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July 16, 2008

VIA MESSENGER

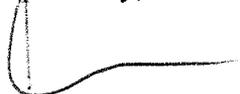
Honorable William F. Eich
840 Farwell Drive
Madison, WI 53704

Re: *State of Wisconsin v. Abbott Laboratories, et al.*
Dane County Case Number: 04-CV-1709

Dear Judge Eich:

In at least a couple of the e-mails that have flowed back and forth between the parties and you, I gathered, I hope correctly, that you would be receptive to a submission confined to new developments impacting on defendants' government knowledge assertions. The enclosed memo addresses two new developments that plaintiff believes are important in that connection.

Respectfully,



Charles Barnhill

CB:lm

Enclosures

cc: All Counsel (via LNFS)
Honorable Richard Niess (via messenger)
Ms. Ann Ford (via messenger)

than the dictionary definition, and consistent with defendants' published prices for Wisconsin.

Here is how Judge Niess characterized the only defense to summary judgment he recognized in his decision:

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.

Niess Decision, Exhibit A at p. 6 (emphasis added).

And he reemphasizes that the only government knowledge defense that he recognizes is the existence of a valid agreement in the paragraph that follows holding:

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 not undisputed....

Judge Niess' decision is consistent with the law under the Federal False Claims Act which holds that government knowledge of defendants' wrongdoing alone is not a defense to a False Claims Act claim. Instead, defendants must show that the government *agreed* to defendants' conduct, i.e., that the government agreed that the term "cat" included dogs. "That the relevant government officials know of the falsity is not in itself a defense." *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). Indeed, without the government's agreement, courts have held that "even a contractor who tells a government contracting officer that a claim is false still violates the statute when the false claim is submitted." *United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F. Supp.218, 223 (D.

Md. 1995). As a result, no case has held that government knowledge automatically or invariably absolves a defendant of liability. *See, e.g., United States ex rel. Kreindler & Kreindler v. United Techs. Corp.* 985 F.2d 1148, 1156 (2nd Cir. 1993).

At most, evidence about government knowledge is only relevant under the FCA to the extent that it serves to negate a defendant's scienter. *See United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002); *Kreindler*, 985 F.2d at 1157; *Shaw v. AAA Eng'g & Drafting, Inc.* 213 F.3d 519, 534 (10th Cir 2000). To make the necessary showing, courts have required that defendant (1) prove that it identified a problem, (2) fully disclosed the problem, and (3) completely cooperated with the government to resolve the problem. *See, e.g., United States ex rel. Costner v. URS Consultants, et al.*, 317 F.3d 883, 888 (8th Cir. 2003) (defendants' "openness with the EPA...and their close working relationship in solving the problems negated the required scienter" under the FCA); *Shaw*, 213 F.3d at 534 (defendant's knowledge was not negated where defendant "repeatedly evaded government employees' questions"); *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 327-29 (9th Cir. 1995) (defendant "complete cooperated and shared all information" during the testing of Apache helicopters); *Wang ex rel. United States v. FMS Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992) (defendant disclosed deficiency and discussed how to fix it). These cases all focus on information within the defendant's control being shared with the government *and* an affirmative act by the government acquiescing in defendant's conduct.

Judge Niess' decision narrowing the relevant governmental inquiry also necessarily limits the scope of governmental discovery. Without debating the issue of who exactly has the power to authorize the State to enter into the kind of agreement described by Judge Niess, it is safe to say that individual state employees have no such authority. This is consistent with long-standing

authority holding that the government cannot be bound or estopped from enforcing the law by actions of individual government employees, as discussed in more detail below. *See, e.g., Utah Power & Light v. United States*, 243 U.S. 389, 409 (1917) (government agents' knowledge of and apparent acquiescence to private parties' occupation of federal land was insufficient to estop the government from enjoining such occupation). What individual Wisconsin employees believe about defendants' inflated prices is therefore irrelevant. This issue is addressed in a real world context in Wisconsin's Reply to Quash Defendant's Notice to Depose Gregory L. Kipfer, a Wisconsin investigator whom defendants seek to depose regarding a meeting he was supposed to have attended in 1998.

In sum, Judge Niess has provided the defendants with a restrictive guideline for future governmental discovery and, although plaintiff believes even this standard is overly generous to defendants (see section 2 below), and will be further limited when subjected to more rigorous analysis as trial approaches, it binds the parties at this juncture. And it is time to apply this strict standard to defendants' inexhaustible requests for discovery from even the lowest level Wisconsin employee.

II. THE *NOVELL* CASE REPUDIATES ANOTHER LONG-STANDING CLAIM OF THE DEFENDANTS.

A recent decision of the Wisconsin Supreme Court, *Novell v. Migliaccio*, 208 Wis. 44 (2008) repudiates a long-standing claim of defendants, namely, that Wisconsin must prove reliance as part of its case in chief.

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 874.¹ (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. 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

¹ 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.

would have been reimbursed at these prices since they were always lower than the price at which they were MAC'd by Wisconsin.

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 cannot be the case, however, where the State is the plaintiff. As long-standing precedent 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,² 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.

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.

² Wisconsin was required by federal law to pay no more than the estimated acquisition cost of the drugs used by Medicaid participants. See 42 CFR 447.301 *et seq.*

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). See *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 391 (1917):

In their answers some of the defendants assert that when the forest reservations were created an understanding and agreement was had between the defendants, or their predecessors, and some unmentioned officers or agents of the United States to the effect that the reservations would not be an obstacles to the construction or operations of the works in question; that all rights essential thereto would be allowed and granted under the act of 1905; that, consistently with this understanding and agreement, and relying thereon, the defendants, or their predecessors, completed the works and proceeded with the generation and distribution of electric energy, and that, in consequence, the United States is estopped to question the right of the defendants to maintain and operate the works. Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *Lee v. Munroe*, 7 Cranch, 366, 3 L. ed. 373; *Filor v. United States*, 9 Wall.45, 49, 19 L. ed. 549; *Hart v. United States*, 95 U.S. 316, 24 L. 3d. 479; *Pine River Logging Co. v. United States*, 186 U.S. 279, 291, 46 L. 3d. 1164, 1170, 22 Sup. Ct. Rep. 920.

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.

See Westgate Hotel, Inc. v. E.R. Krumbiegel, 39 Wis. 2d 108, 113, 158 N.W.2d 362, 364 (Wis. 1968), where 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. *And see Wisconsin Employment Relations Commission v. Teamsters Local 563*, 75 Wis.2d 602, 612-13, 250 N.W.2d 696 (Sup. Ct. 1977), where the Court held that was unlawful for a state agency to contract away a statute's prohibition (just as it would be unlawful for a state employee to authorize defendants to violate § 100.18(10)(b) prohibiting the publication of wholesale prices where retailers were actually paying less).

This line of authority bars any defense that State employees acted unreasonably, negligently or unlawfully in utilizing 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.

Dated this 16th day of July, 2008.

Respectfully submitted,



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EXHIBIT A



May 20 2008
2:08PM

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

STATE OF WISCONSIN,

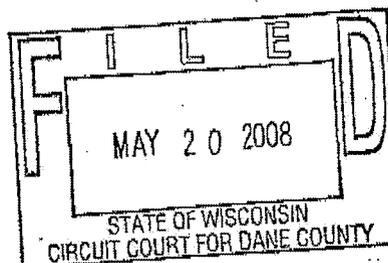
Plaintiff,

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. Mussallem*, 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 foray 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 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 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, 162 N.W. 667(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 765, 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?

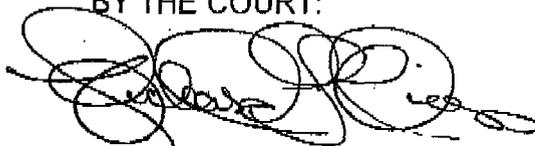
In short, the court finds little advantage to the ultimate resolution of this case at trial in rendering the interlocutory summary judgment plaintiff seeks, even if the plaintiff otherwise qualified for such relief (which, again, it does not). On the other hand, granting the motion might very well create 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)

STATE OF WISCONSIN

CIRCUIT COURT
Branch 9

DANE COUNTY

STATE OF WISCONSIN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 04-CV-1709
)	Unclassified – Civil: 30703
ABBOTT LABORATORIES, et al.,)	
)	
Defendants.)	

CERTIFICATE OF SERVICE

I hereby certify that I caused true and correct copies of the foregoing Plaintiff's Memorandum on Two Recent Developments Relating to Defendants' "Government Knowledge" Defense to be served on counsel of record by transmission to LNFS pursuant to Order of the Circuit Court of Dane County, Branch 7, Case Number 04-CV-1709, dated December 20th, 2005.

Dated this 16th day of July, 2008.



Charles Barnhill

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