhibit 29).

⁴³ *Id.* at 3.

⁴⁴ *See, e.g.*, Gray Deposition at 53:9-16, 54-60, 82-84 (Ex. 11) (indicating that DHFS had access to pricing information from wholesalers such as Cardinal, McKesson and F. Dohmen; internet sources such as IPC and VetNet; and invoices submitted directly by providers); Collins Deposition at 63:19-64:3 (Ex. 9)(same).

⁴⁵ *U.S. ex rel. Englund v. Los Angeles County*, 2006 WL 3097941 at *11 (E.D. Cal. Oct. 31, 2006) (quoting *U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018) (7th Cir. 1999)).

Government Choice Evidence also is relevant to disproving Plaintiff's claims that Defendants' statements were material. Wisconsin courts interpreting materiality in the context of other provisions of the medical assistance fraud statute have found that the key issue in determining materiality is whether the false statements affected the amount of benefits or payments to be made.⁴⁶ Similarly, cases interpreting analogous federal statutes with materiality requirements have found that government knowledge of falsity can render statements immaterial for liability purposes.⁴⁷ Accordingly, evidence reflecting that Plaintiff was aware that AWP was a term of art and that FDB's AWP's did not represent actual average prices paid by providers, and chose to use AWP-based reimbursement formulas notwithstanding that knowledge, is directly relevant to whether the alleged misstatements were material under Wis. Stat. § 49.49(4m)(a)(2).

Government Choice Evidence also is relevant to disproving the other elements necessary to establish liability under § 49.49(4m)(a)(2), including Plaintiff's claim that AWP's were important *in determining rights* to a benefit under Medicaid, as required by § 49.49(4m)(a)(2).

d. Unjust enrichment claim

Government Choice Evidence also is relevant to Plaintiff's claims that Defendants were unjustly enriched. A claim of unjust enrichment requires, among other things, a

⁴⁶ See *State v. William*, 179 Wis.2d 80, 87-88 (Wis. Ct. App. 1993) ("If the statements had no legal effect, the court could determine as a matter of law that the false statements were not material.")

⁴⁷ *Lamers*, 168 F.3d at 1019 (holding that statements made to Federal Transportation Authority concerning the characterization of bus routes were immaterial to the government's funding decision because the FTA was "fully apprised" of the city's bus route design and had approved funding nevertheless); *U.S. ex rel Costner v. United States*, 317 F.3d 883, 887 (8th Cir. 2003) (holding that the materiality requirement was not met because "although the EPA undisputedly was informed of the operational problems from at least three sources, it nonetheless continued to approve monthly payments.")

showing that Defendants inequitably retained a benefit.⁴⁸ If Defendants can prove that Plaintiff knew that AWP did not reflect the actual averages of wholesale prices, but continued to reimburse Medicaid providers based on AWP, something the discovery thus far shows,⁴⁹ they can rebut Plaintiff's claims that Defendants were "unjustly" enriched. This argument would be further strengthened to the extent the evidence reveals (which it does)⁵⁰ that Plaintiff purposely used the "spread" between acquisition cost and a discounted AWP as a way to incentivize Medicaid providers to provide care to Medicaid recipients or as a "cross-subsidy" for inadequate dispensing fees, thereby furthering the goals of the Medicaid program. Accordingly, Government Choice Evidence clearly is relevant to Defendants' ability to defend against Plaintiff's unjust enrichment claim and thus discoverable.

C. Government Choice Evidence is Relevant to Defendants' Affirmative Defenses.

Defendants also are entitled to Government Choice Evidence because it is relevant to many of their potential affirmative defenses. In its brief, Plaintiff mischaracterizes Defendants' potential affirmative defenses for which Government Choice Evidence may be relevant, arguing that none of them – at least the few that Plaintiff chooses to discuss – are viable, and as such, that Defendants are not entitled to Government Choice Evidence in support of them. Importantly, however, Defendants have not yet decided which defenses

⁴⁸ See *Tri-State Mech., Inc., v. Northland Coll.*, 273 Wis. 2d 471, 479 (Wis. Ct. App. 2004); *Puttkammer v. Minth*, 83 Wis. 2d 686, 689 (1978)(requiring proof that retention of any alleged benefit is "inequitable" or "unjust.").

⁴⁹ See, e.g., 12/18/1975 Schreiber Letter (Ex. 19) ("once again pegging reimbursements to the highly-suspect AWP figure published in trade publications . . . will result in increased Medicaid expenditures and will fail as long-term management techniques."); Memorandum to Medicaid Pharmacy Task Force from R. Durkin at 3 (Jan. 16, 1976) (attached as Exhibit 30) ("it was the conclusion of the task force that Blue Book prices overstate actual drug costs.").

⁵⁰ See, e.g., 6/26/1989 Nye Memorandum (Ex. 21) ("[Bureau of Health Care Financing] acknowledges that AWP is inflated, but argues that total payments are not excessive because dispensing fees are artificially low and off-set the over allowance.").

upon which they may or may not rely. Discovery must be completed before a proper assessment of each defense can be made. Although Defendants have not yet decided what affirmative defenses they ultimately may raise, the following three defenses illustrate the relevance of Government Choice Evidence to just some of Defendants' potential defenses: (a) statute of limitations defense, (b) limitation of damages under Wis. Stat. § 49.49 defense, and (c) Plaintiff's failure to mitigate defense.⁵¹

1. Statute of Limitations Defense

Government Choice Evidence is relevant to Defendants' ability to assert a statute of limitations defense because Plaintiff's knowledge concerning AWP is central to determining when Plaintiff's cause of action accrued for statute of limitations purposes. By way of example, Plaintiff's fraud claims in this action, such as its Medical Assistance Fraud claim, are governed by Wisconsin Statute § 893.93(1)(b) which bars an action based on fraud unless the action is "commenced within 6 years after the cause of action accrues."⁵² Such an action accrues upon "the discovery, by the aggrieved party, of the facts constituting the

⁵¹ Additionally, depending on what the evidence culled from the discovery process may show – and indeed, discovery thus far has already suggested as much – Defendants may choose to argue that this case represents a non-justiciable political question, especially if strong evidence is uncovered showing a significant and/or purposeful role taken by the Wisconsin legislative and executive branches in developing drug reimbursement methodology. *Mills v. County Bd. Of Adjustments*, 261 Wis. 2d 598, 608 (Wis. Ct. App. 2003) (political question doctrine is "invoked by courts declining to address issues better left resolved by other branches of government.). In support of this argument, evidence showing that the Wisconsin legislature and executive branch purposefully based Medicaid reimbursement on AWP with knowledge that AWP is greater than acquisition cost in order to carry out considered policy decisions – to, for example, subsidize under-reimbursement for dispensing fees or to ensure access for Medicaid beneficiaries or satisfy a potent pharmacists' lobby – would clearly be relevant.

⁵² Contrary to Plaintiff's assertion in its Motion, its Medicaid fraud claim is governed by the limitations period set out in Wis. Stat. § 893.93, which states that an action based on fraud is barred unless "commenced within 6 years after the cause of action accrues." See Plaintiff's Brief at 17 (erroneously asserting that a 10-year limitations period applies to Plaintiff's §49.49 Medicaid fraud claim). Plaintiff's civil claims for damages under § 133.05 are also subject to a six-year limitations period. Wis. Stat. § 133.18(2).

fraud.”⁵³ Here, Defendants will argue that Plaintiff’s fraud-based causes of action accrued when the State of Wisconsin first learned, or was on inquiry notice, that AWP’s did not represent actual average wholesale prices of drugs.⁵⁴ Evidence relating to when the State learned this information is relevant to this defense. Indeed, if Defendants can prove that, prior to June 3, 1998,⁵⁵ the State was aware, or through reasonable diligence would have been aware, that AWP’s did not represent an actual averages of wholesale prices, and that actual prices were, in fact, less than AWP’s, then Wisconsin’s claims based on fraud may be barred. Evidence of this nature has already been uncovered through the discovery process,⁵⁶ prompting Defendants’ belief that Plaintiff may possess additional evidence that supports Defendants’ statute of limitations defense.

Kolpin v. Pioneer Power & Light Company Inc.,⁵⁷ cited by Plaintiff for the proposition that Defendants have no viable statute of limitations argument,⁵⁸ is inapposite.

⁵³ Wis. Stat. § 893.93(1)(b); *Kohl v. F.J.A. Christiansen Roofing Co.*, 95 Wis. 2d 27, 32 (Wis. Ct. App. 1980) (“The statute of limitations in a fraud action begins to run from the time the fraud is first discovered.”) (citing Wis. Stat. § 893.19(7)); see also *Kypke v. Atterbury, Riley & Luebke, S.C.*, 2003 WL 22724764, *1 (Wis. Ct. App. 2003) (“[A] cause of action accrues when the plaintiff discovered or, in the exercise of reasonable diligence, should have discovered his injury, its nature, its cause and the identity of the allegedly responsible defendant.”)(quoting *Carlson v. Pepin County*, 167 Wis. 2d 345 (Wis. Ct. App. 1992)).

⁵⁴ In Wisconsin, for causes of action sounding in fraud, “it is not necessary that a defrauded party have knowledge of the ultimate fact of fraud. What is required is that it be in possession of such essential facts as will, if diligently investigated, disclose the fraud.” See *Milwaukee Western Bank v. A.A. Lienemann*, 15 Wis. 2d 61, 65 (1961); see also, *Koehler v. Haechler*, 27 Wis. 2d 275, 278 (1965) (finding that the “burden of diligent inquiry is upon the defrauded party as soon as he has such information as indicates where the facts constituting the fraud can be discovered.”); *Stroh Die Casting Co. v. Monsanto Co.*, 177 Wis. 2d 91, 117-118 (Wis. Ct. App. 1993), review denied, 505 N.W.2d (Wis. 1993) (finding that a diligent investigation is required for fraud claim).

⁵⁵ The original complaint in this action was filed on June 3, 2004. Thus, if the cause of action accrued prior to June 3, 1998, six years before the filing of the complaint, then the complaint would have been filed out of time for these claims.

⁵⁶ See, e.g., Gray Deposition at 53:9-16, 54-60, 82-84 (Ex. 11) (indicating that DHFS had access to pricing information from wholesalers such as Cardinal, McKesson and F. Dohmen; internet sources such as IPC and VetNet; and invoices submitted directly by providers); Collins Deposition at 63:19-64:3 (Ex. 9)(same); Vavra Deposition at 474, 479, 482-515 (Ex. 4) (noting that DHFS received and reviewed numerous federal reports indicating that AWP did not represent an actual average of wholesale prices).

⁵⁷ 162 Wis. 2d 1, 21-25 (1991).

Kolpin was an action for negligence, not fraud.⁵⁹ The *Kolpin* court was not even addressing a situation where there had been a continuing course of negligence, but merely concluded that the continuum of negligence theory did not apply because the plaintiffs' loss was attributable to a single act of negligence.⁶⁰ Importantly, while Wisconsin Courts do recognize a doctrine of continuing negligence, the doctrine is only applicable to negligence cases, and has never been expanded to include other tort actions, such as actions for fraud.⁶¹ There is simply no reason for this Court to expand the scope of the continuing negligence doctrine now, and certainly not in the context of a discovery motion.⁶²

2. Damages Are Limited Under Wis. Stat. § 49.49 Defense.

Government Choice Evidence also is relevant to a potential defense that any alleged damages are limited under Wis. Stat. § 49.49. As discussed above, Plaintiff has alleged that by “publishing false and inflated wholesale prices” Defendants have “knowingly made

⁵⁸ Plaintiff's Brief at 16-18.

⁵⁹ 162 Wis.2d 1.

⁶⁰ *Id.*

⁶¹ Indeed, there are compelling reasons for confining the “continuing course of negligence” theory to a finite subset of cases – in part due to a strong judicial preference for adherence to the purposes and policies of the statute of limitations. *See, e.g., John Beaudette, Inc. v. Sentry Ins.*, 94 F.Supp.2d 77, 107 (D. Mass. 1999) (“Massachusetts courts limit [the continuing tort doctrine] to actions in nuisance and trespass...The reluctance of Massachusetts courts to extend the theory beyond nuisance and trespass actions is based upon a strong judicial preference to adhere to the purposes and policies of the statute of limitations.”); *see also White's Farm Dairy, Inc. v. De Laval Separator Co.*, 433 F.2d 63, 67 (1st Cir. 1970) (Massachusetts confines continuing tort theory “to instances of nuisance and trespass”); *see also Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F.Supp. 358, 363-364 (D. Mass. 1985) (noting Massachusetts courts' reluctance to extend the theory beyond nuisance and trespass actions), *aff'd*, 814 F.2d 775 (1st Cir. 1987).

⁶² Plaintiff's secondary argument that application of the six-year statute of limitations means that, “at most, defendants' e-mail search must be limited to the period prior to 1998,” is nonsensical. *See* Plaintiff's Brief at 18. There is no reason to presume that documents created after 1998 would not reference the State's knowledge at earlier points in time. Indeed, all evidence is to the contrary. *See, e.g.,* Letter from Governor McCallum to Al Bennin, Walgreens (Mar. 14, 2001) (attached as Exhibit 31) (stating that “[a] 1997 report [from OIG] found that pharmacies generally obtain brand name drugs from their wholesaler at an average price of AWP minus 18.3 percent.”); LFB Paper #479, Drug Reimbursement (DHFS – Medical Assistance) at 3 (June 1, 1999) (attached as Exhibit 32) (referencing the 1997 OIG report).

or caused to be made false statements or representations of material fact for use in the determination and calculation of payment by the Wisconsin Medicaid Program in violation of Wis. Stat. § 49.49(4m)(a)(2).” In the event of a finding of liability under § 49.49, the statute provides damages should be based upon “an amount reasonably necessary to remedy the harmful effects of the violation[.]”⁶³

Case law interpreting analogous federal statutes has measured such damages as “the amount the Government would not have paid had it known the true facts.”⁶⁴ As such, if it can be demonstrated that Plaintiff knew “the true facts” (*i.e.*, that AWP does not represent actual acquisition costs), and yet chose to use AWP in its Medicaid reimbursement formula to further the goals of the program,⁶⁵ Defendants can argue that no damages, or lesser damages, should be recoverable under this provision. Government Choice Evidence is plainly relevant to this affirmative defense.

3. Plaintiff’s Failure to Mitigate Defense

Government Choice Evidence also is relevant to a potential defense that Plaintiff failed to mitigate its damages, and thus that damages should be reduced by the extent of Plaintiff’s failure to mitigate. “An injured party must take all reasonable steps to mitigate damages.”⁶⁶ While there is no explicit duty to mitigate contained in the statutory

⁶³ Wis. Stat. § 49.49(6).

⁶⁴ *U.S. v. Cabrera-Diaz*, 106 F.Supp.2d 239, 239 (D.P.R. 2000) (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)). In addition, case law interpreting the False Claims Act has limited the amount of forfeitures recoverable due to “fairness” concerns, including the amount of actual damages suffered by the government. *See U.S. ex rel. Virgin Islands Housing Authority v. Coastal General Const. Services Corp.*, 299 F.Supp.2d 483, 489 (D.V.I. 2004) (assessing the minimum possible civil penalties in part because the government suffered no actual damages and the defendant had never actually been paid on his false claims).

⁶⁵ Indeed, discovery to date has produced at least some evidence in this regard. *See* testimony and documents cited *supra*, note 19.

⁶⁶ *Handicapped Children’s Educ. Bd. of Sheboygan County v. Lukaszewski*, 112 Wis. 2d 197, 207-208 (1983); *see also Langreck v. Wisconsin Lawyers Mut. Ins. Co.*, 226 Wis. 2d 520, 524-525 (Wis. Ct. App. 1999) (“An injured party has a duty to use reasonable means under the circumstances to avoid or minimize his or her damages.”); *Kuhlman, Inc. v. G. Heileman*

provisions under which Plaintiff has asserted claims, the duty to mitigate has been applied under the consumer protection acts of other jurisdictions.⁶⁷ Moreover, Wisconsin Courts have long recognized a plaintiff's duty to mitigate damages in common-law tort actions.⁶⁸

Here, discovery has already uncovered evidence showing that Plaintiff was well aware of, and considered, potential changes to its drug reimbursement methodology, that could potentially result in enormous cost savings yet were not adopted by Plaintiff.⁶⁹ The evidence further suggests that many of these changes would have been simple, straightforward and cost-effective to implement. Defendants seek further discovery of information reflecting Plaintiff's knowledge regarding other drug reimbursement

Brewing Co., Inc., 83 Wis. 2d 749, 752 (1978) ("An injured party has a duty to mitigate damages, that is, to use reasonable means under the circumstances to avoid or minimize the damages. An injured party cannot recover any item of damage which could have been avoided.").

⁶⁷ See, e.g., *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 857 (Tex. 1999) (holding that common-law duty to mitigate principles clearly apply to claimants under the Texas Deceptive Trade Practices-Consumer Protection Act); see also *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 72 F.3d 190, 204-05 (1st Cir. 1995) (imposing duty to mitigate in a case brought under Massachusetts consumer protection laws, Chapter 93A actions, and writing "[t]he general principle is well settled that a party cannot recover for harms that its own reasonable precautions would have avoided."); *DiVenuti v. Reardon*, 637 N.E.2d 234, 236 (Mass. App. Ct. 1994) ("Chapter 93A of the General Laws 'is not designed or intended to throw out all concepts of reasonableness and mitigation or to allow injured parties to turn their backs on reasonable, probable, and practical dispute resolution so they can conduct a prolonged quest for the mother lode.'") (quoting trial judge); *Savers Property & Cas. Ins. Co. v. Admiral Ins. Agency, Inc.*, 807 N.E.2d 842, 849-850 (Mass. App. Ct. 2004) (affirming imposition of duty to mitigate when plaintiff was on notice of potential liability and "had a duty to investigate the matter further, plan a course of action . . . [and] should have spurred [the plaintiff] into immediate action."); *Cambridge Plating Co., Inc. v. Napco, Inc.*, 85 F.3d 752 (1st Cir. 1996) (vacating and remanding the damages award based on plaintiff's "wrongful conduct in failing to mitigate.").

⁶⁸ See, e.g., *O'Brien v. Isaacs*, 17 Wis. 2d 261, 266-267 (1962) ("That a plaintiff must do all that is reasonable to minimize damages after a tort or breach of contract has occurred is well established.").

⁶⁹ See, e.g., DHFS 1999-2001 Biennial Budget Issue Paper at 3 (June 2, 1998) (attached as Exhibit 33) ("It is estimated that each percentage increase in the discount rate to AWP will generate cost savings of \$1.3 million in all funds. Increasing the discount rate would bring Wisconsin MA payments more in line with the actual cost of drugs to the provider."); DHFS 2001-2003 Biennial Budget Issue Paper at 3 (Sept. 22, 2000) (attached as Exhibit 34) (estimating cost savings for each percentage discount from AWP); LFB Paper #474 at 5 (Ex. 22) (same); LFB Paper #479 at 5 (Ex. 23) (same); Vavra Deposition at 416 (Ex. 4) (noting that the Governor and the Wisconsin legislature would have been apprised of the savings available from these reimbursement alternatives).

methodologies available to it, including the potential costs and savings of those methods, the processes and procedures necessary to implement changes to the reimbursement formula, and Plaintiff's reasons for choosing to continue using AWP-based reimbursement. Such evidence would support Defendants' mitigation of damages arguments, and is clearly relevant for such a purpose.

D. Plaintiff Improperly Assesses the Viability of Potential Defenses and Mischaracterizes Facts.

Plaintiff's comments on the merits of selected defenses are inappropriate in the context of a discovery motion. Furthermore, its conclusions regarding the viability of those defenses – at least the few Plaintiff saw fit to address – are erroneous. Plaintiff also mischaracterizes the facts upon which Defendants' potential Government Choice defenses rely, cites to inapplicable or easily distinguished case law for its erroneous proposition that no defense based on Government Choice Evidence could possibly be successful against the State of Wisconsin, and ignores cases in which defenses based on evidence of government knowledge or choice have been used successfully against various governmental entities.

1. Discovery of Government Choice Evidence has been allowed to proceed in other AWP-related cases.

Plaintiff argues that “[t]he courts that have directly come to grips with [the issue of Government Choice Evidence] have held that government knowledge is not a valid defense in any shape or form in three different contexts.”⁷⁰ In fact, and contrary to Plaintiff's assertion, discovery relating to Government Choice has been allowed in a number of AWP-related cases, including in the *In re Pharmaceutical Industry Average Wholesale Price*

⁷⁰ Plaintiff's Brief at 19-20.

Litigation multi-district litigation (“MDL”) presided over by Judge Saris,⁷¹ as well as in the Alabama state AWP action.

Government knowledge evidence has also influenced rulings. In the MDL, for example, Judge Saris rejected plaintiffs’ position that defendants acted unfairly and deceptively by tolerating any spread between the published AWP and the true average of prices charged to providers, because for brand name drugs, “the *government* and industry were well aware by the late 1990’s that there was a 20 to 25% spread.”⁷² Similarly, Judge Saris ruled that the federal government’s knowledge, as well as the knowledge of third-party payor plaintiffs, was relevant to determining when to apply the statute of limitations, finding that these payors knew, or should have known, by at least 1997 that AWP was not an actual average of wholesale prices.⁷³

The New Jersey,⁷⁴ Texas⁷⁵ and New York⁷⁶ cases cited by Plaintiff for the proposition that “government knowledge is not a valid defense in any shape or form”⁷⁷ are all easily

⁷¹ *In re: Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, Civil Action No. 01-12257-PBS (Saris, J. D.Mass).

⁷² Findings of Fact & Conclusions of Law at 7, *In re Pharmaceutical Industry* (D. Mass. August 27, 2007) (excerpt attached as Exhibit 35) (emphasis added).

⁷³ *Id.* at pp. 6, 109.

⁷⁴ The New Jersey ruling (Plaintiff’s Exhibit F) is distinguishable because it involved a motion *in limine* to preclude defendants from presenting government knowledge evidence at trial. As discussed above, information that is the proper subject of discovery may or may not be admissible at trial. Presently, Defendants are seeking pre-trial discovery, nothing more. The admissibility of evidence obtained by this discovery will be determined later. Moreover, in the New Jersey case, defendants sought to impute government knowledge to third party plaintiffs. By contrast, here, Defendants seek to discover information regarding *Plaintiff’s own knowledge*, which is directly relevant to this case as Plaintiff was the one formulating the State’s drug reimbursement methodology.

⁷⁵ The Texas ruling cited by Plaintiff involved a summary judgment motion. As with the motion *in limine* addressed in the New Jersey case, the relevance of evidence for purposes of a summary judgment motion is inapplicable to the relevance of evidence for pre-trial discovery purposes. In addition, the Texas motion for summary judgment (Plaintiff’s Exhibit G) does not discuss whether government knowledge is relevant, but merely which defenses were applicable to the case. Importantly, the Texas court never suggested, much less ruled, that government knowledge was irrelevant.

distinguishable. In fact, as noted above, the opposite of Plaintiff's proposition is true.

Defendants thus are entitled to discover Government Choice Evidence.

2. Plaintiff can be estopped by its prior actions.

Although the doctrine of equitable estoppel "is not applied as freely against governmental agencies as it is in the case of private persons,"⁷⁸ Plaintiff's claim that estoppel is not available in this case, and that "there is no room for debate" on the issue, is wrong.⁷⁹ Wisconsin courts are required to "balance the public interests at stake if estoppel is applied against the injustice that might be caused if it is not" on a case-by-case basis.⁸⁰ In the present case, Defendants may argue that (a) severe injustice would be caused if Plaintiff were allowed to recoup money that was voluntarily paid under a reimbursement scheme created by Plaintiff with full knowledge of the relationship between AWP and

⁷⁶ The New York ruling (Plaintiff's Exhibit H) held that government knowledge evidence was not discoverable because the New York drug reimbursement formula, unlike Wisconsin's, was statutorily mandated by the New York legislature. According to that court, what was relevant was the legislature's knowledge and intent when it crafted New York's drug reimbursement formula – information that could be culled from legislative history. In Wisconsin, however, it is not the legislature, but DHFS, along with the Governor's office, which formulates Plaintiff's drug reimbursement methodology. Because there is no comparable "legislative" history in the public record from which to cull the requisite information, discovery of the knowledge and intent of the agency and officials involved is relevant and necessary. The New York court also reasoned that government knowledge was not relevant in that case because plaintiffs' claims did not depend upon an allegation that agencies or officials were deceived. Here, however, Plaintiff has brought fraud claims against Defendants that require, as discussed above, a showing of untrue, misleading or deceptive statements, and a showing that Plaintiff relied upon such statements.

⁷⁷ Plaintiff's Brief at 19-20.

⁷⁸ *Libby, McNeil & Libby v. Wis. Dept. of Taxation*, 260 Wis. 551, 559 (1952).

⁷⁹ Plaintiff's Brief at 7.

⁸⁰ *Milas v. Labor Ass'n of Wis., Inc.*, 214 Wis.2d 1, 14-15 (1997) (holding that it would be unjust to allow the County to question the arbitrator's decision after it had fully participated in the proceedings, while there would be no harm to the public interest in upholding the arbitrator's decision); see also *Wis. Dept. of Revenue v. Moebius Printing Co.*, 89 Wis.2d 610, 641 (1979) (estopping the Department of Revenue from collecting taxes from a printing company after the Department's tax representative advised the company that its exemption certificates were valid, and stating that "the estoppel doctrine is applicable where it would be unconscionable to allow the state to revise an earlier position. In each case the court must determine whether justice requires the application of the doctrine of estoppel; the determination of whether the state is estopped must be made on a case-by-case basis.") (internal citations omitted).

acquisition cost, and in furtherance of the goals of the State Medicaid program, whereas (b) application of estoppel would cause no harm to the public interest because Plaintiff has reimbursed providers in accordance with its determined methodology. The important point for purposes of this Motion is that the Court should not have to conduct this balancing in an evidentiary vacuum.

Plaintiff spends several pages of its Brief arguing that Plaintiff cannot be estopped from prosecuting Defendants on the basis of “errors or misconduct on the part of governmental employees,”⁸¹ and cites to various cases holding that a government entity cannot be held liable for representations made by its employees that are inconsistent with regulations or statutes or outside the scope of the employee’s authority.⁸² These cases are easily distinguished because they all involve wrongdoing or error by individual government *employees* in contravention of their duty or authority.⁸³ Here, Defendants seek Government Choice Evidence that reflects that the State of Wisconsin, as opposed to a few, individual employees, made an informed and conscious decision to reimburse Medicaid providers as it

⁸¹ See Plaintiff’s Brief at 6-13.

⁸² *Id.* at 6-10. For example, Plaintiff cites to *Heckler v. Community Health Services of Crawford County, Inc.*, in which the Supreme Court of the United States declined to estop the government from collecting federal Medicare funds that were wrongfully paid, on the basis that respondent’s reliance on an erroneous statement by a Medicare manager that salaries of its employees who provided care to Medicare patients were reimbursable was unreasonable. 467 U.S. 51, 56, 66 104 S.Ct. 2218, 2222, 2227 (1984). Additionally, Plaintiff cites *State v. City of Green Bay* for the proposition that “Wisconsin’s citizens do not lose their right to enforce laws passed for their welfare because of errors or misconduct on the part of governmental employees[.]” Plaintiff’s Brief at 10. Plaintiff omits that the Wisconsin Supreme Court found that the state *should* be estopped from collecting forfeiture payments when the city failed to close its waste disposal sites in reliance on statements made by the Department of Natural Resources. *State v. City of Green Bay*, 96 Wis. 2d 195, 211 (1980).

⁸³ See *City of Milwaukee v. Leavitt*, 31 Wis. 2d 72, 77-79 (1996) (“Ordinarily a municipality is not estopped by a mistake, unauthorized act, laches, dereliction, or wrongful conduct *on the part of a public official*”) (cited in Plaintiff’s Brief at 9-10)(emphasis added). Furthermore, the holdings in many such cases are predicated on the idea that any reliance by the party asserting estoppel on the representations of a government employee is unreasonable. See, e.g., *Heckler*, 467 U.S. at 66, 104 S.Ct. at 2227 (rejecting an estoppel argument because defendant’s reliance on the “oral policy judgment by an official, who, it should have known, was not in the business of making policy” was unreasonable).

did. Moreover, Plaintiff acted, *not* in contravention of any duty or authority as Plaintiff contends, but in order to carry out a deliberate government policy.⁸⁴

Finally, Wisconsin law distinguishes between the estoppel of the enforcement of a government agency's police powers or laws enacted for public welfare or safety, and the estoppel of the enforcement of forfeitures or other monetary penalties. While the former, which represents the majority of the cases cited by Plaintiff,⁸⁵ have generally been rejected, the latter, like the pending action, have been allowed by Wisconsin courts.⁸⁶

Government Choice Evidence that would support Defendants' potential estoppel defense is relevant and therefore discoverable. At a minimum, there is a fair dispute as to the applicability of the doctrine. As such, Defendants should not be precluded from taking discovery relevant to making an estoppel argument.

⁸⁴ See, e.g., *Department of Revenue v. Family Hospital, Inc.*, 105 Wis. 2d 250, 255 (1982) (holding that the Department of Revenue was estopped from assessing sales tax after the hospital relied on a Department memorandum stating that parking receipts were nontaxable); *Libby*, 260 Wis. at 554 (estopping the state Department of Taxation from compelling a corporation to pay taxes it had failed to deduct from shareholders' dividends, on the basis that the Department had acquiesced in the corporation's failure to deduct taxes).

⁸⁵ See *City of Milwaukee v. Milwaukee Amusement, Inc.*, 22 Wis. 2d 240, 252-53 (1964) (gambling ordinance)(cited in Plaintiff's Brief at 10); *State v. Chippewa Cable Co.*, 21 Wis. 2d 598 (1963) (statute regulating tower height); *Park Bldg. Corp. v. Ind. Comm.*, 9 Wis. 2d 78 (1960) (building code); *Town of Richmond v. Murdock*, 70 Wis. 2d 642 (1975) (zoning ordinance); *McKenna v. State Highway Comm.*, 28 Wis. 2d 179 (1965) (control of highway access); *Leavitt*, 31 Wis. 2d at 77-79 (zoning ordinance).

⁸⁶ See *City of Greenbay*, 96 Wis. 2d at 201-202, 210-211 (specifically distinguishing between estoppel in cases where the State is attempting to enforce laws enacted for public health, for which the defense of estoppel is prohibited, and cases where the State is seeking forfeitures, in which estoppel is allowed) (cited in Plaintiff's Brief at 10); see also *Moebius*, 89 Wis. 2d at 640, ("holding the Department estopped to collect a tax deficiency will ordinarily cause less direct harm to the public good than will a similar holding in the sphere of the state's exercise of the police power. To estop the state's action in the sphere of the police power is typically to expose a significant number of persons to a risk the legislature has determined to be contrary to their safety, welfare health or morals. To estop the state from collecting taxes from a taxpayer reduces the revenue available to the state but does not expose a significant number of persons directly to some specific harm the legislature has sought to prevent."); *Family Hosp.*, 105 Wis. 2d at 255; *Libby*, 260 Wis. at 559.

3. Federal False Claims Act defenses should be considered when assessing liability under Plaintiff's § 49.49 claim.

Plaintiff cursorily dismisses the relevance of any potential defense to its Wis. Stat. §49.49 claims based on defenses to the analogous False Claims Act ("FCA"),⁸⁷ stating that such defenses are "simply unavailable to the defendants at the state level."⁸⁸ Plaintiff's argument is, however, unsupported by case law. In situations where there is little Wisconsin case law interpreting or assessing liability under a state statute, as is the case for the claims and defenses under § 49.49(4m), Wisconsin courts regularly look to analogous federal statutes for guidance.⁸⁹ Here, the elements of Plaintiff's § 49.49 claim are quite

⁸⁷ Many courts have held that government knowledge provides a defense to FCA liability, primarily because government knowledge defeats the requisite falsity and materiality elements. *See, e.g., Englund*, 2006 WL 3097941 at *12-13 (noting that "the 'knowing' submission of a false claim is logically impossible when responsible government officials have been fully apprised of all relevant information" in granting summary judgment for defendants in a Medicaid fraud case); *U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993) ("the fact that government officials knew of the contractor's actions may show that the contract has been modified or that its intent has been clarified, and therefore that the claim submitted by the contractor was not 'false.'"); *Lamers*, 168 F.3d at 1019 (holding that statements made to the Federal Transportation Authority concerning the characterization of bus routes were immaterial to the government's funding decision because the FTA was "fully apprised" of the cities' bus route design and had approved funding nevertheless); *Costner*, 317 F.3d at 887 (holding that the materiality requirement was not met because, "although the EPA undisputably was informed of the operational problems from at least three sources, it nonetheless continued to approve monthly payments."). Additionally, courts have held that there can be no "false claim" where the allegedly deceived party authorized the pricing or reimbursement used by the defendant. *See, e.g., U.S. v. Bruno's, Inc.*, 54 F. Supp. 2d 1252, 1260 (M.D. Ala. 1999) (finding that defendant pharmacies did not defraud Alabama Medicaid by charging a higher dispensing fee than to third-party payors, because Alabama sets the dispensing fee, and "Defendants merely charge the fee Medicaid tells them to charge"); *U.S. ex rel Hochman v. Nackman*, 145 F.3d 1069, 1074-75 (9th Cir. 1998) (Veteran's Administration policy authorized funded resident system and therefore clinic's reimbursement for compensation of resident was not a false claim); *U.S. ex rel Glass v. Medtronic, Inc.*, 975 F.2d 605, 607 (8th Cir. 1992) (medical device manufacturer's Medicare claim was authorized by Medicare manual and therefore not a false claim).

⁸⁸ Plaintiff's Brief at 16.

⁸⁹ *See, e.g., State v. Waste Management of Wis. Inc.*, 81 Wis. 2d 555, 574 (1978) (looking to the Sherman Act for guidance on what amounts to a conspiracy and restraint of trade under the Wisconsin antitrust act); *Matter of Kersten's Estate*, 71 Wis. 2d 757, 763 (1976) (construction by the federal courts of parallel federal provision ought to be given considerable weight by the state court in construing the state provision).

similar to elements of the FCA.⁹⁰ As such, FCA precedents can be instructive. And, as those cases illustrate, government knowledge can be a defense.⁹¹

4. The Statute of Limitations Applies To Wisconsin⁹²

Plaintiff also cites two nineteenth-century cases for the erroneous proposition that statutes of limitations and laches can never bar actions brought by the government.⁹³ Plaintiff ignores more recent Wisconsin cases concluding that state actors can be barred from bringing claims after the limitations period has run.⁹⁴ Other courts have similarly held that laches can be invoked against the state and state actors where equity should prevent them from asserting claims.⁹⁵ Accordingly, Defendants should be allowed to discover relevant information necessary to determine whether Plaintiff's claims are barred.

5. Plaintiff Asserts Erroneous Legal Conclusions

Plaintiff also asserts a number of erroneous legal conclusions in its Brief. Plaintiff argues, for example, that had Defendants somehow determined and reported an actual average of wholesale prices, "Wisconsin would have had no choice but to pay those prices—that is what federal law commands."⁹⁶ Federal regulations, however, place no restrictions

⁹⁰ The FCA states in relevant part: "Any person who . . . (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government . . . is liable to the United States Government[.]" 31 U.S.C. § 3729(a).

⁹¹ See cases cited *supra*, notes 46, 47, 88.

⁹² See also, discussion *supra*, section C.1.

⁹³ Plaintiff's Brief at 8.

⁹⁴ See *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 507 (1983) (finding state's breach of contract claim barred by statute of limitations); *Village of Gilman v. Northern States Power Co.*, 242 Wis. 130, 135 (1943) (refusing to allow a village to cancel bonds after the statute of limitations had run, finding that "[a]n action such as the instant one would be barred if brought by the state, it is also barred by a subdivision of the state").

⁹⁵ See *People ex re. Hartigan v. Progressive Land Developers, Inc.*, 216 Ill. App.3d 73, 576 N.E.2d 214 (Ill. App. Ct. 1991) (barring Attorney General from bringing suit under doctrine of laches); *Hickey v. Ill. Central Railroad Co.*, 35 Ill.2d 447, 448, 220 N.E.2d 415, 426 (Ill. 1966) (concluding that "the reluctance to apply equitable principles against the State does not amount to absolute immunity of the State from laches and estoppel under all circumstances.").

⁹⁶ Plaintiff's Brief at 6.

on how a state chooses to pay providers for drugs as long as it does not exceed, for certain generic drugs, the federal upper limit (FUL)⁹⁷ or, for brand name drugs and multi-source drugs not subject to 42 CFR § 447.332, the aggregate (1) Estimated Acquisition Cost (EAC) plus a reasonable dispensing fee or (2) providers' usual and customary chart to the general public.⁹⁸ Wisconsin has never been required to use AWP in setting these reimbursement rates, and has, in fact, been warned repeatedly against doing so,⁹⁹ and does not do so for certain generics on its MAC list.¹⁰⁰ Wisconsin does not rely solely on published AWP in setting its rates for its non-MAC drugs, but also examines other sources in determining EAC, such as other States' reimbursement rates and surveys of providers.¹⁰¹ Evidence supporting these facts is relevant to disproving Plaintiff's claim that it had no choice but to pay actual averages of wholesale prices.

Plaintiff also mistakenly argues that Federal Medicaid regulations impose some sort of price-reporting duty on Defendants.¹⁰² Plaintiff states that "no Wisconsin employee is authorized to exempt the defendants from [federal] regulations."¹⁰³ Importantly, however, the regulations cited in Plaintiff's Brief do not apply to Defendants – they merely address

⁹⁷ See 42 CFR § 447.332, 333(b)(1)(i).

⁹⁸ See 42 C.F.R. 447.331.

⁹⁹ See Vavra Deposition at 474, 479, 482-515 (Ex. 4) (noting that DHFS received and reviewed numerous federal reports indicating that AWP did not represent an actual average of wholesale prices, and recommending against the use of AWP as the basis for Medicaid reimbursement). Defendants also take issue with Plaintiff's statement that "there is no dispute that, contrary to federal regulations, Wisconsin reimbursed providers at levels far in excess of the acquisition cost of the drugs they dispensed." Plaintiff's Brief at 5. In fact, Wisconsin reimbursed providers adequately for their costs of obtaining and dispensing drugs, and did not contravene federal regulations.

¹⁰⁰ See Collins Deposition at 160-61 (Ex. 9).

¹⁰¹ See Vavra Deposition at 93-99 (Ex. 4) (stating that DHFS determined EAC by looking at other states' reimbursement methods, federal reports such as OIG reports and information from private payors).

¹⁰² Plaintiff's Brief at 4 (claiming that Defendants have a duty to report "what is generally and currently paid by providers"). It should be noted that many Defendants sell many of their products to wholesalers, and not directly to providers, and therefore have no idea "what is generally and currently paid by providers" for many products.

¹⁰³ *Id.*

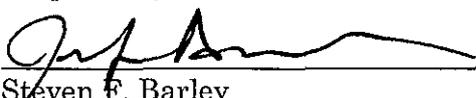
the requirements a state agency must meet to participate in the Federal Medicaid Program.¹⁰⁴ In fact, federal Medicaid regulations impose no obligations on drug manufacturers to report average wholesale prices.¹⁰⁵

CONCLUSION

Plaintiff's Motion For a Protective Order Barring Defendants From Requiring Wisconsin To Search Its Electronic Files For What Defendants Call Government Knowledge Documents should be denied because a search of these files will produce information relevant to the subject matter of this action, and is therefore discoverable.

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¹⁰⁴ See 42 C.F.R. §§ 447.300-32. See also Plaintiff's Brief at 4 ("If a state does elect to participate, it must comply with all provisions if the federal Medicaid statute and implementing regulations[,]” quoting *J.K. v. Dillenberg*, 836 F. Supp. 694, 696 (D. Az. 1993)).

¹⁰⁵ See Sample Rebate Agreement between the Secretary of Health and Human Services and the Manufacturer (attached as Exhibit 36) (requiring manufacturers to report Average Manufacturer Price (“AMP”), Best Price, and other price information but, importantly, not AWP).

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2007, a true and correct copy of the foregoing was served upon all counsel of record via electronic service pursuant to Case Management Order No. 1 by causing a copy to be sent to LexisNexis File & Serve for posting and notification.

/s/ Jennifer A. Walker
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