

Second, contrary to Plaintiff's assertion otherwise, the recent Wisconsin Supreme Court decision in *Novell v. Migliaccio*¹ supports Defendants' position. In that case, the Wisconsin Supreme Court made clear in no uncertain terms that evidence of the reasonableness of a plaintiff's reliance, which the so-called government knowledge evidence is designed in part to repudiate, is relevant to the causation element of a claim under Wis. Stat. §100.18.

Even if these decisions stood for the propositions Plaintiff asserts, they would not provide grounds for limiting discovery in this case. They only address *one* of Plaintiff's four claims, and do not address *any* of Defendants' affirmative defenses. As established in Defendants' prior briefing, evidence of the State's understanding of pricing terms is relevant to *all four* of the State's claims and several of Defendants' affirmative defenses. Defendants are entitled to all evidence relevant to each of the claims and defenses asserted in this action.²

Plaintiff's attempt to limit discovery of the State's knowledge on the grounds that it believes Defendants' arguments are not viable puts the cart before the horse—discovery must be allowed to determine the viability of all claims and potential defenses involved in this action.³ Plaintiff will have the opportunity to argue at trial whether such government knowledge evidence is ultimately admissible and whether the defenses supported by such evidence are valid. Indeed, Plaintiff has already indicated its intent to file a motion *in*

¹ 2008 WI 44, 749 N.W.2d 544 (2008).

² Wis. Stat. § 804.01(2)(a) (permitting 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...”).

³ Wisconsin's discovery rules are designed to “facilitate the ascertainment of truth,” and to allow parties to “formulate, define and narrow the issues to be tried,” to ascertain workable claims and defenses, to flesh out good arguments and relinquish the bad, and to gauge the strengths and weaknesses of each. *See, e.g., State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis.2d 559, 576, 150 N.W.2d 387 (1967); *Alt v. Cline*, 195 Wis.2d 679, 538 N.W.2d 860 at *3 (Ct. App. 1995) (citing various Wisconsin and federal cases).

limine to exclude such evidence.⁴ That motion will provide the proper forum to argue whether government knowledge evidence is admissible.⁵ The standard for discovery, however, is relevance, not admissibility.⁶

Practical considerations also militate in favor of the denial of Plaintiff's discovery motion seeking a ban on government knowledge discovery. The first trial in this case is scheduled to commence in roughly seven months and the discovery deadline for that trial defendant is in about five months. As it is, there is limited time to complete the discovery if the motions are quickly denied. If they are granted and subsequently overturned, there likely will be insufficient time to complete this discovery and maintain the trial date. Alternatively, reversible error will result if Defendants are denied this legitimate discovery, yet the trial date is maintained.

Accordingly, Defendants reiterate their request that the Special Master deny Plaintiff's Motion to prevent Defendants from seeking relevant, discoverable evidence regarding the State's knowledge and understanding.

ARGUMENT

I. THE CIRCUIT COURT'S RECENT DECISION DENYING PLAINTIFF'S SUMMARY JUDGMENT MOTIONS SUPPORTS DEFENDANTS' POSITION THAT THE STATE'S KNOWLEDGE IS RELEVANT.

The Court recently denied Plaintiff's motions for partial summary judgment, which sought summary judgment on liability for only *one* of Plaintiff's four claims – specifically,

⁴ See Transcript of July 9, 2008 Status Conference at 22-25 (excerpt attached as Ex. A). If the Special Master were to limit discovery as Plaintiff requests, and Plaintiff's intended motion *in limine* is denied by the Court (as Judge Niess's comments at the July 9 status conference suggest it would be), it will be necessary to postpone the trial schedule to allow Defendants to pursue discovery of the State's knowledge.

⁵ See *State v. Wright*, 2003 WI App 252, ¶ 37, 268 Wis.2d 694, 673 N.W.2d 386 (Ct. App. 2003) ("The purpose of the motion *in limine* is to obtain an advance ruling on admissibility of certain evidence.").

⁶ Wis. Stat. § 804.01(2)(a) ("It is not ground for objection that the information sought will be inadmissible at the trial...").

its Wis. Stat. §100.18 claim. In response to those motions, Defendants submitted to the Court substantial amounts of government knowledge evidence showing that Plaintiff's principal claim—that it understood AWP to literally represent an actual average of wholesale prices—lacked merit. Defendants argued that this evidence was relevant to the disposition of these summary judgment motions for a number of reasons, including, among other things, that the evidence contradicted Plaintiff's contention that the statements at issue were “untrue, deceptive or misleading” under §100.18, and that the evidence showed there was no causation (*i.e.*, the statements has no causal impact on the State's actions). The Court reviewed this evidence and concluded it was relevant.

In reaching its decision that Plaintiff had not met its burden of establishing that Defendants' AWP's were “untrue, deceptive or misleading,”⁷ the Court explicitly considered the government knowledge evidence submitted by Defendants and stated that the “context” in which the alleged representations were made (as demonstrated in part by government knowledge evidence) was relevant.⁸ Plaintiff's hopeful but misguided statement that this evidence is only relevant to “the existence of a valid agreement” between the parties is flat wrong.⁹ The Court carefully distinguished such an agreement from the “context” in which the statements were made, writing:

On this point, the court accepts that context is relevant to this inquiry, *as are* any mutual understandings between/among the parties to the representations. At the very least, one cannot, on this record, rule out the relevance of context *and* mutual understanding to these § 100.18(a) claims.¹⁰

⁷ Decision and Order on Plaintiff's Motions for Partial Summary Judgment Against Defendants Novartis, AstraZeneca, Sandoz and Johnson & Johnson (“Decision”) at 7 (May 20, 2008) (attached as Ex. B).

⁸ Decision at 7 (Ex. B).

⁹ Plaintiff's Memorandum On Two Recent Developments Relating to Defendants' “Government Knowledge” Defense (“Plaintiff's Br.”) at 2 (July 16, 2008).

¹⁰ Decision at 7 (Ex. B) (emphasis added).

Similarly, later in its decision, the Court asks rhetorically, “[h]ow is a statement ‘untrue’ in the first place, if the speaker and listener are using terms they mutually understand because they have agreed on their meaning . . . either expressly *or tacitly*.”¹¹ The Court’s statement that evidence of “tacit” understandings is relevant further belies Plaintiff’s argument that the Court somehow intended to limit discovery of government knowledge evidence to the existence of an explicit agreement between the parties. To the contrary, the language unambiguously supports the relevance, and therefore the discoverability, of both the State’s tacit understanding and the “context” in which the alleged representations were made.¹²

Plaintiff’s use of its submission to rehash its discussion of federal False Claims Act (FCA) cases in this context is misplaced — the FCA bears no resemblance to §100.18. Moreover, because the Court has already determined that “context” and evidence of “tacit” understandings are relevant to Plaintiff’s §100.18 claim, regardless of whether the FCA cases actually stand for the proposition that the government’s explicit agreement is required,¹³ they have no bearing on whether the State’s knowledge is relevant to its claim

¹¹ Decision at 7 (Ex. B)(emphasis added). “Tacit” is defined as “[i]mplied but not actually expressed; implied by silence or silent acquiescence.” BLACK’S LAW DICTIONARY 1491 (8th ed. 2004).

¹² Plaintiff’s contention that “government knowledge” is an affirmative defense is wrong as well. The Court’s Decision rested on whether *Plaintiff had satisfied an element of its §100.18 claim*; namely, that an “untrue, deceptive or misleading” statement had been made. That Defendants submitted this evidence in arguing in response to Plaintiff’s summary judgment motions that Plaintiff had not satisfied this element of its claim does not, as Plaintiff seems to believe, make the issue an affirmative defense, or shift the burden of proof to Defendants. The discussion of whether the government knowledge issue is an affirmative defense or not, however, is irrelevant to the disposition of these discovery motions because whether the evidence goes to show that Plaintiff has failed to meet an element of its claim, or supports an affirmative defense, it is nonetheless discoverable for either purpose.

¹³ Even under an FCA analysis, government knowledge is clearly relevant and discoverable: “[i]f the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government’s knowledge effectively negates the fraud or falsity required by the FCA.” *U. S. ex rel. Durholz v. FKW, Inc.*, 189 F.3d 542, 545 (7th Cir. 1999); *see*

under the Wisconsin Deceptive Trade Practices Act. The Court has already determined that it is.

Plaintiff's argument that the Court's decision restricts Defendants' discovery of the knowledge of individual government employees fails for the same reason—there is no need to show that an express, “authorized” agreement existed between the parties as to the meaning of AWP – a “tacit” understanding will suffice, as will evidence of the “context” surrounding the State's affirmative decision to use a discounted AWP for Medicaid pharmacy reimbursement. The understanding of individual Wisconsin employees¹⁴ involved in the setting and implementing of reimbursement is relevant to showing the context of the State's understanding, even if these individual employees did not have the “power to authorize the State” to enter into an express agreement.¹⁵

Additionally, the Court's decision only ruled on *one* element of Plaintiff's §100.18 claim, finding that Plaintiff had failed to prove that Defendants' statements were “untrue, deceptive or misleading.” The Court did not reach Defendants' argument that Plaintiff had failed to establish the causation element of §100.18. However, the Court did state that had it reached the causation issue, “the defense argument and evidentiary submissions demonstrating that the misrepresentations caused the state no damage *would be material* if plaintiff were seeking a full summary judgment on its first claim for relief.”¹⁶ These material evidentiary submissions, of course, consisted largely of government knowledge

also 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 (“Defendants' Opposition”) at 13-14, 18-19, 26-27 (Nov. 5, 2007) (discussing the relevance of the State's knowledge under an FCA analysis).

¹⁴ It should be noted that Defendants' discovery requests are not limited to the knowledge of “individual” Wisconsin employees (although they necessarily encompass such individual knowledge).

¹⁵ See Plaintiff's Br. at 3-4.

¹⁶ Decision at 6 (Ex. B) (emphasis added).

evidence.¹⁷ Thus, the Court's decision unequivocally supports the relevance of the government knowledge evidence as to two distinct elements of Plaintiff's §100.18 claim: 1) whether the alleged statements was "untrue, deceptive or misleading"; and 2) whether the alleged statements caused Plaintiff's alleged losses.¹⁸ Far from supporting Plaintiff's argument that the Court's summary judgment decision "narrow[s] the scope of Defendants' discovery," the decision signals a death knell to Plaintiff's efforts to bar discovery of its knowledge.¹⁹

Furthermore, even if Plaintiff's reading of the Court's decision was accurate (which it is not), the decision did not touch at all upon any aspect of Plaintiff's other three non-§100.18 claims, nor did it address Defendants' affirmative defenses, such as their statute of limitations, mitigation of damages or other defenses, and therefore cannot be said to limit discovery regarding any of those claims or defenses. As demonstrated in Defendants' prior briefing, the State's knowledge of pricing terms is relevant to each of Plaintiff's claims and many of Defendants' affirmative defenses.²⁰

II. *NOVELL* HOLDS THAT RELIANCE *IS* RELEVANT TO A §100.18 CLAIM.

The Wisconsin Supreme Court in *Novell* unequivocally stated that "[r]eliance *is* an aspect of the third element [of a § 100.18 claim]."²¹ Although it found that reasonable

¹⁷ Defendants incorporate by reference Defendants' Joint Response to Plaintiff's Partial Motions for Summary Judgment Against AstraZeneca, Johnson & Johnson, Novartis & Sandoz and the attached exhibits, filed January 15, 2008.

¹⁸ The Court's comments at a recent status conference confirm the Court's belief that evidence of the State's knowledge *is* relevant to the causation element of Plaintiff's §100.18 claim. See Transcript of July 9, 2008 Status Conference at 23-24 (Ex. A) ("But doesn't the government knowledge defense go to the reasonable reliance issue? ... If the evidence is gonna come in anyway, we can deal with it at trial as to whether or not we've got an estoppel defense.").

¹⁹ Plaintiff's Br. at 2-3.

²⁰ For a detailed discussion of the relevance of government knowledge evidence to these other claims and defenses, see Defendants' Opposition at 6-21 (Nov. 5, 2007).

²¹ *Novell*, 2008 WI 44, ¶ 49. To prevail on a § 100.18 claim, Plaintiff must prove three elements: "(1) the defendant made a representation to the public with the intent to induce an obligation; (2)

reliance was not an *element* of a § 100.18 claim, the Court stated that “the reasonableness of a plaintiff’s reliance may be relevant in considering whether the representation materially induced (caused) the plaintiff to sustain a loss.”²² Thus, Plaintiff’s statement to the contrary notwithstanding, evidence of the State’s knowledge and understandings of the alleged representations is unquestionably relevant to whether it in fact reasonably relied on these representations and whether such representations “materially induced” Plaintiff’s alleged loss.²³

Plaintiff argues that *Novell’s* holding—that the reasonableness of a plaintiff’s reliance is relevant to the “causation” element—should not apply when the State is the plaintiff, because the “unreasonableness” of the government’s actions cannot estop it from bringing a claim.²⁴ The affirmative defense of estoppel, however, is but one of the myriad of arguments Defendants are asserting to which the State’s knowledge is relevant.²⁵ Furthermore, *Novell* has nothing whatsoever to do with the viability of the affirmative defense of estoppel to a §100.18 claim. Rather, that case holds that the unreasonableness of a plaintiff’s reliance can be introduced to show that the plaintiff did not in fact rely on the alleged misrepresentation, and therefore to disprove an *essential element* of its claim. Likewise, Defendants here seek further evidence that Plaintiff did not in fact reasonably

the representation was untrue, deceptive or misleading; and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff.” *Id.*

²² *Novell*, 2008 WI 44, ¶¶ 3.

²³ See Plaintiff’s Br. at 4-5. Moreover, Judge Niess clearly indicated at the recent status conference that the reasonableness of Plaintiff’s alleged reliance is at issue. See Transcript of July 9, 2008 Status Conference at 23-24 (Ex. A).

²⁴ See Plaintiff’s Br. at 7.

²⁵ And, as discussed at length in Defendants’ Opposition, Plaintiff can be estopped. See Defendants’ Opposition at 23-25, 27-29. Numerous Wisconsin courts have estopped governmental entities from pursuing cases like this one, where those entities were acting in their official capacities and seeking forfeitures or money damages. Plaintiff has presented nothing new on its tired estoppel argument in its most recent Brief, and Defendants do not see the need to repeat their counter-arguments here.

rely on any alleged statement by Defendants, thus disproving the causation element of Plaintiff's claim.

In any event, the Special Master need not independently assess the merits of Plaintiff's estoppel arguments because the Court has already rejected them. In moving for summary judgment, Plaintiff stated that Defendants have "no defense as a matter of law to Plaintiff's [summary judgment] motion," asserting the same estoppel argument it raises here.²⁶ The Court necessarily rejected these arguments in denying Plaintiff's motions for summary judgment. It also bears observing that Plaintiff's three and a half-page discussion of *Novell* is taken almost verbatim from a motion for reconsideration filed by Plaintiff seeking to overturn the Court's denial of its summary judgment motions.²⁷ The Court summarily denied that motion in a two-sentence order, stating: "Motion denied. *Novell* not pertinent to Court's rationale in decision denying Plaintiff summary judgment."²⁸ As the Court clearly recognized, even if reliance were not an element of Plaintiff's §100.18 claim, and even if the reasonableness of such reliance were not relevant to whether Plaintiff could meet its burden of proof, government knowledge evidence would

²⁶ See, e.g., Motion for Partial Summary Judgment on Liability Against Defendant Novartis Pharmaceuticals Corporation with Respect to Counts I and II of Wisconsin's Second Amended Complaint, and Supporting Memorandum Filed by Plaintiff State of Wisconsin at 24-28 (Oct. 29, 2007) (excerpt attached as Ex. C).

²⁷ Compare Plaintiff's Br. at 4-8 with Plaintiff's Supplemental Memorandum on the Relevance of the Recently Decided Supreme Court Case *Novell v. Migliaccio* and in Support of Motion for Reconsideration of Denial of Plaintiff's Motion for Summary Judgment on Liability ("Plaintiff's Supplemental Memorandum Regarding *Novell*") at 5-8 (June 5, 2008) (attached as Ex. D). Defendants incorporate by reference their first response to this exact same argument, contained in their Opposition to Plaintiff's Motion for Reconsideration of Denial of Plaintiff's Motion for Summary Judgment on Liability (June 11, 2008) (redacted version attached as Ex. E).

²⁸ Surprisingly, despite largely cutting and pasting the argument from its motion for reconsideration, Plaintiff failed to inform the Special Master of the Court's rejection of the argument in denying that motion. Order Denying Plaintiff's Motion for Reconsideration of Denial of Plaintiff's Motion for Summary Judgment on Liability (June 16, 2008) (attached as Ex. E).

still be relevant to the “untrue, deceptive or misleading” element of Plaintiff’s claim, which *Novell* does not address.

Perhaps more to the point, Defendants seek government knowledge evidence for a much broader and more important purpose than to support their estoppel defense alone— Defendants seek evidence to disprove *essential elements* of Plaintiff’s claims. Both the Court’s decision and *Novell* show that the State’s knowledge and understanding of the alleged misrepresentations are relevant, at a minimum, to disproving elements of Plaintiff’s §100.18 claim.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants’ Opposition, Defendants respectfully request that the Special Master deny Plaintiff’s Motion for a Protective Order Barring Defendants from Requiring Wisconsin to Search Its Electronic Files for What Defendants Call Government Knowledge Documents.

July 25, 2008

Respectfully submitted,



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EXHIBIT A

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(On the record at 11:08 a.m.)

THE CLERK: State of Wisconsin v. Abbott Laboratories, et al, 04 CV 1709.

THE COURT: I will note the appearances as being those set forth in the document that has been provided to me so that we don't have to go down the list of everybody who might be on the call.

I have a substitute court reporter today. Please identify yourself when you speak so that she can get down the appropriate individual.

I apologize for the delay. Most of it was due to scheduling, but part of it is due to my attempt to locate a July 2, 2008 letter from Mr. Barnhill that has been referenced in Mr. Barley's July 8, 2008 letter. We still have not been able to locate that letter, so Mr. Barley, you're responding to something that I haven't seen yet, so I don't imagine that that's of particular significance for this morning.

I would like to cover a number of topics here today. We're getting closer to the February trial date and we've got a number of things that are hanging fire that need to be resolved in that regard.

First of all, thank you for your briefs on the jury issue, and my question is whether or not

1 that I would throw out a bunch of these concerns and
2 then we would get together on fairly short notice
3 after everybody's had an opportunity to consult with
4 each other, including opposing counsel, and see if we
5 can't work out some of this.

6 Mr. Barnhill, my concern is this. While
7 I would very much like to move these along as a two
8 week per defendant clip, if we get to a Friday
9 afternoon on a two-week trial and we've got a jury
10 selection on the next one the following Monday, my
11 hands are tied pretty much in terms of mistrying the
12 case and starting over. I'm not gonna tell a jury
13 they're only going to sit here for two weeks and then
14 have it spill into three and four weeks because we
15 misjudged. I would rather take the first couple of
16 trials and over schedule them in terms of the amount
17 of time allotted and be pleasantly surprised, and
18 then we could use that as the predictor for future
19 trials rather than start out with trying to compress
20 things into what may turn out to be too optimistic a
21 timetable.

22 MR. BARNHILL: Your Honor, we have no
23 objection to that, of course, so that whatever you're
24 most comfortable with. One thing that this does
25 raise, Mr. Barley's threat to introduce mountains of

1 evidence on government knowledge, is that your Honor
2 is the one that must decide the estoppel argument.
3 That's not subject to the jury's determination, and
4 we think we can handle that in written submissions
5 well before trial, and I think it will be useful to
6 do that.

7 MR. CROSS: Your Honor, this is Wayne
8 Cross. I represent Sandoz, which is one of the three
9 other defendants. I would point out -- and
10 obviously, we can discuss this amongst ourselves and
11 get back to you -- that the trial schedule order that
12 you entered provides for the submission of expert
13 reports no later than eight months prior to any
14 defendant's trial, and we're within that eight-month
15 period now at least, so any other defendants are
16 going to have to be out farther than February or
17 March.

18 THE COURT: Let me address another
19 issue. We'll decide who's going to be the defendants
20 up first in the batting order and length of each
21 trial at the next status conference which, as I say,
22 will be convened fairly quickly so that you can all
23 talk about it.

24 This suggestion that there are going to
25 be more and more written submissions to deal with

1 issues in this case concerns me because Branch 9 is
2 about to be capsized with the paper already, not just
3 with this case, but other cases. I have, as I said,
4 been struggling with the summary judgment motions and
5 the girth of the materials that have been provided,
6 and I can tell you right now it's going to be highly
7 unlikely you're going to see a decision on those much
8 before the end of September. That's just predicting
9 what I have in terms of other cases, trials, and
10 pending summary judgment motions in other cases. If
11 we have other material and meaty issues that need to
12 be resolved, including this issue of estoppel which
13 suggests to me will be a highly evidentiary-intensive
14 type of a motion, at least affidavits and such, I
15 just despair for how we're going to get it all done
16 before this trial. That's my concern. I don't know
17 what to do about that.

18 MR. BARNHILL: Well, this is Charles
19 Barnhill, your Honor. I don't know what to do about
20 it either. The estoppel argument is, if we prevail,
21 which we expect to, that will remove a great deal of
22 the evidence the defendants are seeking to introduce
23 at the trial in this case, and that's why I mentioned
24 it. We're -- and maybe your Honor needs to have a
25 hearing on that particular defense beforehand, but

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maybe we can think about this more and come back to you on the next status call.

THE COURT: Well, I wish you would. I will say this. I know that there are, or at least I suspect that there are additional defendants seeking to file more facts specific to their case summary judgment motions. I want to tell you right now I do not want to see anymore summary judgment motions until further notice because at this point they're just gonna sit there with the time clock ticking and I'm going to have no ability to address them.

My initial thought here is trying to tie some of these anticipated summary judgment motions to the trial schedule that we develop after this next February and March trial schedule so that we can identify who the next defendants are up far enough out so that we can set them for trial, give them the opportunity for their summary judgment motion without them being in competition with all the other defendants who might have their summary judgment motions pending at the same time.

I don't know what to do about this. I'm concerned that I'm not going to be able to give these the attention they deserve, and unfortunately, the clock keeps ticking on other cases as well.

1 MR. BARLEY: This is Mr. Barley, your
2 Honor. Under the current schedule, I believe the
3 dispositive motions for Pfizer and/or Pharmacia,
4 depending on the what ruling is as to who's going to
5 trial in February, are due on October 31st --

6 THE COURT: Okay.

7 MR. BARLEY: -- of this year, and we do
8 not anticipate, at least right now, filing anything
9 before that.

10 THE COURT: Well let me say whether it's
11 anticipated or not, we will remove the anticipation
12 by telling you do not file anymore summary judgment
13 motions until no earlier than October 31st.

14 MR. BARLEY: Understood, your Honor.

15 THE COURT: And I don't know what that
16 does for your estoppel argument, Mr. Barnhill,
17 whether that's in the nature of a motion in limine or
18 a summary judgment, partial summary on a defense, I
19 just don't know, but why don't you think about, as
20 you say, how to best present that issue and then
21 we'll -- but if it's a fact-intensive issue, seems to
22 me we ought to hear a trial.

23 MR. BARLEY: Your Honor, this is
24 Mr. Barley. Some of the estoppel argument has been
25 raised in the summary judgment briefing, in the

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defendant's summary judgment papers and the
plaintiff's response and our reply --

THE COURT: Okay.

MR. BARLEY: -- relating to, I guess,
the relevance of the government choice evidence.

MR. BARNHILL: Your Honor, this is
Charles Barnhill. My initial reaction, just
listening to you, is to probably file a sort of joint
motion, a motion in connection with the estoppel that
the defendants cannot meet the requirements of that
defense and/or a motion in limine in connection with
that evidence which would take care of -- because
you're going to get that motion anyway, which would
also address the evidentiary nature of their
government knowledge so-called defense.

THE COURT: But doesn't the government
knowledge defense go to the reasonable reliance
issue?

MR. BARNHILL: Well, no, a lot of it
does not, your Honor. First of all, our position is
that they cannot meet the elements of estoppel. They
have to show a variety of things that they cannot
possibly show. Second of all, a great deal of this
mountain of evidence that Mr. Barley points to has no
relationship whatsoever with any causation argument

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that we're raising, your Honor.

THE COURT: Well you say that.
Mr. Barley, are you willing to stipulate to that?

MR. BARLEY: No, your Honor. We believe
it's relevant for a whole host of reasons which we
set forth in our papers.

THE COURT: Let me suggest this. If
it's, you know, if the State strongly believes the
estoppel argument cannot be made, yet there is other
base -- there are other bases upon which this
evidence would be relevant to a material issue in the
case, let's not screw around with just one issue. If
the evidence is gonna come in anyway, we can deal
with it at trial as to whether or not we've got an
estoppel defense.

MR. BARNHILL: Well we're going to make
a motion in limine, your Honor, no matter what
because they are pressing documents that have no
business in here, have nothing to do with any
agreement between the State and the defendants and
have no business in this case, and that motion's
going to come before you no matter what.

THE COURT: All right. Well we'll hear
it and we'll hear the defense response and see where
we go with it, but as you say, Mr. Barnhill, you can

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discuss with your colleagues the timing of that.

MR. BARNHILL: Fine.

THE COURT: All right. Let me see what else.

All right. Those are the burning issues that were on my mind. Let me turn to the plaintiff and see what you would like to add to the list of things to be considered either today or in the subsequent status conference and what you see as a reasonable road map to get this case still moving along forward.

MR. BARNHILL: Well, your Honor, we have a couple of issues. One is that we have gone through this process, you may or may not recall it, of identifying what we call the targeted drugs, the drugs that we're seeking relief for.

THE COURT: Yes.

MR. BARNHILL: And we're prepared to file on July 23rd our amended Exhibit E. We're a little uncertain as to the date that it's actually due. We would file leave to amend our new Exhibit E which reduces -- this is the good news, your Honor. It reduces the NDC's from 5,000 to 3,400. We understand that some of the defendants still have objections to the targeted drug list in Exhibit E,

EXHIBIT B

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

STATE OF WISCONSIN,

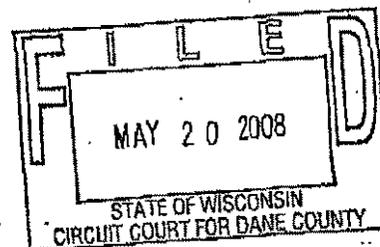
Plaintiff,

v.

Case No. 04 CV 1709

ABBOTT LABORATORIES, et al.

Defendants.



**DECISION AND ORDER ON PLAINTIFF'S MOTIONS FOR PARTIAL SUMMARY
JUDGMENT AGAINST DEFENDANTS NOVARTIS, ASTRAZENECA, SANDOZ, AND
JOHNSON & JOHNSON**

OVERVIEW

Plaintiff State of Wisconsin moves for partial summary judgment against defendants Novartis, Astra Zeneca, Sandoz, and Johnson & Johnson on the liability issues in its first two claims for relief in the Second Amended Complaint premised upon §100.18(1) and §100.18(10)(b), Stats., respectively. All defendants oppose the motions, and have responded with summary judgment motions of their own. This decision will resolve only the state's motions; defense motions will be addressed in a subsequent decision.

The parties have submitted evidentiary materials and written briefs both for and against the plaintiff's motions, and no party has requested oral argument. Accordingly, the motions are ripe for resolution.

For the following reasons, the motions are denied. The court, however, dismisses "Count II-- Violation of Wis. Stat. §100.18 (10) (b)" of the Second Amended Complaint, merging it into "Count I-- Violation of Wis. Stat. §100.18(1)", as more fully explained below.

SOME INITIAL CONSIDERATIONS UNDER §802.08, STATS

Section 802.08, Stats., provides in pertinent part:

"(1) Availability. A party may ... move for summary judgment on any claim, counterclaim, cross-claim, or 3rd-party claim which is asserted by or against the party. ...

(2) Motion. ... The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

(Underlining added).

At the outset, several considerations pertinent to plaintiff's motions arise under the statute.

First, the motions against the four defendants purportedly seek summary judgment on the issue of liability alone, and then only with respect to two of the state's five claims. Accordingly, whether or not to grant summary judgment is discretionary with the court, given the statute's specific inclusion of the word "may" for partial versus "shall" for full summary judgment. See, e.g., *City of Wauwatosa v. Milwaukee County*, 22 Wis. 2d 184, 191, 125 N.W. 2d 386, 389-90 (1963). Presumably, if there is no genuine issue as to any material fact and the law indisputably favors the movant, the court should exercise its discretion to grant interlocutory partial summary judgment on liability only in those circumstances where to do so would "secure the just, speedy and inexpensive determination of [the] action and proceeding." §801.01 (2), Stats.¹ More on this below.

Secondly, what does §802.08 (2), Stats., mean by "liability"? Of particular relevance to plaintiff's motions, does "liability" include cause? If so, the state's motions must be denied outright, because they expressly and quite candidly do not purport to resolve the causation issues under §100.18, Stats. The summary judgment statute itself is not entirely clear on this point, although it suggests that causation is part of "liability", since partial summary judgment is permissive in those circumstances where there remains a "genuine issue as to the amount of damages." Usually the "amount of damages" is not even a relevant consideration until causation is decided. That is to say, rendering interlocutory summary judgment on liability where only the *amount of*

¹ Section 801.01 (2), Stats., provides "... Chapters 801 to 847 shall be construed to secure the just, speedy and inexpensive determination of every action and proceeding."

damages remains to be determined presupposes resolution of the causation issues in the liability analysis.²

Caselaw is also less than instructive. In *Physicians Plus Ins. Corp v. Midwest Mutual Ins. Co.*, 254 Wis. 2d 77, 101 (2002), for example, causation was held necessary to establish liability. But *Physicians Plus* is a public nuisance case, and thus less than compelling in its applicability to our case. This is especially true considering that the Supreme Court there upheld a partial summary judgment even though the issue of causation was remanded for trial along with the damages issues. The Supreme Court thus appears unperturbed by the question raised here, which accordingly will be considered no further. More specifically, this court accepts, while not entirely convinced, that it could exercise its discretion to grant partial summary judgment on liability issues in this case notwithstanding genuine material factual issues concerning causation.

APPLYING PARTIAL SUMMARY JUDGMENT METHODOLOGY UNDER §802.08, STATS.

The prescribed summary judgment methodology is well-described in *In re Cherokee Park Plat*, 113 Wis. 2d 112, 115 *et seq.* (Ct. App. 1983):

"Summary judgment is governed by sec. 802.08, Stats. Its purpose is to determine whether a dispute can be resolved without a trial. Summary judgment methodology must be followed by an appellate court as well as the trial court. *Board of Regents v. Mussalem*, 94 Wis. 2d 657, 674, 289 N.W 2d 801, 809 (1980).

Under that methodology, the court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented. If the complaint (in these consolidated cases, the notice of the appeal to the circuit court) states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a prima facie case for summary judgment. To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the claim. If the moving party has made a prima facie case for summary judgment, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore a trial is necessary. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W. 2d 473, 476-77 (1980).

² Even beyond this frolic into §802.08(2) esoterica is the question of whether or not partial summary judgment on liability can ever be appropriately granted where, as here, the remedies sought do not include common-law "damages", but are purely equitable. See Second Amended Complaint, pages 31-32, and §100.18 (11) (a), Stats. (enforcement actions to be commenced and prosecuted "in any court having equity jurisdiction.") Because the state's motions are decided on other grounds, we need gnaw this bone no further.

Summary judgment methodology prohibits the trial court from deciding an issue of fact. The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment. *Grams*, 97 Wis. 2d at 338-39, 294 N.W. 2d at 477."

Analyzing the state's Second Amended Complaint under this methodology, plaintiff's first claim for relief based on §100.18(1), Stats., ("COUNT I") is legally sufficient, while the second claim for relief under §100.18 (10) (b) Stats., ("COUNT II") is not.

On the first claim, the Court rejects the defense contention that §100.182, not §100.18(1), is the appropriate and exclusive statutory remedy for plaintiff's claims. Plaintiff's allegations relate to fraudulent pricing, while §100.182 is targeted at entirely different types of fraudulent drug advertising, such as deceptive or misleading representations material to the effects of the drug, physical or psychological effects associated with the use of the drug, and deceptive resemblances to controlled substances. Accordingly, defendants cannot fashion a successful defense patterned after *Gallego v. Wal-Mart Stores Inc.*, 288 Wis. 2d 229 (Ct. App. 2005), which featured a global statute prohibiting fraudulent advertising specific to food that, unlike §100.182, largely mirrors a more generic §100.18(1) in the types of conduct prohibited,

As for plaintiff's second claim for relief, §100.18(10)(b) does not create a separate claim for relief, but merely defines one species of conduct that is deceptive and therefore remediable under §100.18(1), Stats. Accordingly, the second claim ("COUNT II") is dismissed, and any conduct by defendants which the state proves transgresses §100.18 (10) (b) will be considered under the first claim for relief.

Finally, the court rejects without further comment the defense position that separation of powers principles prohibit judicial enforcement of §100.18(1) in this case, because the legislature has expressly granted this court jurisdiction in equity to address violations of the statute under §100.18(11), without in any way restricting its reach to pharmaceutical pricing.

THE STATE'S PRIMA FACIE CASE

While varying in the particulars against each of the four target defendants, plaintiff presents evidence broadly supporting its contention that defendants, in marketing their drugs, falsely reported both wholesale acquisition costs ("WACs") and average wholesale prices ("AWPs") to third parties, such as First DataBank and Red Book, knowing that these third parties would publish pharmaceutical pricing information relied upon by the state in paying or reimbursing retail providers of the drugs through the Wisconsin Medicaid program. The misrepresented WACs and AWP's caused the third parties to publish artificially high drug prices which, in turn, caused, and still causes, the Wisconsin Medicaid program to overpay for defendants' drugs. A *prima facie* case for partial summary judgment on liability under §100.18, Stats., is thus presented.

DEFENDANTS' RESPONSE TO THE STATE'S EVIDENCE

Defendants present a number of factual and legal arguments against the state's motions, some with merit, some without. The arguments without merit are easily dispatched.

First, defendants argue that providing false information to third parties with whom defendants are in a contractual relationship, such as First DataBank, does not qualify as a misrepresentation to "the public", which is required for liability under §100.18(1), Stats. While defendants' argument is correct as far as it goes, it is beside the point. Section 100.18(1) prohibits not only direct misrepresentations to the public, but misrepresentations which defendants "cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state..." The thrust of plaintiff's *prima facie* case is that, by reporting false prices to third parties, defendants indirectly (and perhaps directly) caused dissemination of misrepresented drug prices to the public, including Wisconsin Medicaid, through the third parties' publications. That defendants had contracts with the third parties is no defense.

Secondly, and closely related, the argument (made by at least one defendant) that no misrepresentation was made "in this state", as required for liability under §100.18(1), ignores these third party publications distributed here.

Thirdly, the defense argument and evidentiary submissions demonstrating that the misrepresentations caused the state no damage would be material if plaintiff were seeking a full summary judgment on its first claim for relief. However, because plaintiff has moved only for partial summary judgment on limited issues concerning liability (excluding causation), they are not directly on point. Nonetheless, because the causation element appears, to the court at least, to require that plaintiff present proof to the fact finder at trial³ establishing the specific misrepresentations made regarding the particular drugs at issue, granting a partial summary judgment to the extent requested by the state seemingly would accomplish little to further "the just, speedy, and inexpensive determination of the action" [§801.01(2), Stats.] Again, more on this below.

Turning now to the meritorious defense positions, defendants' evidence demonstrates the existence of material factual issues, and competing reasonable inferences derived from the factual record, on whether or not actionable misrepresentations occurred and what role, if any, the defendants played in fomenting these misrepresentations (which, after all, allegedly ripened in third party publications).

³ The court deliberately uses the term "fact finder" because, although this case has been scheduled for jury trial(s) commencing in February, 2009, it does not appear that plaintiff's §100.18 enforcement action entitles it to a jury, given its equitable nature under §100.18(11), Stats. See also *State v. Excel Management Services, Inc.*, 111 Wis. 2d 479, 331 N.W. 2d 312 (1983). There is no jury trial right in equitable actions. *Neff v. Barber*, 165 Wis. 503, 182 N.W. 687(1917). The parties' entitlement to jury trial on this and plaintiff's other claims for relief [unjust enrichment also sounds in equity, see *General Split Corp. v. P & V Atlas Corp.*, 91 Wis. 2d 119, 124, 280 N.W. 2d 766, 768 (1979)] will be addressed at the next status conference.

On this point, the court accepts that context is relevant to the inquiry, as are any mutual understandings between/among the parties to the representations. At the very least, one cannot, on this record, rule out the relevance of context and mutual understanding to these §100.18 (1) claims.

Plaintiff's argument that "[a]n untrue statement is untrue regardless of whether the listener knows it is untrue" (Plaintiff's Reply Brief, p. 6) begs the question. How is a statement "untrue" in the first place, if the speaker and listener are using terms they mutually understand because they have agreed on their meaning— that is, they have together developed the definitions, either expressly or tacitly, such that they have a common understanding? If two parties agree that the term "cat" shall be defined to include a "dog", is the definition "untrue" under §100.18(1)? With such agreed terminology, it seems self-evident that representing a "dog" to be a "cat" cannot, years later, expose one party to a legitimate misrepresentation charge by the other, under §100.18(1) or otherwise. This is essentially the defense position in an admittedly oversimplified nutshell.

The state demurs, citing dictionary definitions which, while relevant, are not dispositive. It also contends that there was no agreement on the definition of AWP's and WAC's, let alone one to which the state was a party. This latter point may very well be true, but it is not undisputed. This court's function on summary judgment is not to resolve discrepancies in the proof, nor to favor one inference over another. Rather, the court must accept all reasonable inferences emanating from the evidence in favor of the defense, and end its inquiry where, as here, there are disputed material facts or competing reasonable conclusions that can be drawn from the evidence.

SOME ADDITIONAL OBSERVATIONS

Even if the evidence and inferences were undisputed, and the law unequivocally favored plaintiff, it is doubtful the court would exercise its discretion to grant plaintiff the interlocutory partial summary judgment requested. This is because it is difficult to see how doing so would advance the just, speedy, and inexpensive determination of this action, which is the overriding goal under §801.01(2), Stats.

As plaintiff emphasizes, this is an enforcement action seeking to enjoin violation of §100.18, Stats., as well as other appropriate relief. But even if we accept the state's summary judgment position as uncontroverted, what conduct would the court enjoin? As defendants point out, the state's motions are devoid of any particulars concerning which particular drugs are at issue and what specific misrepresentations were allegedly pertinent to each. The statute already generically prohibits the misrepresentations which it addresses, and an injunction by this court duplicating these non-specific statutory prohibitions would add little, if anything, to effective enforcement.

For example, violation of §100.18(10)(b) is perhaps the state's strongest case under §100.18(1). Section 100.18(10)(b) provides:

"It is deceptive to represent the price of any merchandise as a manufacturer's or wholesaler's price, or a price equal thereto, unless the price is not more than the price which retailers regularly pay for the merchandise."

What efforts would plaintiff be spared at trial were the court to grant partial summary judgment finding that a defendant or defendants violated this subsection? The state would still have to prove specific misrepresentations/deception concerning specific drugs for the court to fashion appropriate, targeted relief, and so that causation could be determined.

Bottom line, how would the interlocutory summary judgment be anything other than an advisory ruling to the effect that if plaintiff proves that the wholesaler's price or manufacturers price on a specific drug or drugs was deceptive within the meaning of §100.18(10)(b), then §100.18(1) has been violated by the misrepresenting defendant?

In short, the court finds little advantage to the ultimate resolution of this case at trial in rendering the interlocutory summary judgment plaintiff seeks, even if the plaintiff otherwise qualified for such relief (which, again, it does not). On the other hand, granting the motion might very well create an unlevel playing field by enabling plaintiff to suggest to the jury⁴, right out of the gate and devoid of all context, that the court has already found defendant(s) in violation of state law and the rest is just details, when we truly cannot know if a violation has occurred until we see the evidence on specific representations regarding specific drugs.

CONCLUSION

Plaintiff State of Wisconsin's amended motions for partial summary judgment on liability against defendants Novartis, Astra Zeneca, Sandoz, and Johnson & Johnson are DENIED. Count II of plaintiff's Second Amended Complaint, purporting to allege a separate claim for relief under §100.18(10)(b), Stats., is DISMISSED and merged into plaintiff's claim for relief under §100.18(1), Stats., in Count I.

Dated this 20 day of May, 2008.

BY THE COURT:



Richard G. Niess
Circuit Judge

CC: Attorney William M. Conley

⁴ If all or any part of this case is heard by a jury, advisory or otherwise.

(for immediate service on all parties per
usual practice in this case)

EXHIBIT C

“wholesale” in its reporting of “average wholesale prices.” Finally, the third element is undisputed. As Michael Conley, Novartis’s corporate designee, testified at deposition:

Q: Is it Novartis’s -- has it been Novartis's belief since 1997 that the AWP’s that were reported to First Databank for the targeted drugs in fact represented a true price generally and currently available to retailers when purchasing these drugs from wholesalers?

A: Can you restate the question?

Q: Sure. Since 1997, has Novartis believed that the AWP’s it reported to First Databank represented actual prices that were generally and currently being paid by retail pharmacies to wholesalers for Novartis’s drugs?

A: I don’t believe so. I mean, we publish the number, but our belief as to what that number represented, again based on the -- on the disclaimer that we put in -- in the notifications, I don’t know that I can speak for everyone in the organization, but I don’t believe that’s the case.

PUF 46; *see also* PUF 47-51.

Section 100.18(10)(b) is consistent with Federal Trade Commission law. *Federated Nationwide Wholesalers Service v. Federal Trade Commission*, 398 F.2d 253, 256-57 (2d Cir. 1968) (finding that it was deceptive to call a price a wholesale price “where the price actually charged exceeds what retailers in the area normally pay their sources of supply for the same item.”); *see also L. & C. Mayers Co. v. Federal Trade Commission*, 97 F.2d 365 (2d Cir. 1938) (finding it to be a deceptive practice to represent prices as wholesale prices when those prices are higher than the usual and customary prices charged by wholesalers).

C. Novartis Has No Defense as a Matter of Law To Plaintiff’s Motion.

The State expects Novartis to oppose the instant motion by arguing that liability cannot be established because certain Wisconsin employees connected with the Medicaid program knew or should have known that First DataBank’s published average wholesale prices for at least some drugs were being discounted to pharmacies and doctors. That is, Novartis is likely to argue that certain Wisconsin employees knew or should have known that Novartis’s average wholesale

prices were false. Moreover, Novartis will likely argue that these employees failed adequately to amend or modify the Medicaid program's reimbursement formula for prescription drugs to account fully for such discounting, thereby permitting, through negligence, inadvertence, or design, reimbursement to providers above their actual acquisition cost. Finally, Novartis will likely argue that it made certain statements, which Novartis will characterize as "disclaimers," that insulate it from liability. As explained below, these argument fails for several reasons.

1. Knowledge or Belief of State Employees is Legally Irrelevant to Liability.

As shown above, liability under the statutes invoked by the State is established by virtue of Novartis's conduct. What State employees knew, should have known, or could have discovered is simply irrelevant to the question of liability.

In connection with the statutes at issue in this motion, liability is established by virtue of Novartis's admissions that it published average wholesale prices and wholesale acquisition costs that were false. No more needs to be proven, and nothing else is relevant to the determination of liability. Thus, Wis. Stat. § 100.18(1) makes it unlawful to publish a false statement – period. Similarly, Section 100.18(10)(b) provides that representing a price as a wholesale price when retailers regularly pay less than that price is a *per se* deceptive act. None of the elements of these claims examines the knowledge, belief, action, or inaction, of the State or any individual state employees. They do not even require knowledge by Novartis of the falsity of the statements (although if required, such knowledge is established here).⁸ In sum, liability under these statutes depends solely and exclusively on the conduct of Novartis. Any efforts by Novartis to shift the

⁸ In contrast, Section 100.18(12)(b) shields real estate brokers from liability unless they have "knowledge that the assertion, representation, or statement of fact is untrue, deceptive or misleading."

focus of the court's inquiry to the knowledge, belief, or actions of the State or its employees is improper.

2. Novartis's Estoppel Argument is Unavailable as a Matter of Law.

Novartis's attempt to shift the focus from its own misconduct to the knowledge, belief, action, or inaction of Wisconsin employees is also improper because it is an estoppel argument that is not available to Novartis as a matter of law. Even assuming that certain state Medicaid employees negligently or purposely looked the other way as Novartis violated the law, such conduct cannot estop Wisconsin from establishing liability against Novartis in this civil law enforcement action.

It is well-established that a defendant who breaks the law cannot excuse its conduct by pointing to negligent, misleading or intentional misconduct on the part of state employees. The United States Supreme Court articulated this principle in *Heckler v. Community Health Services*, 467 U.S. 51, 63 (1984):

Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.

Heckler is consistent with a well-established line of authority holding that a defendant may not excuse its unlawful conduct by blaming a government employee when a public right is involved. *See, e.g., Nevada v. United States*, 463 U.S. 110, 141 (1983) ("As a general rule laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest."); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) ("Whatever the form in which the Government functions, anyone entering into an arrangement

with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.”); *United States v. Socony-Vacuum Oil Co.*, 310 US 150, 226 (1940) (“Though employees of the government may have known of those (unlawful) programs and winked at them or tacitly approved them, no immunity would have thereby been obtained.”); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) (“As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest”); *U.S. v. Aging Care Home Health, Inc.*, 2006 WL 2915674 (W.D.La. 2006) (“The defense of estoppel is unavailable where the government’s recovery of public money is concerned.”) (citing *Rosas v. United States*, 964 F.2d 351, 360 (5th Cir.1992)); *Federal Trade Commission v. Crescent Publ’g Group, Inc.*, 129 F.Supp.2d 311, 324 (S.D.N.Y. 2001) (“As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.”).

This doctrine dates back to the earliest days of the Supreme Court. See *United States v. Kirkpatrick*, 22 U.S. 720, 735 (1824); *United States v. Insley*, 130 U.S. 263, 266 (1889) (“The principle that the United States are not bound by any statute of limitations nor barred by any

laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right or to assert a public interest, is established past all controversy or doubt.”).

Wisconsin adopted these principles in the seminal case of *Wisconsin v. City of Green Bay*, 96 Wis.2d 195, 291 N.W.2d 508 (1980). There the court stated:

We have not allowed estoppel to be invoked against the government when the application of the doctrine interferes with the police power for the protection of the public health, safety or general welfare. *State of Chippewa Cable Co.*, 21 Wis.2d 598, 608, 609, 124 N.W.2d 616 (1963); *Park Bldg. Corp. v. Ind. Comm.*, 9 Wis.2d 78, 87, 88, 100 N.W.2d 571 (1960); *Town of Richmond v. Murdock*, 70 Wis.2d 642, 653, 654, 235 N.W.2d 497 (1975); *McKenna v. State Highway Comm.*, 28 Wis.2d 179, 186, 135 N.W.2d 827 (1965); *Milwaukee v. Milwaukee Amusement, Inc.*, 22 Wis.2d 240, 252-53, 125 N.W.2d 625 (1964).

City of Green Bay, 96 Wis.2d at 201-202, 291 N.W.2d at 511. In this case, the Wisconsin Attorney General is acting for the “public health, safety [and] general welfare.” The State is seeking to enforce a “public right” and recover “public money.” Accordingly, estoppel is unavailable to Novartis. *See also Westgate Hotel, Inc. v. E.R. Krumbiegel*, 39 Wis.2d 108, 113, 158 N.W.2d 362, 364 (1968) (rejecting the argument that because the City of Milwaukee had not enforced an ordinance for nine years, the defendant had been lulled into thinking that it was in full compliance with the ordinance and that the City was therefore estopped from enforcing the ordinance).

3. Novartis’s Argument Misplaces the Duties of the Parties.

Novartis’s “government knowledge” argument misplaces the burdens and duties of the parties. Novartis has a duty to be honest and truthful with the State where, as here, it knows that the AWP’s it sets, controls, reports, and causes First DataBank to publish will determine the amount of taxpayer dollars spent by the Wisconsin Medicaid program on Novartis’s drugs. *Heckler*, 467 U.S. at 63. In contrast, the State had no duty to sue Novartis earlier or to modify its

Medicaid program to account for Novartis's misconduct. Rather, the reverse is true. Wisconsin is permitted to sue to enforce its laws at any time to recover public funds that were lost due to Novartis's misconduct. *Aging Care Home Health, Inc.*, 2006 WL 2915674 at *1 (defendants' argument that the government was at fault in not discovering defendants' wrongdoing earlier was irrelevant); see also *Westgate Hotel*, 39 Wis.2d at 114, 158 N.W.2d at 365 (where government failed to enforce ordinance for nine years, "the most that can be said for the plaintiff's position is that he had been violating the law for a number of years and had got away with it"); *id.* ("It, however, is axiomatic that a law-enforcing body, when faced with the practical difficulties of enforcing all of its regulations at once, is not thereby barred from future enforcement of the law.").

4. Novartis's So-Called "Disclaimer" Did Not Reveal that its Prices Were False.

The State expects Novartis to argue that it can escape liability because of what Novartis will characterize as "disclaimers" it made in certain documents regarding its AWP's. Although there are likely to be factual disputes as to, among other things: (1) whether such "disclaimers" were communicated to the State, (2) the date that such "disclaimers" were communicated to the State, and (3) whether such "disclaimers" pertained to each of the drugs at issue in this case, such disputes do not preclude summary judgment for the State. Even assuming that Novartis communicated such "disclaimers" to the State, such "disclaimers" are of no legal relevance.

The State expects Novartis to argue that since 1997, each time it launched or introduced a new drug into the market, it provided the State with a written announcement that identified a WAC and an AWP for the drug. The State expects Novartis to argue that in each announcement was the following language:

As used in this letter, the term AWP or Average Wholesale Price constitutes a reference for each Novartis product, and in keeping with current industry practices, is set as a percentage above the price at which each product is offered generally to wholesalers. Notwithstanding the inclusion of the term price, in Average Wholesale Price, AWP is not intended to be a price charged by Novartis for any product to any customer.

The State expects Novartis to argue that based on this “disclaimer,” the State knew that Novartis’s AWP’s were not true prices. This argument misses by a mile. The term “average wholesale price” has a plain meaning, as Judge Saris found – “the average price at which wholesalers sell drugs to their customers.” *In re Pharm. Indus. Average Wholesale Price Litig.*, 460 F.Supp.2d 277 at 278; *see also Federated Nationwide Wholesalers*, 398 F.2d at 257 n.3 (“[t]he term ‘wholesale price’ is generally defined as the price which a retailer pays to its source of supply when purchasing goods for resale to the ultimate consumer.”); *Guess*, 51 F.Supp. at 65 (“a wholesale price is that price which the retailer pays in the expectation of obtaining a higher price by way of profit from the ultimate consumer”). Novartis’s so-called “disclaimer” says nothing about whether Novartis’s AWP’s are the true average prices charged by wholesalers. Rather, it addresses a completely different issue – the price that Novartis charges its customers.

The case law relating to disclaimers makes clear that, to be effective, a disclaimer must be *unambiguous*. As the U.S. Court of Appeals for the First Circuit has noted in the advertising context, “[d]isclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.” *Removatron Intern. Corp. v. F.T.C.*, 884 F.2d 1489, 1497 (1st Cir. 1989) (citing *Giant Food, Inc. v. F.T.C.*, 322 F.2d 977, 986 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964)). Here, Novartis’s so-called “disclaimer” does not unambiguously state that its reported AWP’s do not accurately reflect the actual average price

that wholesalers charge to pharmacies. Novartis's "disclaimer" does not even address this issue. *See also, Giant Food*, 322 F.2d at 986 (retailer Giant Food's attempt to disclaim the plain meaning of the pricing term "manufacturer's list price" was so confusing that it "only added to the deceptiveness of the term as used by Giant."). For this reason, Novartis's so-called "disclaimers" are irrelevant as a matter of law.

V. RELIEF SOUGHT

Wisconsin requests the court grant its motion for summary judgment and enter a finding of liability against Novartis on Counts I and II of plaintiff's Second Amended Complaint. Wisconsin further requests that the court enjoin Novartis from reporting and causing to be published false average wholesale prices and wholesale acquisition costs.

Dated this 27th day of October, 2007.



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EXHIBIT D

See § 100.18(11)(d).¹ To arm Wisconsin in this task, the Act provides special injunctive provisions available to the State alone, *see* § 100.18(11)(a) and (d), and only requires the State to prove two elements to prevail in connection with such a judgment, neither of which relates to reliance:

We first address the legal sufficiency of the claim based upon sec. 100.18(1), Stats. There are two elements to this offense: There must be an advertisement or announcement, and that advertisement must contain a statement which is 'untrue, deceptive or misleading.'

State v. American TV & Appliance of Madison, 146 Wis.2d 292, 300, 430 N.W.2d 709 (Sup. Ct. 1988). Both of the necessary elements have been established by Wisconsin.

In its decision on summary judgment the Court found that Wisconsin had tendered significant evidence showing that defendants had falsely reported average wholesale prices for their products:

While varying in the particulars against each of the four target defendants, plaintiff presents evidence broadly supporting its contention that defendants, in marketing their drugs, falsely reported both wholesale acquisition costs ("WACs") and average wholesale prices ("AWPs") to third parties, such as First DataBank and Red Book, knowing that these third parties would publish pharmaceutical pricing information relied upon by the state in paying or reimbursing retail providers of the drugs through the Wisconsin Medicaid program. The misrepresented WACs and AWPs caused the third parties to publish artificially high drug prices which, in turn, caused, and still causes, the Wisconsin Medicaid program to overpay for defendants' drugs. A *prima facie* case for partial summary judgment in liability under § 100.18, Stats., is thus presented. Decision at 4.

This evidence was never refuted by any of the defendants.

Moreover, as plaintiff showed in its Reply Brief in support of its motion for summary judgment (at 19), defendants' prices are a public problem, not simply an issue for Wisconsin's

¹ "... the department of justice ... may commence an action in circuit court in the name of the state to restrain by temporary or permanent injunction any violation of this section."

Medicaid program. As the witness from Shopko testified, defendants' inflated average wholesale prices are the only prices Shopko sends to its third party payers.

Q. When a drug goes from a brand to generic and the price drops precipitously, you continue to bill at the AWP and you don't tell, for example, the State of Wisconsin that the price now, the acquisition price has dropped precipitously. You wait for Wisconsin to figure that out itself, is that correct? * * *

A. What we send, regardless of brand or generic or at any given point, we send AWP of that drug. Has nothing to do with the cost that we pay for it. So that we're paid on a formula based on AWP. We submit AWP to our third parties and that's what we're paid off of... We send 100 percent of AWP to our third-party payers, to anybody. That's how we bill for a drug, yes.

Deposition of Lorie L. Neumann, October 31, 2007, p. 274.

The publication of wholesale prices that are greater than retailers are actually paying is deceptive as a matter of Wisconsin law. Wis. Stat. § 100.18(10)(b).

It is deceptive to represent the price of any merchandise as a manufacturer's or wholesaler's price, or a price equal thereto, unless the price is not more than the price which retailers regularly pay for the merchandise. The effective date of this subsection shall be January 1, 1962.

Thus, Wisconsin has clearly proved that defendants published advertisements that were deceptive as a matter of law—all that it is required to prove to obtain an injunction.

The *Novell* case broadly supports Wisconsin's position in two ways. First, it makes clear that the major focus of § 100.18(1) is deterrence. As the Wisconsin Supreme Court stated:

¶30 In addition, the purpose of § 100.18 does not support the proposition that reasonable reliance is an element of a § 100.18 claim. This court and the court of appeals have made clear that the purpose of § 100.18 is to deter sellers from making false and misleading representations in order to protect the public. In State v. Automatic Merchandisers of America, Inc., this court determined that the statute applied to face-to-face communications in addition to media advertisements because the statute was 'intended to protect the residents of Wisconsin from any untrue, deceptive or misleading representations made to promote the sale of a product.' 64 Wis. 2d 659, 663, 221 N.W.2d 683 (1974). (Emphasis supplied.)

* * * * *

¶32 Deterrence does not depend on reasonable reliance. Requiring that plaintiffs demonstrate reasonable reliance as a statutory element of a § 100.18 claim therefore would not fulfill the statutory purpose.

Novell, supra, ¶¶ 30, 32.

Holding the injunctive relief hostage to a damage award thus ignores the central focus of the statute and adds a layer of proof not required by Wisconsin law.

Second, *Novell* makes clear that, to the extent reliance has any role to play (but see below), it only applies to the damage prong of § 100.18 and does not impact the only two elements of § 100.18(1) Wisconsin must prove to prevail on its injunctive relief. Thus, *Novell* states at paragraph 47:

¶47 Nonetheless, we stated that even though a plaintiff need not prove reasonable reliance in a § 100.18 claim, ‘the reasonableness of a plaintiff’s reliance may be relevant in considering whether the representations materially induced the plaintiff’s pecuniary loss....’ *Id.* In support of this proposition, we cited Malzewski.

Thus, proof of reliance is unrelated to the State’s entitlement to an injunction. The Supreme Court’s holding in *State v. American TV & Appliance of Madison, Inc.*, that Wisconsin only need prove that defendants published false prices to prevail is dispositive on this point.

Moreover, the holding of *Novell* removes the Court’s concern that ruling for Wisconsin in its enforcement capacity would be nothing more than an advisory opinion, reversible if Wisconsin failed to show damages. Wisconsin’s enforcement claim is based on the undisputed evidence that defendant’s misrepresented their prices to the public and a decision on this claim will be a final judgment in its own right. This judgment will be unaffected by any later damage proceeding, whatever the outcome.

Wisconsin, therefore, requests that the Court enter summary judgment against these four defendants.

II. THE *NOVELL* DECISION INVALIDATES DEFENDANTS' NO CAUSATION ARGUMENT IN CONNECTION WITH PLAINTIFF'S CLAIM FOR DAMAGES.

The *Novell* decision also destroys defendants' no causation argument in connection with Wisconsin's claim for damages.

From the inception of this case, defendants have argued that reliance was an element of plaintiff's *prima facie* case. This argument took many forms but the one most often repeated was that Wisconsin could not prove "that the representation caused the plaintiff a pecuniary loss" unless it showed that it reasonably relied on defendants' false prices.

That argument, which was wrong from the start, has been permanently put to rest by *Novell*. The court stated unequivocally at paragraph 48 that:

¶48 As with Malzewski, we were explicit that plaintiffs in § 100.18 actions do not have to demonstrate reasonable reliance as an element of the statutory claim. K&S Tool & Die, 301 Wis. 2d 109, ¶ 36. Thus, neither the language of the statute, the purpose of the statute, nor the case law supports the Migliaccios' argument that reasonable reliance is an element of a § 100.18 cause of action.

Reliance is only available as an affirmative defense and the burden of proof is, hence, on the defendants, not the plaintiff. The court made this clear in paragraph 49:

¶49 The Migliaccios' maintain that even if reasonable reliance is not an element of a §100.18 claim, the reasonableness of a person's actions in relying on representations is a defense and may be considered by a jury in determining cause. We agree. As set forth above, there are three elements in a § 100.18 cause of action: (1) the defendant made a representation to the public with the intent to induce an obligation, (2) the representation was 'untrue, deceptive or misleading,' and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff. K&S Tool and Die, ¶19; see also Wis. JI-Civil 2418. Reliance is an aspect of the third element, whether a representation caused the plaintiff's pecuniary loss. Tim Torres, 142 Wis. 2d at 70; Valente, 48 F.Supp.2d at 874.² (Emphasis added.)

Thus, the only element that plaintiff must prove beyond the falsity of defendants' prices in order to prevail on its damage claim is that these misrepresentations caused Wisconsin harm.

² The court in *Novell* also made clear in its opinion that the term "materially induced" is simply another term for "caused," not some different legal standard. See paragraphs 49 and 53.

Proof of causation requires only that defendants' misrepresentations be a significant factor in causing plaintiff's harm. *See K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, ¶ 37, 301 Wis. 2d 109, 130, ¶ 37, 732 N.W.2d 792, ¶ 37. Causation is a given in this case. The vast majority of the drugs which Wisconsin paid for were reimbursed on the basis of a formula that relied on defendants' inflated average wholesale prices. Had defendants published their true lower prices, Wisconsin would have paid less. A similar analysis applies to Wisconsin's MAC program. Had defendants published their true, lower prices, pharmacists would have been reimbursed at these prices since they were always lower than the price at which they were MAC'd by Wisconsin.

III. REASONABLE RELIANCE IS NOT A VIABLE DEFENSE TO WISCONSIN'S DAMAGE CLAIM.

Characterizing reasonable reliance as a defense, instead of an element of plaintiff's liability case, has the added consequence of erasing it as a factor in this case altogether.

As *Novell* explains, in the ordinary case if defendant proves that a plaintiff's reliance on its false promises was unreasonable, a jury may choose to deny damages despite plaintiff's proof of unlawful conduct. This is not the case, however, where the State is the plaintiff. As long-standing precedent on the estoppel doctrine makes clear, the "unreasonableness," foolishness, or even impropriety of a government employee's actions cannot estop the government from obtaining relief from a defendant's misconduct. None of the various spins that defendants from time to time have attempted to put on the conduct of Wisconsin employees—that they acted negligently in relying on defendants' prices, that they used defendants' false prices to evade federal regulations requiring that the state only pay the estimated acquisition cost of the drugs being purchased, or that they reached an agreement with the defendants to permit them to publish

wholesale prices greater than retailers were actually paying in the face of a statutory provision banning such conduct—afford a valid defense as a matter of law.

As the Court is well aware from the enormous briefs already filed in this case, the State of Wisconsin has a protected role as a consumer and litigant. Defendants, in their business dealings with the State, cannot bend the rules. *Caveat emptor* is not the governing rule. Instead, parties seeking public funds have a special obligation of honesty. The Supreme Court stated this principle in *Heckler v. Community Health Services*, 467 U.S. 51, 63 (1984):

Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.

Additionally, public funds are protected by a series of decisions dating back to the Republic's infancy, which boil down to the notion that acts of state agents cannot exculpate a defendant who has violated the law and caused damage to the public treasury. Thus, a wrongdoer cannot get off the hook by asserting it was misled by a state employee, or that a state employee acted unreasonably, or that state employees signaled approval of the conduct, or that the a state employee was in cahoots with the defendant. "As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest." *FTC v. Crescent Publ'g Group, Inc.*, 129 F.Supp.2d 311, 324 (S.D.N.Y. 2001). See also *United States v. Kirkpatrick*, 22 U.S. 720 (1824). n *Nevada v. US*, 463 U.S. 110 (1983) (relying on *Utah Power & Light Co. v. US*, 243 U.S. 389, 409 (1917)), the Supreme Court rejected the argument that certain officials of the United States had impliedly acquiesced in granting the defendant an unfettered right to utilize federal lands holding:

As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.

Similarly, in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947), the Court stated:

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.

See also *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 (1940): "Though employees of the government may have known of those (unlawful) programs and winked at them or tacitly approved them, no immunity would have thereby been obtained."

Wisconsin adopted these principles in the seminal case of *State v. City of Green Bay*, 96 Wis. 2d 195, 291 N.W.2d 508 (Wis. 1980). There the Wisconsin Supreme Court held:

We have not allowed estoppel to be invoked against the government when the application of the doctrine interferes with the police power for the protection of the public health, safety or general welfare. *State of Chippewa Cable Co.*, 21 Wis. 2d 598, 608, 609, 124 N.W.2d 616 (1963); *Park Bldg. Corp. v. Ind. Comm.*, 9 Wis. 2d 78, 87, 88, 100 N.W.2d 571 (1960); *Town of Richmond v. Murdock*, 70 Wis. 2d 642, 653, 654, 235 N.W.2d 497 (1975); *McKenna v. State Highway Comm.*, 28 Wis. 2d 179, 186, 135 N.W.2d 827 (1965); *Milwaukee v. Milwaukee Amusement, Inc.*, 22 Wis. 2d 240, 252-53, 125 N.W.2d 625 (1964).

City of Green Bay, 96 Wis. 2d at 201-202, 291 N.W.2d at 511. In this case, Wisconsin's Attorney General is acting for the "public health, safety (and) general welfare," and hence, estoppel is unavailable to the defendant.

In *Westgate Hotel, Inc. v. E.R. Krumbiegel*, 39 Wis. 2d 108, 113, 158 N.W.2d 362, 364 (Wis. 1968), the Court rejected the argument that the City had lulled the defendant into thinking it was in full compliance with an ordinance by its failure to enforce it for nine years. Similarly, in *Wisconsin Employment Relations Commission v. Teamsters Local 563*, 75 Wis.2d 602, 612-13, 250 N.W.2d 696 (Sup. Ct. 1977), the Court held that is unlawful for a state agency to contract away a statute's prohibition.

This line of authority bars any defense that State employees acted unreasonably, negligently or unlawfully in relying on defendants' false prices. Thus, unlike in the ordinary case, the issue of the "reasonableness" of the State's reliance on defendants' false misrepresentations and any related affirmative defenses, is irrelevant.

CONCLUSION

Plaintiff requests that the Court revise its decision on summary judgment and grant Plaintiff's motion.

Dated this 4th day of June, 2008.

Respectfully submitted,



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EXHIBIT E



STATE OF WISCONSIN

CIRCUIT COURT
Branch 9

DANE COUNTY

STATE OF WISCONSIN,)

Plaintiff,)

v.)

ABBOTT LABORATORIES, et. al.,)

Defendants.)

Case No.: 04 CV 1709

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR RECONSIDERATION OF DENIAL OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY
&
REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'
NOTICE OF SUPPLEMENTAL AUTHORITY IN FURTHER SUPPORT
OF DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Plaintiff asks this Court to reconsider its May 20, 2008 decision and order denying Plaintiff's motions for summary judgment but fails to provide any legitimate reason why the Court should do so. Plaintiff's motion entirely ignores the underlying basis for this Court's summary judgment decision: that Plaintiff failed to prove as a matter of law that Defendants' representations were untrue, deceptive or misleading under §100.18. Plaintiff nevertheless argues that *Novell v. Migliaccio* requires reconsideration of that decision. It does not. *Novell* does not address the issue of when a representation is untrue, deceptive or misleading. Rather, it addresses the causation element of a § 100.18 claim.

Instead of addressing the Court's decision and presenting – as it is required to on a motion for reconsideration – newly discovered evidence or establishing a manifest error of law or fact, Plaintiff's motion merely rehashes arguments regarding injunctive relief,

estoppel and reliance, none of which are supported by new fact or argument, or impacted in the least by the recent Supreme Court decision in *Novell*.

Even when Plaintiff invokes *Novell* in its discussion of the causation element, Plaintiff badly misreads the decision, citing it as support for the argument that it need not prove reliance to prevail on its § 100.18 claim. *Novell* contains no such proposition. To the contrary, rather than support Plaintiff's motion for reconsideration, *Novell* supports Defendants' cross-motions for summary judgment by specifically holding that reliance is an aspect of the causation element of a § 100.18 claim.

For these reasons, Defendants request that the Court deny Plaintiff's motion for reconsideration and grant Defendants' cross-motions for summary judgment based on *Novell*, case law previously cited in Defendants' supporting memorandum, and the record in this case.

ARGUMENT

I. Plaintiff Fails to Address the Underlying Basis for this Court's Decision in Its Motion for Reconsideration.

Plaintiff spends most of its nine-page motion reasserting its previously made arguments regarding injunctive relief, estoppel, and reliance, but fails to come forward with new evidence or argument, fails to show how *Novell* supports its arguments and fails to establish that this Court made any error of law or fact in its summary judgment decision.¹

To prevail on a § 100.18 claim, Plaintiff must prove three elements: "(1) the defendant made a representation to the public with the intent to induce an obligation; (2) the representation was untrue, deceptive or misleading; and (3) the representation

¹ *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 275 Wis.2d 397, 416-17, 685 N.W.2d 853, 862, 2004 WI App. 129, ¶ 44 (Wis. Ct. App. 2004) (affirming denial of motion to reconsider that "merely took umbrage with the court's ruling and rehashed old arguments" because it did not present "newly discovered evidence or establish a manifest error of law or fact"), citing *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000).

materially induced (caused) a pecuniary loss to the plaintiff.”² In denying Plaintiff’s motions for summary judgment, the Court ruled that Plaintiff failed to prove as a matter of law the second element of its claim – that Defendants made untrue, deceptive or misleading representations.³ The Court found that material questions of fact exist regarding “whether or not actionable misrepresentations occurred and what role, if any, the defendants played in fomenting these representations,”⁴ thus precluding summary judgment in Plaintiff’s favor. Plaintiff does not address this essential aspect of the Court’s ruling and offers no legitimate reason why this Court should revisit its analysis of the second element of § 100.18 and its denial of Plaintiff’s summary judgment motions.⁵

Nor does the *Novell* decision, or Plaintiff’s invocation of that decision, address, let alone undercut in any way this Court’s analysis of that element. *Novell* has nothing to do with a court’s assessment of whether a representation is untrue, deceptive or misleading under § 100.18, and certainly does not call into question this Court’s determination that “context is relevant to this inquiry.”⁶ Rather, *Novell* focused entirely on the third element of § 100.18, addressing the relevance of the reasonableness of a plaintiff’s reliance in an action under § 100.18.

II. Plaintiff’s Arguments Regarding Injunctive Relief and Estoppel Do Not Support Plaintiff’s Motion for Reconsideration and Are Legally and Factually Incorrect.

After failing to articulate a basis for questioning the Court’s analysis of the second element of its § 100.18 claim, Plaintiff attacks the Court’s analysis of the third element –

² *Novell*, 2008 WI 44, ¶ 49.

³ See Decision and Order on Plaintiff’s Motions for Partial Summary Judgment Against Defendants Novartis, AstraZeneca, Sandoz, and Johnson & Johnson (“Decision and Order”) at 7-8 (May 20, 2008) (holding that the State has not proved that published prices for Defendants’ drugs were “misrepresentations” under §100.18(1) or “deceptive” under §100.18(1)(b)).

⁴ *Id.* at 6-7.

⁵ See *Koepsell’s*, 2004 WI App. 29, ¶ 44.

⁶ Decision and Order at 7.

causation – by trying to resuscitate its injunctive relief and estoppel arguments. Neither of these arguments is supported by the *Novell* decision,⁷ nor does *Novell* provide a basis for reconsidering this Court’s decision based on these arguments.

First, Plaintiff repeats its argument that it need not prove causation when seeking injunctive relief. Even if Plaintiff were correct (which it is not), this would not be a basis for reconsidering a decision that turns on Plaintiff’s failure to show that the representations at issue were untrue, deceptive or misleading. Moreover, Plaintiff is simply wrong on this point. Plaintiff continues to ignore that this is not merely an injunction case; Plaintiff is seeking damages. And, as the Supreme Court holds in *Novell*, a claim for damages requires proof of causation – a point even Plaintiff does not seem to dispute.

Second, Plaintiff again ignores the relevance of the overwhelming evidence of its own knowledge regarding AWP. Plaintiff has tried time and again to repackage the evidence Defendants have presented as relevant only to an estoppel defense. However, and as discussed at length in prior briefing,⁸ Defendants are not arguing that “Wisconsin employees” acted negligently or “tacitly approved” Defendants’ pricing,⁹ and that the actions of these employees estop Plaintiff from pursuing its claims. Rather, Defendants contend, and the evidence shows, that the State of Wisconsin, as an entity and in its official

⁷ For example, Plaintiff argues that its injunctive relief argument is supported by *Novell* because *Novell* generally describes the purpose behind the legislature’s enactment of § 100.18. See Plaintiff’s Br. at 3. *Novell*, however, has nothing to do with injunctive relief or government actions under § 100.18. There is simply nothing in *Novell* to tie that decision to Plaintiff’s injunctive relief argument.

⁸ The bulk of Section III of Plaintiff’s Brief is taken almost word-for-word from its previous briefing. See Plaintiff’s Brief In Support of Protective Order Barring Defendants From Requiring Wisconsin To Search Its Electronic Files For What Defendants Call Government Knowledge Documents at 7-10 (Oct. 9, 2007); see also Plaintiff State of Wisconsin’s Reply Brief In Support of Its Motions For Partial Summary Judgment and Response Brief In Opposition to Defendants’ Cross-Motions for Summary Judgment at 47-49 (Mar. 7, 2008).

⁹ Plaintiff’s Supplemental Memorandum on the Relevance of the Recently Decided Supreme Court Case of *Novell v. Migliaccio* and In Support of Motion for Reconsideration of Denial of Plaintiff’s Motion for Summary Judgment On Liability (“Plaintiff’s Br.”) at 6-7 (June 4, 2008).

capacity,¹⁰ was aware that AWP does not represent an actual average of wholesale prices and intentionally formulated its Medicaid reimbursement methodologies with that knowledge in order to fulfill its federally mandated obligation to provide equal access to care to Medicaid recipients and to satisfy its pharmacy lobby.

This evidence shows that Defendants' representations were not untrue, deceptive or misleading. As this Court recognized in its summary judgment decision:

[C]ontext is relevant to the inquiry, as are any mutual understandings between/among the parties to the representations. At the very least, one cannot, on this record, rule out the relevance of context and mutual understanding to these § 100.18 (1) claims. Plaintiff's argument that "[a]n untrue statement is untrue regardless of whether the listener knows it is untrue" . . . begs the question. How is a statement "untrue" in the first place, if the speaker and listener are using terms they mutually understand because they have agreed on their meaning – that is, they have together developed the definitions, either expressly or tacitly, such that they have a common understanding?¹¹

Even if Defendants *were* in fact presenting evidence of the State's knowledge solely in support of an estoppel defense, there is support for that defense.¹² Wisconsin courts have estopped governmental entities from pursuing cases like this one, where those entities were acting in their official capacities¹³ and seeking forfeitures or money damages.¹⁴

¹⁰ Plaintiff's oft-repeated implication that Wisconsin's knowledge was limited to a few employees is a complete mischaracterization of the evidence before the Court. Defendants have submitted numerous official documents attributed to the Department of Health and Family Services, the Legislative Fiscal Bureau and the Governor's Office demonstrating the State's knowledge and conscious decision to reimburse based on AWP on the basis of this knowledge. *See, e.g.*, DAPUF ¶¶ 9-10, 16, 100-03, 107-15, 137-38, 142, 148, 151, 153-55, 168-69, 177, 180, 190.

¹¹ Decision and Order at 7.

¹² For a detailed rebuttal of Plaintiff's estoppel argument and a discussion of the cases cited therein, *see* 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 at 23-25 (Nov. 5, 2007) and Defendants' Joint Response to Plaintiff's Partial Motions for Summary Judgment Against AstraZeneca, Johnson & Johnson, Novartis and Sandoz & Defendants' Joint Cross-Motion for Summary Judgment and Supporting Memorandum at p. 83 n.111 (Jan. 15, 2008).

¹³ *See, e.g.*, *Department of Revenue v. Family Hospital, Inc.*, 105 Wis.2d 250, 255, 313 N.W.2d 828, 830 (Wis. 1980); *Libby, McNeill & Libby v. Wisconsin Department of Taxation*, 260 Wis. 551, 554, 51 N.W.2d 796, 798 (Wis. 1952).

III. *Novell* Supports Defendants' Cross-Motions for Summary Judgment.

When Plaintiff finally raises an argument that *is* influenced by *Novell*, it completely misreads the Supreme Court's opinion. Plaintiff incorrectly states that *Novell* stands for the proposition that "[r]eliance is only available as an affirmative defense and the burden of proof is, hence, on the defendants, not the plaintiff."¹⁵ The *Novell* decision says nothing of the sort, nor does any case cited in *Novell*.

To the contrary, *Novell* states unequivocally that "[r]eliance is an aspect of the third element [of a § 100.18 claim]."¹⁶ Although the Supreme Court ultimately determined that the reasonableness of a plaintiff's reliance is not a required *element* of a § 100.18 claim, it concluded that "the reasonableness of a plaintiff's reliance may be relevant in considering whether the representation materially induced (caused) the plaintiff to sustain a loss."¹⁷ The Supreme Court also concluded, as defendants have argued in their summary judgment papers, that trial courts are free to make that determination as a matter of law, stating:

[T]here are cases in which a circuit court may determine as a matter of law that a plaintiff's belief of a defendant's representation is unreasonable, and as a result the plaintiff's reliance (which is based on the unreasonable belief) is also unreasonable. The circuit court may determine that the representation did not materially induce the plaintiff's decision to act and that plaintiff would have acted in the absence of the representation.¹⁸

This is one such case. Plaintiff's blithe and unsupported pronouncement that "[c]ausation is a given in this case" notwithstanding,¹⁹ Defendants have provided the Court

¹⁴ *State v. City of Green Bay*, 96 Wis.2d 195, 201-02, 210-11, 291 N.W.2d 508, 511-12, 515-16 (Wis. 1980); *Wisconsin Department of Revenue v. Moebius Printing Company*, 89 Wis.2d 610, 640, 279 N.W.2d 213, 226 (Wis. 1979); *Family Hospital* 105 Wis.2d at 255, 313 N.W.2d at 830; *Libby*, 260 Wis. at 559, 51 N.W.2d at 800.

¹⁵ Plaintiff's Br. at 5.

¹⁶ *Novell*, 2008 WI 44, ¶ 44 (emphasis added).

¹⁷ *Novell*, 2008 WI 44, ¶ 3 (emphasis added).

¹⁸ *Novell*, 2008 WI 44, ¶ 51 (citing Wis. JI-Civil 2418).

¹⁹ Plaintiff's Br. at 6.

with a mountain of uncontroverted *evidence* that Plaintiff did not believe that published AWP's represented actual averages of transaction prices as its lawyers now argue. This evidence shows that Plaintiff intentionally used and retained AWP as part of its reimbursement methodology (and did not use AWP's to set MACs) *because* it knew AWP generally exceeded prices at which pharmacies obtained the products. Plaintiff intentionally adopted this methodology to satisfy the federal equal access mandate and the State's formidable pharmacy lobby. For these very reasons, Plaintiff's own Medicaid officials candidly described this case as [REDACTED]

[REDACTED]²⁰

Plaintiff also has presented *no evidence* that it would have reimbursed providers differently had it known the so-called "truth" about AWP. As set forth in Defendants' prior submissions, the undisputed evidence is that, even after filing its Complaint in this case, Plaintiff has not reduced its reimbursement to providers, has continued to use AWP in reimbursing providers and continues to contract to receive the same (supposedly false) information from FDB. Nor has Plaintiff presented any evidence that Defendants' alleged representations materially induced (caused) it to sustain a loss. Consequently, this is a case that fits the hypothetical raised in *Novell* – a case where Plaintiff's alleged reliance is clearly unreasonable and warrants a finding by the Court that its § 100.18 claim fails as a matter of law.

Conclusion

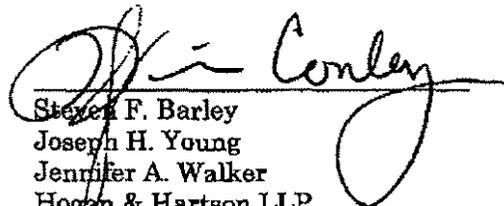
For the foregoing reasons, Defendants request that the Court deny Plaintiff's motion for reconsideration and grant Defendants' cross-motions for summary judgment based on

²⁰ DAPUF ¶ 23.

Novell, case law previously cited in Defendants' supporting memorandum, and the record in this case.

June 11, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2008, 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.



EXHIBIT F

Branch 9

2008 JUN 16 PM 4:22



STATE OF WISCONSIN,

Plaintiff,

v.

ABBOTT LABORATORIES, et al.,

Defendants.

Case No. 04-CV-1709
Unclassified - Civil: 30703

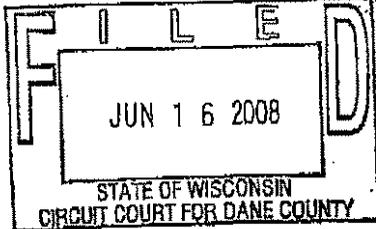
PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS NOVARTIS, JOHNSON & JOHNSON, ASTRAZENECA AND SANDOZ

Pursuant to Wis. Stat. § 806.07, plaintiff moves the Court to reconsider its decision denying plaintiff's motion for summary judgment against defendants Novartis, Johnson & Johnson, AstraZeneca and Sandoz. The grounds for this motion are that the latest Supreme Court decision interpreting Wis. Stat. § 100.18(1), *Novell v. Migliaccio*, 2008 WI 44 (2008) makes clear that Wisconsin has proved all the elements required to establish its public enforcement claim that these defendants caused to be published wholesale prices greater than retailers were generally paying in violation of Wis. Stat. § 100.18(1) and (10)(b) and, hence, is entitled to judgment, an injunction, and an award of attorneys' fees and costs.

Dated this 4th day of June, 2008.

Respectfully submitted,

One of Plaintiff's Attorneys



forced 6-16-08
CC. Atty Conley for distributions to All

ORDER
6/16/08
Motion denied.
Novell Nat.
pertinent to court's rationale in its decision denying plaintiff's summary judgment