

TABLE OF CONTENTS

	<u>PAGE</u>
I. RESPONSES TO CLAIMS.....	4
A. Count I – Wis. Stat. § 100.18(1).....	4
B. Count II – Wis. Stat. § 100.18(10)(b).....	5
C. Counts I and II – Time Period.....	5
II. ELEMENTS OF DEFENSES.....	5
III. PROPOSED UNDISPUTED FACTS	5
A. Responses to Plaintiff’s Proposed Undisputed Facts.....	5
B. Defendants’ Proposed Undisputed Facts.	31
C. AstraZeneca’s Supplemental Proposed Undisputed Facts (“AZPUF”)....	32
IV. ARGUMENT.....	38
A. THE LEGAL STANDARD.....	38
B. WISCONSIN HAS FAILED TO PROFFER ADMISSIBLE EVIDENCE ON EACH ELEMENT OF WISCONSIN LAW NECESSARY TO ESTABLISH A § 100.18 CLAIM AGAINST ASTRAZENECA.	38
C. THE STATE’S MOTION FOR PARTIAL SUMMARY JUDGMENT MUST BE DENIED BECAUSE THE LONG-STANDING CONTRACTUAL RELATIONSHIP BETWEEN FIRST DATABANK/EDS AND WISCONSIN AFFIRMATIVELY SHOWS THE ABSENCE OF CAUSATION.	48
V. RELIEF SOUGHT.....	51

TABLE OF AUTHORITIES

	<u>PAGE</u>
Cases	
<i>Amoco Oil Co. v. Gomez</i> , 125 F. Supp. 2d 492 (S.D. Fla. 2000)	51
<i>Ball v. Sony Elecs., Inc.</i> , No. 05-C-307-S, 2005 U.S. Dist. LEXIS 22004 (W.D. Wis. Sept. 28, 2005)	46, 47
<i>Below v. Norton</i> , 2007 WI App 9, 297 Wis. 2d 781, 728 N.W.2d 156	43
<i>Clements Auto Co. v. Service Bureau Corp.</i> , 444 F.2d 169 (8th Cir. 1971).....	50
<i>Commodity Credit Corp. v. Rosenberg Bros. & Co.</i> , 243 F.2d 504 (9th Cir. 1957)	51
<i>Foss v. Madison 20th Century Theaters</i> , 203 Wis. 2d 210, 551 N.W.2d 862 (Ct. App. 1996)	45
<i>Gilson v. Rainin Instrument, LLC</i> , No. 04-C-852-S, 2005 U.S. Dist. LEXIS 7754 (W.D. Wis. Apr. 25, 2005).....	4, 39, 42
<i>Grube v. Daun</i> , 173 Wis. 2d 30, 496 N.W.2d 106 (Ct. App. 1992), <i>aff'd</i> , 210 Wis. 2d 681, 563 N.W.2d 523 (1997)	46
<i>In re Pharm. Indus. Average Wholesale Price Litig.</i> , 230 F.R.D. 61 (D. Mass. 2005)	43
<i>In re Rezulin Prods. Liab. Litig.</i> , 390 F. Supp. 2d 319 (S.D.N.Y. 2005)	47
<i>K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.</i> , 2007 WI 70 , 301 Wis. 2d 109, 732 N.W.2d 792	passim
<i>Kellerman v. Mar-Rue Realty & Builders, Inc.</i> , 132 Ill. App. 3d 300, 476 N.E.2d 1259 (Ill. App. Ct. 1985).....	46
<i>Lambert v. Hein</i> , 218 Wis. 2d 712, 58 N.W.2d 84 (Ct. App. 1998)	45
<i>Lands' End, Inc. v. Remy</i> , 447 F. Supp. 2d 941 (W.D. Wis. 2006)	5, 39, 46, 47
<i>Malzewski v. Rapkin</i> , 2006 WI App 183, 296 Wis. 2d. 98, 723 N.W.2d 156	44
<i>Osterman v. Sears</i> , No. BDV-99-522(c), 2000 Mont. Dist. LEXIS 1631 (Cascade County Montana Ct., August 30, 2000).....	45
<i>St. Paul Mercury Ins. Co. v. Viking Corp.</i> , No. 04-C-1124, 2007 U.S. Dist. LEXIS 3142 (E.D. Wis. Jan. 12, 2007).....	44

<i>State v. McGuire</i> , 2007 WI App 139, ___ Wis. 2d ___, 735 N.W.2d 555	51
<i>Swift Freedom Aviation, LLC v. R.H. Aero</i> , No. 1:04-cv-90 2005 U.S. Dist. LEXIS 37261 (E.D. Tenn. Sept. 13, 2005)	45
<i>Tagliente v. Himmer</i> , 949 F.2d 1 (1st Cir. 1991).....	45
<i>Valente v. Sofamor, S.N.C.</i> , 48 F. Supp. 2d 862 (E.D. Wis. 1999).....	44
<i>Williams v. Rank & Son Buick, Inc.</i> , 44 Wis. 2d 239, 170 N.W.2d 807 (1969)	44

Statutes and Rules

42 C.F.R. § 447.301	13
42 C.F.R. § 447.304(c).....	12
42 C.F.R. § 447.331(b)	12
42 C.F.R. § 447.512(b)	12
42 U.S.C § 1396r-8	7, 47
Wis. Stat. § 100.18.....	passim
Wis. Stat. § 100.18(1)	passim
Wis. Stat. § 100.18(10)(b).....	5, 48

Other Authorities

72 Fed Reg. 39142, 39239 (July 17, 2007).....	12
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AstraZeneca Pharmaceuticals LP and AstraZeneca LP (“AstraZeneca”)¹ respectfully submit this Memorandum of Law in Response to the State of Wisconsin’s Motion for Partial Summary Judgment On Liability Against AstraZeneca Pharmaceuticals LP and AstraZeneca LP with Respect to Counts I and II of the Complaint. Summary Judgment for Plaintiff should be denied, and summary judgment should be granted in favor of AstraZeneca.

Pursuant to the Court’s Standing Order relating to Motions for Summary Judgment, AstraZeneca hereby states that there is no dispute regarding the parties or the procedural facts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Any statement AstraZeneca made about “AWP” was entirely correct in the context and the industry usage within which it was made. Wisconsin Medicaid has known for decades what “AWP” was (an industry benchmark or reference point), and what “AWP” was not (an actual average of wholesaler prices to retailers net of all discounts, rebates, and the like). Wisconsin chose to use “AWP” in its Medicaid reimbursement formula for sound reasons.

Years later Wisconsin filed this Complaint, in essence crying “fraud.” That entire charge is based on the assertion that a three letter acronym – AWP – means an actual average of wholesale prices to retailers net of all discounts, rebates, chargebacks, and the like, a meaning determined by resort to the dictionary. The State’s motion for summary judgment offers no evidence to prove that assertion. The unopposed evidence is that Wisconsin Medicaid did not believe “AWP” had the meaning the State’s lawyers now contend. Nor does the State proffer any evidence that AstraZeneca used or represented “AWP” to have that meaning. Rather than

¹ AstraZeneca Pharmaceuticals LP and AstraZeneca LP were formed in approximately 1999 as a result of a merger between two pharmaceutical companies. The AstraZeneca Defendants will use the term “AstraZeneca” herein to include predecessor entities in the United States unless otherwise noted.

presenting evidence of what people thought “AWP” meant and why, the State hopes that “literalism by dictionary” will prevail.

Several years ago the Packers renovated Lambeau Field. The renovation included replacing the playing field. When the field was torn up, the Packers advertised for sale pieces of the “frozen tundra.” Many Wisconsinites bought their pieces of the “frozen tundra” and received a box of dirt. Resorting to dictionary definitions, the dirt was not “frozen” and it was not “tundra.” Would the Attorney General of Wisconsin charge the Packers with a massive § 100.18 violation based on the dictionary definitions? Evidence of context, history, and usage give meaning to phrases like “frozen tundra,” just as they do to an industry acronym such as “AWP.”

In an attempt to limit the Court’s burden, AstraZeneca restricts its arguments herein to those not included in other Defendants’ briefs. AstraZeneca incorporates by reference each and every argument, construction, and defense against the State asserted in the Defendants’ Joint Response to Plaintiffs’ Partial Motions for Summary Judgment Against AstraZeneca, Johnson & Johnson, Novartis and Sandoz & Defendants’ Joint Cross Motion for Summary Judgment and Supporting Memorandum (“Joint Response” or “Joint Resp.”); Response of Defendant Novartis Pharmaceuticals Corporation to Motion for Partial Summary Judgment Filed by Plaintiff, And Cross Motion For Summary Judgment Dismissing The Complaint, Filed By Defendant Novartis Pharmaceuticals Corporation (“Novartis Response” or “Novartis Resp.”); and the Johnson and Johnson Defendants’ Memorandum of Law in Opposition to the State of Wisconsin’s Amended Motion for Partial Summary Judgment on Liability with Respect to Counts I and II of Wisconsin’s Complaint, and in Support of Defendants’ Joint Cross-Motion for Summary Judgment (“J&J Response” or “J&J Resp.”).

AstraZeneca's arguments show that the State has not proffered evidence against AstraZeneca on even the most basic of the essential elements of § 100.18, including (but not limited to): any evidence of an AstraZeneca "statement"; any evidence that such a "statement" was ever seen and used by Wisconsin Medicaid; and any evidence that the AstraZeneca "statement" was made "in Wisconsin." Moreover, in the context of one of the most basic elements, causation, under which the State bears the burden of proving it would have acted differently in the absence of the misrepresentation, AstraZeneca presents evidence the State neglected to include in its submission — evidence that Wisconsin obtained "AWPs" pursuant to a contract. Wisconsin contracted with Electronic Data Systems, Inc. ("EDS") to obtain what First DataBank ("First DataBank" or "FDB") terms "AWPs." The contract is specific. Wisconsin pays a substantial amount each year for First DataBank's "AWPs." Wisconsin Medicaid knew for decades that First DataBank's "AWPs" are not an actual average of retail prices net of all discounts, rebates, and the like. Wisconsin Medicaid nevertheless desired to obtain First DataBank's "AWPs," used these computations as it chose to, and Wisconsin Medicaid was entirely satisfied with what it received.

Wisconsin then filed the Complaint in this action. The lawyers who drafted the Complaint alleged that Wisconsin was, in essence, "defrauded," and tried to express shock and dismay in learning that First DataBank's "AWP" was not an actual average of net retail prices. For three and a half years since filing the Complaint the State's lawyers have continued this posturing with the same sincerity as Claude Rains in *Casablanca*, who said he was "shocked, shocked to find that gambling is going on in here!" But what about Wisconsin Medicaid? The contract continues. Wisconsin Medicaid still requires EDS to use First DataBank's "AWPs," has continued to pay substantial amounts to have access to First DataBank's "AWPs," has continued

to use First DataBank’s “AWPs” in its reimbursement formula, and has continued to be entirely satisfied with what it obtains.

Since the filing of this complaint *the State has not acted any differently*. That reality alone shows the real world hollowness of the State’s claims.

I. RESPONSES TO CLAIMS

Plaintiff seeks Summary Judgment as to Counts I and II of the Complaint. AstraZeneca opposes Plaintiff’s Motion for Summary Judgment and requests Summary Judgment in its favor dismissing the Complaint. AstraZeneca incorporates by reference the Responses to Claims stated in the Defendants’ Joint Response. AstraZeneca proffers the following additional responses to Plaintiff’s claims.

A. Count I – Wis. Stat. § 100.18(1)

AstraZeneca disputes the elements of Wis. Stat. § 100.18(1) as stated in Plaintiff’s Motion. Under § 100.18(1) Wisconsin Courts require proof of the following additional elements:

1. “[I]n order for liability to attach [under § 100.18(1)] there must be some statement made in Wisconsin. *Gilson v. Rainin Instrument, LLC*, No. 04-C-852-S, 2005 U.S. Dist. LEXIS 7754, at *33 (W.D. Wis. Apr. 25, 2005) (unpublished decision).
2. “[P]roving causation in the context of § 100.18(1) requires a showing of material inducement....the reasonableness of a plaintiff’s reliance may be relevant in considering whether the representation materially induced the plaintiff’s pecuniary loss.” *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶¶ 35-36, 301 Wis. 2d 109, 732 N.W.2d 792.

3. In order to prove causation under § 100.18(1) plaintiff must show that the loss was the result of a misleading, untrue or deceptive statement “made to promote the sale of a product.” *Lands’ End, Inc. v. Remy*, 447 F. Supp. 2d 941, 950 (W.D. Wis. 2006) (citation omitted).

AstraZeneca also incorporates by reference the Responses to Claims as to Count I stated in the Joint Response at II.A.

B. Count II – Wis. Stat. § 100.18(10)(b)

AstraZeneca incorporates by reference the Responses to Claims as to Count II stated in the Joint Response at II.B.

C. Counts I and II – Time Period

1. It is the law of the case that Wisconsin has no claim under § 100.18(1) or § 100.18(10)(b) prior to June 16, 2001. Plaintiff must proffer evidence of conduct by AstraZeneca after June 15, 2001 on each element required by § 100.18.² *See* Remainder of the Decision and Order on Defendants’ Motions to Dismiss, May 18, 2006 at 11 (Ex. 9).

II. ELEMENTS OF DEFENSES

AstraZeneca incorporates by reference the Elements of Defenses stated in the Joint Response at III.

III. PROPOSED UNDISPUTED FACTS

A. Responses to Plaintiff’s Proposed Undisputed Facts.

REDACTED

² Excerpts from the transcripts and other relevant evidence from the factual record cited herein are included as exhibits (“Ex.”) in the Appendix attached to the affidavit of Barbara A. Neider.

REDACTED

B. Defendants' Proposed Undisputed Facts.

AstraZeneca joins, adopts and incorporates as if fully set forth herein the Defendants' Joint Additional Proposed Undisputed Facts ("DAPUF"). *See* Joint Resp. at IV.

**C. AstraZeneca's Supplemental Proposed Undisputed Facts ("AZPUF").
Background on AstraZeneca's Drug Pricing Conventions.**

REDACTED

Evidence Regarding Whether AstraZeneca Made A Representation to the State of Wisconsin Regarding Pricing For Its Drugs.

93. AstraZeneca never made a statement or representation, either orally or in writing, to Wisconsin Medicaid or the Wisconsin Department of Health and Family Services that these entities considered to be untrue. Transcript of September 27, 2007 deposition of Wisconsin corporate designee Carrie Gray (“Gray Tr.”) p. 210 (Ex. 10); Transcript of September 26, 2007 deposition of Wisconsin corporate designee James Vavra (“Vavra 9/26/07 Tr.”) pp. 541-542 (Ex. 11).

94. The only false or misleading statement that the State claims was made by AstraZeneca is that it reported false AWP’s to national pricing services, such as First DataBank. Plaintiff’s Response to AstraZeneca Pharmaceutical LP’s and AstraZeneca LP’s First Set of Requests for Production of Documents and First Set of Interrogatories Directed to Plaintiff, p. 18 (Dec. 14, 2007) (Ex. 12).

95. AstraZeneca never represented to Wisconsin Medicaid or the Wisconsin Department of Health and Family Services that the WACs for its drugs, or the AWP’s included in various pricing compendia, were actual averages of wholesale prices. Vavra 9/26/07 Tr. at 540 (Ex. 11); Gray Tr. at 122-123 (Ex. 10).

REDACTED

97. Neither Wisconsin Medicaid nor the Wisconsin Department of Health and Family Services has asked AstraZeneca whether AWP’s for its drugs were actual averages of wholesale prices. Vavra 9/26/07 Tr. at 541 (Ex. 11).

98. First DataBank and the State of Wisconsin are the only two entities from which Wisconsin’s fiscal intermediary, Electronic Data Systems (“EDS”) receives drug information in the context of its Wisconsin Medicaid business. Transcript of December 19, 2007 deposition of EDS corporate designee Mark Gajewski (“Gajewski Tr.”) p. 122-123 (Ex. 13).

99. Other than interactions related to rebate dispute resolution, EDS never communicates with any drug manufacturer, including AstraZeneca, about the State of Wisconsin’s Medicaid program. Gajewski Tr. at 299-300 (Ex. 13).

Evidence Regarding Whether Wisconsin Medicaid Has Had Access to Sources That Demonstrated What Providers Were Paying for AstraZeneca’s Drugs.

REDACTED

REDACTED

102. Despite having access to this pricing information, Wisconsin Medicaid did not rely on it for setting Medicaid reimbursement for these drugs, or any AstraZeneca drugs. Plaintiff's Response to AstraZeneca Pharmaceutical LP's and AstraZeneca LP's First Set of Requests for Production of Documents and First Set of Interrogatories Direct to Plaintiff, pp. 19-

⁵ This letter was incorrectly dated February 13, 2006. The correct date should be February 13, 2007.

20 (Dec. 14, 2007) (Ex. 12); Plaintiff's Response to Defendants' Fourth Set of Interrogatories and to Defendants' Fourth Requests for Production of Documents, pp. 2-3 (Nov. 26, 2007) (Ex. 15).

103. From 1999 until the present, except for a brief period, Wisconsin Medicaid had access to actual pricing data for brand-name drugs provided by either F. Dohman or Cardinal, two major drug wholesalers in Wisconsin. (DAPUF ¶ 25). At various points from at least 2000 to the present, the State has also had access to pricing data from McKesson, another major national wholesaler. (DAPUF ¶ 25). McKesson sells brand-name prescription drugs, such as those manufactured by AstraZeneca, to retail pharmacies in Wisconsin. (DAPUF ¶ 25).

104. From 1991 through the present, Wisconsin state entities, not including Wisconsin Medicaid programs, have purchased and continue to purchase drugs pursuant to contracts negotiated directly with AstraZeneca. These entities include, but are not limited to, hospitals, prisons, and mental health institutions. Affidavit of Christine McHenry dated January 11, 2008 ("McHenry Aff."), at ¶¶ 8-9.

105. From 1991 through the present, Wisconsin state entities have purchased and continue to purchase AstraZeneca drugs pursuant to contracts negotiated by group purchasing organizations, including Novation, Consorta, and the Minnesota Multi-State Contracting Alliance for Pharmacy ("MMCAP"), directly with AstraZeneca. McHenry Aff., at ¶ 9.

106. The Wisconsin state entities that purchased or continue to purchase drugs pursuant to contracts negotiated directly with AstraZeneca, or by group purchasing organizations with AstraZeneca, are eligible for particular contract benefits from AstraZeneca and can purchase certain drugs at a discount off of WAC. McHenry Aff., at ¶ 9.

107. Between 1985 to 1995 and 1999 to 2006, Wisconsin Medicaid had access to the prices at which Wisconsin state entities were able to purchase prescription drugs through MMCAP, such as those sold by AstraZeneca. (DAPUF ¶ 25).

108. Providers have sent Wisconsin Medicaid wholesaler invoices that showed the actual prices at which they purchased AstraZeneca drugs, as well as the AWP for those drugs. For example, Wisconsin Medicaid has received invoices containing this information for: Arimidex, Atacand, Crestor, Foscovir, Nexium, Plendil, Prilosec, Rhinocort, Seroquel, Sular, Toprol-XL, and Zestril. Transcript of November 1, 2007 deposition of Wisconsin corporate designee Mary Roma Rowlands at pp. 69, 86, 89-90, 92 (Ex. 16); [REDACTED] [REDACTED] Transcript of September 27, 2007 Nicolet Pharmacy corporate designee Gary Donaldson p. 43 (Ex. 17); [REDACTED] [REDACTED] Hodgkinson Tr. at 61-62 (Ex. 3); [REDACTED] [REDACTED]

Evidence Regarding Whether The Conduct At Issue In This Case Occurred in Wisconsin.

109. Since 1991, no Wisconsin pharmacy assistance program, including Medicaid, SeniorCare, and BadgerCare, has purchased drugs from AstraZeneca. McHenry Aff., at ¶ 7; Transcript of August 16, 2007 Wisconsin corporate designee James Vavra (“Vavra 8/16/07 Tr.”) p. 178 (Ex. 17).

110. AstraZeneca never directly provided Wisconsin Medicaid with AWP or WACs for its drugs. Vavra 9/26/07 Tr. at 540-41 (Ex. 11); Gray Tr. at 119 (Ex. 10).

111. The suggested AWP and WACs sent by AstraZeneca to First DataBank were transmitted from AstraZeneca’s headquarters in Wilmington, Delaware. McHenry Aff., at ¶ 6.

112. First DataBank has no offices, or other corporate presence, in Wisconsin. The electronic data systems which held the suggested AWP and WACs that First DataBank received from AstraZeneca are located and maintained in San Bruno, California. Transcript of January 10, 2008 deposition of Marilyn K. Davis (“Davis Tr.”) pp. 51-52 (Ex. 20).

113. The EDS administrator who oversees the contract with First DataBank is located in San Bruno, California. (DAPUF ¶ 202, n. 35).

114. The electronic data systems which held the information EDS received from First DataBank, and which were used to reimburse providers, are located in Plano, Texas. Gajewski Tr. at 158 (Ex. 13).

Evidence Regarding the State of Wisconsin’s Continued Use of AWP To Reimburse Providers For AstraZeneca’s Drugs.

115. Since bringing this litigation in 2004, claiming that AWP is a false and deceptive price, the State has not discontinued its use of AWP to reimburse providers for AstraZeneca’s drugs. Vavra 8/16/07 Tr. at 137 (Ex. 17); Transcript of National Association of Chain Drug Stores corporate designee Nicole Y. Valentine (“Valentine Tr.”), p. 306 (Ex. 19).

116. Since bringing this litigation in 2004, claiming that it was overpaying Medicaid providers for AstraZeneca’s drugs, the State has not decreased its Medicaid reimbursement rate. Valentine Tr. at 306-307 (Ex. 19).

117. On January 1, 2008, the State implemented a proposal to augment Medicaid provider compensation by increasing the dispensing fee by \$.50. (DAPUF ¶ 94); Valentine Tr. at 307 (Ex. 19).

118. Neither EDS nor Wisconsin ever complained about the services provided by First DataBank. Neither EDS nor Wisconsin ever requested a refund of licensing fees, nor

did they complain that the prices provided by First DataBank were inaccurate or fraudulent. Davis Tr. at 34, 106-107, 197-199 (Ex. 20).

The State of Wisconsin Has No Claims for a Violation of § 100.18 Prior to June 16, 2001.

119. Wisconsin has no claims under § 100.18 prior to June 16, 2001, because they are time-barred. *See* Remainder of the Decision and Order on Defendants' Motions to Dismiss, May 18, 2006 at 11 (Ex. 9).

120. The Court's ruling that § 100.18 claims prior to June 16, 2001 are time-barred occurred roughly a year before Wisconsin deposed any AstraZeneca witnesses. McHenry Tr. at 14 (Ex. 1); Hyde Tr. at 15 (Ex. 2).

IV. ARGUMENT

A. THE LEGAL STANDARD.

The Joint Response and the Novartis Response accurately describe the strict standard for summary judgment. AstraZeneca incorporates those discussions by reference. *See* Joint Resp. at V; Novartis Resp. at IV.B. Plaintiff's motion for summary judgment on two counts of the Deceptive Trade Practices Act ("DTPA" or § 100.18) must be denied for a failure of proof and as contrary to law. As stated at the outset, AstraZeneca, joining the Defendants' Joint Response, the Novartis Response and the J&J Response, will limit argument herein to certain discreet matters, including those specifically involving the State's failure to establish § 100.18 claims against AstraZeneca.

B. WISCONSIN HAS FAILED TO PROFFER ADMISSIBLE EVIDENCE ON EACH ELEMENT OF WISCONSIN LAW NECESSARY TO ESTABLISH A § 100.18 CLAIM AGAINST ASTRAZENECA.

1. The State's Motion for Partial Summary Judgment Must Be Denied Because it Has Not Proffered Admissible Evidence of Conduct by AstraZeneca after June 15, 2001 on Each Element Required by § 100.18.

It is the law of the case that Wisconsin has no claim under § 100.18 prior to June 16, 2001. (AZPUF ¶ 119). Therefore, the State must proffer admissible evidence of conduct by AstraZeneca after June 15, 2001 on each element required by § 100.18. The Court's ruling that § 100.18 claims prior to June 16, 2001 are time-barred occurred roughly a year before Wisconsin deposed AstraZeneca witnesses. (AZPUF ¶ 120). All the State proffers are statements made by AstraZeneca witnesses, the majority of which are solely responsive to general questions and

undifferentiated by time.⁶ The State’s “dump-it-all-in” approach to its statement of allegedly undisputed facts ignores the Court’s prior ruling and does not constitute a *prima facie* showing of conduct by AstraZeneca, after June 15, 2001, allegedly in violation of the statute.

2. The State’s Motion For Partial Summary Judgment Must Be Denied Because It Has Not Proven the Elements Necessary to Establish Liability Under § 100.18(1).

The DTPA requires proof of the following elements:

- a. “[W]ith the intent to induce an obligation, the defendant made a representation to ‘the public.’” *K&S Tool & Die Corp.*, 301 Wis. 2d 109, ¶ 19.
- b. “[T]he representation was untrue, deceptive or misleading.” *Id.*
- c. “[I]n order for liability to attach [under § 100.18(1)] there must be some statement made in Wisconsin.” *Gilson*, 2005 U.S. Dist. LEXIS 7754, at *33.
- d. “[P]roving causation in the context of § 100.18(1) requires a showing of material inducement....the reasonableness of a plaintiff’s reliance may be relevant in considering whether the representation materially induced the plaintiff’s pecuniary loss...” *K&S Tool & Die Corp.*, 301 Wis. 2d 109, ¶ 19.
- e. In order to prove causation under § 100.18(1) plaintiff must show that the loss was the result of a misleading, untrue or deceptive statement “made to promote the sale of a product.” *Lands’ End, Inc.*, 447 F. Supp. 2d at 950 (citation omitted).
- f. “[T]he representation caused the plaintiff a pecuniary loss.” *K&S Tool & Die Corp.*, 301 Wis. 2d 109, ¶ 19.

The State asserts that there is supposedly no factual dispute on any element or aspect of its § 100.18(1) claim against AstraZeneca. *See* Motion for Partial Summary Judgment on Liability Against Defendants AstraZeneca LP and AstraZeneca Pharmaceuticals LP (“Pl.’s Br.”) at 18. Conclusory assertions in the State’s brief are not substitutes for specific evidence and cannot form the basis of summary judgment.

⁶ For example, an affirmative response to a question phrased “since 1991 has X done Y” only establishes that at some time after 1991 X did Y, not that for 13 or 15 years after 1991 X always does Y.

(a) The State Offers No Evidence that AstraZeneca Represented AWP to the Public With the Intent to Induce an Obligation.

AstraZeneca joins, adopts and incorporates as if fully set forth herein the arguments made in the Joint Response at VI.C.3, the Novartis Response at IV.D.3, and the J&J Response at VI.I.A.i.

(i) The State Has Not and Cannot Prove That It Is A Member of the Public Under § 100.18.

AstraZeneca joins, adopts and incorporates as if fully set forth herein the arguments made in the Novartis Response at IV.D.2.

(ii) The State Has Not Proffered Evidence of Any “AstraZeneca AWP” Statements, Much Less Statements that Were Deceptive, Misleading or Untrue.

The bedrock requirement of establishing a § 100.18 claim is a “statement” made by the defendant. *See* Wis. Stat § 100.18(1). The State only obliquely suggests that AstraZeneca, on certain occasions, reported “AWPs” to pricing compendia.⁷ *See* Pl.’s Br. at 20-21. Wisconsin does not proffer any specific AWP “statements” made by AstraZeneca, any AWP “statements” about each (or even any) of the specific AstraZeneca drugs at issue, and certainly no specific AWP “statements” made during the six-month period between June 16, 2001 and January, 2002.⁸ Indeed, the factual record shows that AstraZeneca never made a misrepresentation directly to Wisconsin, and never represented to Wisconsin that AWPs for its drugs have a particular meaning. (AZPUF ¶¶ 93-97). The failure of the State to present

⁷ Moreover, as discussed in the Joint Response and the Novartis Response, “WAC” statements made by AstraZeneca are not actionable under § 100.18, nor is there any evidence that they were used by the State for reimbursements. *See* Joint Resp. at VI.F; Novartis Resp. at 39-41, 58. Nor does the State contend that AstraZeneca WAC statements were false or misleading. (AZPUF ¶ 94).

⁸ Wisconsin concedes that AstraZeneca did not send any “AWPs” to First DataBank after the start of 2002. *See* Plaintiff’s Proposed Undisputed Facts at ¶¶ 41-43.

AstraZeneca, and the Court, with any such actual “statements” made by AstraZeneca demonstrates the fundamental lack of evidence supporting the core element of its § 100.18 claim.

While the State’s lawyers assert that AstraZeneca controlled “AWPs” produced by First DataBank, they proffer no evidence to establish that conclusion. *See* Pl.’s Br. at 19. The evidence in the record is that First DataBank bases “AWPs” upon surveys of wholesalers, and that manufacturers do not determine the AWP’s issued by First DataBank. (DAPUF ¶¶ 225-28, 234). Wisconsin’s reimbursement methodology utilizes a specific First DataBank field, namely “Blue Book AWP.” (DAPUF ¶¶ 229-230). This field is based on information that First DataBank obtains from wholesalers, and is unrelated to information provided by manufacturers. (DAPUF ¶¶ 229, 230, 233-234). Thus, even assuming that the State could establish an AWP “statement” by AstraZeneca, which it has not, there is no connection between a “statement” made by AstraZeneca and what Wisconsin Medicaid used in its reimbursement methodology. Further, before First DataBank “AWPs” are used by the State to calculate reimbursements to providers, EDS makes substantial alterations to the “AWPs” it receives from First DataBank. (DAPUF ¶ 208). EDS applies an algorithm to the raw pricing data, which varies depending on the drug, as well as various filters; only then is the data loaded into a file the State can access for use in reimbursing providers. (DAPUF ¶¶ 208-211).

Notwithstanding the State’s self-serving contentions, AstraZeneca is entitled to require the State to proffer evidence that not only establishes a statement by AstraZeneca, but also connects the dots between an actual “AstraZeneca AWP statement” and what Wisconsin actually saw and used. The State has not done so. There is no evidence in the record that there was any AstraZeneca AWP statement, let alone that Wisconsin saw or used any “AstraZeneca AWP statement.” Indeed, the record is uncontested that what Wisconsin saw and used was First

DataBank's "Blue Book AWP field," which was based upon First DataBank wholesaler surveys. (DAPUF ¶¶ 229-235).

(b) The State Has Not Proven and Cannot Prove that AstraZeneca's AWP's were Untrue, Deceptive or Misleading.

AstraZeneca joins, adopts and incorporates as if fully set forth herein the arguments made in the Joint Response at VI.D.1, the Novartis Response at IV.C and the J&J Response at V.I.A.ii.

(c) There is No Evidence That AstraZeneca Made the Allegedly Actionable Statement In Wisconsin.

To trigger the applicability of § 100.18, Wisconsin must offer evidence that AstraZeneca's "statement" *was made in Wisconsin*. The text of § 100.18 only proscribes misleading statements made in Wisconsin. "No person . . . *shall make . . . in the state . . . a . . . statement . . . relating . . . to . . . merchandise . . . which is untrue, deceptive or misleading.*" (Emphasis added). *See, e.g., Gilson*, 2005 U.S. Dist. LEXIS 7754, at *33 ("However convoluted the language of the statute one thing is clear: in order for liability to attach there must be some statement made in Wisconsin. It is undisputed that the alleged misrepresentations took place in Illinois, not Wisconsin."). When AstraZeneca sent information to First DataBank, headquartered in San Bruno, California, which is where its servers are located and maintained, AstraZeneca did so from Wilmington, Delaware. (AZPUF ¶¶ 111-112; DAPUF ¶ 201); *see In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 83 (D. Mass. 2005) (stating that alleged misrepresentations related to AWP were made in the states of manufacturers' principal places of business). The State must proffer *evidence*, beyond its lawyers' conclusory assertions, that AstraZeneca made a statement in Wisconsin sufficient to trigger the applicability of the statute,

which it has not done. *See* Pl.’s Br. at 20-25 (presenting no factual evidence or legal recognition of the statute’s jurisdictional requirement).

(d) The State Does Not Establish That It Was Materially Induced To Act by Any AstraZeneca Statement And Reliance By The State Must Be Deemed Unreasonable As a Matter of Law.

AstraZeneca will not repeat the argument in the Joint Response and the Novartis Response that an essential element of a claim under § 100.18 is causation; namely, in order to show causation a plaintiff must show that the defendants’ untrue representation “materially induced” the plaintiff to act differently than it would have absent the representation. Joint Resp. at 86-89; Novartis Resp. at 56-57; *see K&S Tool & Die Corp.*, 301 Wis. 2d 109, ¶¶ 35-36. AstraZeneca points out that the Supreme Court has also found that whether or not the plaintiff relied on the defendant’s untrue “statement” is strongly determinative of whether the plaintiff was or was not “materially induced” to act in a way that caused it to suffer a loss. *See K&S Tool & Die Corp.*, 301 Wis. 2d 109, ¶¶ 35-36. In addition, in certain instances a plaintiff’s reliance on a statement would be so unreasonable that, as a matter of law, the plaintiff could not have been materially induced by the statement. *See Below v. Norton*, 2007 WI App 9, ¶ 13 n.4, 297 Wis. 2d 781, 728 N.W.2d 156 (noting that there are some circumstances where reasonable reliance should be an element of a § 100.18 claim).

The State does not contend that Wisconsin Medicaid “thought” First DataBank’s “AWPs” were actual averages of net prices retailers paid to wholesalers.⁹ The record is uncontested that Wisconsin knew for decades prior to June 16, 2001, that First DataBank’s

⁹ Because the State cannot deny it knew precisely that AWP’s are not actual average of wholesale prices, its attorneys assert that its knowledge is irrelevant to this litigation. *See* Pl.’s Br. at 30-31. This is clearly untrue as a matter of Wisconsin law, since the State is the party bringing this litigation, and its undisputed knowledge goes to material elements of its claims. *See* Joint Resp. at 84-86.

“AWPs” were not actual average wholesale prices.¹⁰ (DAPUF ¶¶ 1-30). Under these circumstances, it is beyond dispute that the State knew the representations it now complains about were “untrue.” See Joint Resp. at 81-84. Consequently, reliance must be deemed unreasonable here as a matter of law. See *Malzewski v. Rapkin*, 2006 WI App 183, ¶ 24, n.3, 296 Wis. 2d 98, 723 N.W.2d 156 (explaining that as matter of law a plaintiff should not be determined to have reasonably relied on a statement that must be untrue on its face).

As § 100.18 case law makes clear, where the evidence indicates that a plaintiff did not actually rely on a defendant’s misrepresentation, the plaintiff cannot demonstrate material inducement. See *St. Paul Mercury Ins. Co. v. Viking Corp.*, No. 04-C-1124, 2007 U.S. Dist. LEXIS 3142, at *74 (E.D. Wis. Jan. 12, 2007) (unpublished decision) (holding that a plaintiff must show “actual reliance on the representation”); *Valente v. Sofamor, S.N.C.*, 48 F. Supp. 2d 862, 874 (E.D. Wis. 1999) (granting summary judgment for defendant on the basis that where there was no reliance on a misrepresentation, causation could not be established). Moreover, a plaintiff cannot have actually relied on a misrepresentation where, as here, the factual truth underlying the misrepresentation was known to the plaintiff. See *Williams v. Rank & Son Buick, Inc.*, 44 Wis. 2d 239, 245, 170 N.W.2d 807 (1969) (finding that “[it] is apparent that the

¹⁰The evidence is that since the 1970s the State knew that AWP were not actual acquisition costs. Since that time, the State has received numerous Medicaid action transmittals and government reports, including some specific to Wisconsin, indicating that AWP are higher than providers’ actual acquisition costs. (DAPUF ¶¶ 5-12, 16, 122-124, 127, 161-163, 174). The State has commissioned its own study, which findings showed that Wisconsin pharmacies purchase prescription drugs at a significant discount to AWP. (DAPUF ¶ 21). Further, the State has long had access to a wide variety of transactional data from wholesalers and other market participants indicating the actual prices that retailers pay for brand name drugs. (AZPUF ¶¶ 103-107; DAPUF ¶¶ 24-25). Indeed, its corporate designees fully acknowledged that the State has been aware that AWP are not supposed to represent actual averages of wholesale prices. (DAPUF ¶¶ 17-18). Finally, the fact that since 1990 the State has applied a discount off of AWP in estimating its providers’ aggregate acquisition costs is evidence that it could not have believed that AWP were supposed to represent a proxy for those costs. (DAPUF ¶ 131).

obviousness of a statement's falsity vitiates reliance since no one can rely upon a known falsity.”).

Finally, where a plaintiff is aware that a misrepresentation has been made and acts notwithstanding this knowledge, the plaintiff ceases to have a viable claim under the statute. AstraZeneca is aware of no § 100.18 case in which a plaintiff knew that a misrepresentation had been made and yet was able to successfully claim he or she was deceived. In the context of common law fraud cases, Wisconsin courts have repeatedly held that it is *de facto* unreasonable to rely on a known falsity. *See, e.g., Lambert v. Hein*, 218 Wis. 2d 712, 732, 58 N.W.2d 84 (Ct. App. 1998); *Foss v. Madison 20th Century Theaters*, 203 Wis. 2d 210, 218-19, 551 N.W.2d 862 (Ct. App. 1996) (“The law will not permit a person to predicate damage upon statements which he does not believe to be true, for if he knows they are false, it cannot be said that he is deceived by them.”). These principles apply with equal force to the State’s allegations brought under § 100.18, predicated upon deception claims.¹¹

There is no evidence that any “statement” made by AstraZeneca “materially induced” Wisconsin to act differently than it would have acted absent any such “statement.” The

¹¹ Courts interpreting other states’ consumer protection statutes have held that a plaintiff is barred from bringing a claim where he or she is aware of the misrepresentation that forms the basis of the claim. *See, e.g., Tagliente v. Himmer*, 949 F.2d 1, 3, 7-8 (1st Cir. 1991) (buyer’s loss was not caused by deceptive statement where the buyer “knew of the existence of . . . wetlands on the property throughout the transaction” and was “aware of the regulation of wetlands by the government.”); *Swift Freedom Aviation, LLC v. R.H. Aero*, No. 1:04-CV-90, 2005 U.S. Dist. LEXIS 37261, at *54-55 (E.D. Tenn. Sept. 13, 2005) (unpublished decision) (“where a buyer was ‘in possession of all material facts, either actually or constructively,’ relevant to the condition of the item for sale, yet proceeded with the purchase, and could not succeed on its TCPA claim because any unfair or deceptive trade practices were not the *cause* of its injury”) (emphasis in original) (citation omitted); *Osterman v. Sears*, No. BDV-99-522(c), 2000 Mont. Dist. LEXIS 1631 (Cascade County Montana Ct., Aug. 30, 2000) (unpublished decision) (granting summary judgment on a Montana consumer protection claim where the plaintiff should have been aware of the false information that formed the basis of the claim); *Kellerman v. Mar-Rue Realty & Builders, Inc.*, 132 Ill. App. 3d 300, 476 N.E.2d 1259 (Ill. App. Ct. 1985) (because of plaintiff’s awareness of mortgage insurance charge plaintiff could not establish causation).

explanation for this gaping evidentiary hole in the State's case is plain: Wisconsin Medicaid knew at all times what First DataBank's "AWPs" were and were not, *see* Joint Resp. at 84-86, just as Wisconsin Medicaid knew what it was doing – before and after June 16, 2001 – in setting provider reimbursement rates based on First DataBank's "AWPs." *See* Joint Resp. at 61-64, 90. The State is thus not entitled to summary judgment because it cannot demonstrate that AstraZeneca caused anything at all.

(e) There is No Evidence That The State Was Induced by Any AstraZeneca Statement to Purchase Any AstraZeneca Products.

The causation element of § 100.18 contemplates that a plaintiff is induced by a defendant's false "statement" to purchase the defendant's merchandise (or services), and plaintiff therefore suffers a pecuniary loss. *See, e.g., K&S Tool & Die Corp.*, 301 Wis. 2d 109, ¶ 35-36. Consequently, in order to link the inducement with the loss, the statute requires that an actual purchase was made by the plaintiff. *See Ball v. Sony Elecs., Inc.*, No. 05-C-307-S, 2005 U.S. Dist. LEXIS 22004, at *8 (W.D. Wis. Sept. 28, 2005) ("In order to sustain the claim plaintiff must demonstrate that the [defendant's] warranty was a material inducement *in the purchasing decision.*") (emphasis added). DTPA jurisprudence supports this contention; the body of law surrounding § 100.18 demonstrates the expectation that a plaintiff suing under this statute purchased something that originated with the defendant. In *Lands' End, Inc. v. Remy*, the Court, finding that defendant's statements were not actionable under § 100.18, distinguished between the plaintiffs, who were not the consumers and did not purchase any of defendant's goods, and the plaintiffs' customers, who did purchase the goods but were not deceived by defendant's statements, which they never saw. *See Lands' End*, 447 F. Supp. 2d at 950 (explaining that the actual purchasers "were not deceived into purchasing goods they did not wish to purchase and

were not subjected to any misrepresentations about the goods they ultimately purchased. They obtained exactly what they sought. . .”); *see also Grube v. Daun*, 173 Wis. 2d 30, 47, 496 N.W.2d 106 (Ct. App. 1992), *aff'd*, 210 Wis. 2d 681, 563 N.W.2d 523 (1997) (plaintiff purchased land from defendant); *Ball*, 2005 U.S. Dist. LEXIS 22004, at *5 (plaintiff purchased allegedly defective camcorders manufactured by defendant). AstraZeneca is aware of no successful § 100.18(1) case where the plaintiff did not purchase the defendant’s product, land or services.

It is undisputed that Wisconsin Medicaid does not purchase AstraZeneca drugs. (AZPUF ¶ 109; DAPUF ¶ 31). It is similarly undisputed that the State does not purchase pricing information from AstraZeneca. (AZPUF ¶ 110). In a desperate attempt to fit its claims into § 100.18, the State will likely attempt to equate its own conduct (reimbursing providers a portion of pharmacies’ costs for AstraZeneca’s drugs) with the transactional requirement of § 100.18. A reimbursement is not a “purchase” as contemplated by the statute. *See Joint Resp. at 78-79; see also In re Rezulin Prods. Liab. Litig.*, 390 F. Supp. 2d 319, 333 (S.D.N.Y. 2005) (finding that third party payers who made reimbursements for drugs did not have standing to bring claims as consumers under several states’ consumer protection statutes because they did not purchase drugs). Moreover, reimbursing providers was required by federal law imposed on Wisconsin when the State elected to participate in Medicaid. 42 U.S.C § 1396r-8. Wisconsin does not proffer any evidence that it was “induced” to reimburse providers by any AstraZeneca “statement,” even if “reimbursements” paid to providers could somehow be construed as a purchase of goods or services from AstraZeneca. *See Joint Resp. at 78-79.*

(f) The State Has Not Proffered Evidence and Cannot Prove that AstraZeneca's AWP's Caused it To Suffer a Pecuniary Loss.

AstraZeneca joins, adopts and incorporates as if fully set forth herein the arguments made in the Novartis Response at IV.D.4 and the J&J Response at VI.I.A.iii.

3. The State's Motion Must Be Denied Because § 100.18 Does Not Apply to Drugs.

AstraZeneca joins, adopts and incorporates as if fully set forth herein the arguments made in the Joint Response at VI.C.1 and VI.C.2.

4. The State's Motion for Partial Summary Judgment On Its § 100.18(10)(b) Claim Must Be Denied.

AstraZeneca joins, adopts and incorporates as if fully set forth herein the arguments made in the Joint Response at VI.E and the Novartis Response at IV.E.

C. THE STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT MUST BE DENIED BECAUSE THE LONG-STANDING CONTRACTUAL RELATIONSHIP BETWEEN FIRST DATABANK/EDS AND WISCONSIN AFFIRMATIVELY SHOWS THE ABSENCE OF CAUSATION.

The State has contracted with a third-party administrator, EDS, which manages the State's Medicaid program and processes claims. (DAPUF ¶¶ 200, 202-206). This contractual relationship and the surrounding circumstances serve both to show there is no § 100.18 causation, and also to highlight the inequity of the State's finger-pointing.

One of the provisions of the contract between the State and EDS explicitly requires EDS to "maintain drug pricing using the tape drug pricing mechanism *from First DataBank.*" (DAPUF ¶ 207) (emphasis added). In its bid, EDS explained that it contracts with First DataBank and set forth the process by which EDS updated the drug file by using the Blue Book tape from First DataBank. (DAPUF ¶ 207). Thus, the State specifically asked EDS to supply it with "AWPs" and in accepting EDS' bid the State accepted that the "AWPs" under the

contract would be First DataBank “AWPs.” EDS provided First DataBank’s “AWPs,” and the State was satisfied. (AZPUF ¶ 118; DAPUF ¶¶ 206, 215-217). Nowhere in its Request for Proposal (“RFP”) or in the contract does the State ask EDS to furnish the “actual average of wholesale prices net of all discounts” for Medicaid-eligible drugs. (DAPUF ¶ 207, n. 36). Moreover, as fully described in the Joint Response, it is undisputed that the State knew that First DataBank’s “AWPs” were not an actual average of wholesale prices net of all discounts. *See* Joint Resp. at 32-40.

It is also undisputed that after the State filed this Complaint in June 2004—after even the State’s lawyers admitted the State “knew” of the supposed “fraud”—the State has continued to contract with EDS for the provision of the exact same information—“AWPs” supplied by First DataBank that the State’s lawyers now call “phony.” (DAPUF ¶¶ 206, 215-17). The State chose to continue to use First DataBank’s “AWPs” as the reference point for provider reimbursement. (AZPUF ¶ 115; DAPUF ¶ 43). *The State has, for almost four years, acted no differently despite admittedly knowing that First DataBank’s “AWPs” were not actual averages of net retail prices.* (AZPUF ¶ 116). Furthermore, AstraZeneca has been reporting Average Sales Price (“ASP”) information to Wisconsin since 2003; such ASPs represent a figure close to the actual costs of those drugs to providers. (AZPUF ¶¶ 100-101). The State acknowledges that, despite having access to this information, it never altered the way it reimbursed for these drugs, or any AstraZeneca products. (AZPUF ¶ 102; DAPUF ¶¶ 218-224).¹² Finally, after the State brought this litigation in June 2004 and “knew the truth,”

¹² Other sources have also given the State access to actual pricing information for AstraZeneca’s drugs. It is undisputed that several Wisconsin governmental entities, other than Medicaid, purchased AstraZeneca drugs at discounts off WAC pursuant to contracts negotiated directly with AstraZeneca, or through contracts negotiated by group purchasing organizations. (AZPUF ¶¶ 104-106; DAPUF ¶ 25). Wisconsin Medicaid had access to the prices

Wisconsin has not only failed to lower its Medicaid reimbursement rate, it has actually decided to *increase* provider compensation. (AZPUF ¶¶ 116-117).

The State has thus not proffered any evidence that it would have acted differently absent the alleged misconduct by AstraZeneca, as required for a viable claim under § 100.18. Indeed, the evidence in the record shows that the State has not altered its conduct since “becoming aware” of the nature of “AWP,” or bringing its claims in this case. *See* Joint Resp. at 89-90. Consequently, the State cannot demonstrate causation under the statute.¹³ *See K&S Tool & Die Corp.*, 301 Wis. 2d 109, ¶ 37 n.7 (citing Wis. JI.—Civil 2418).

Entirely distinct from the foregoing deficiencies with the State’s § 100.18 claims, the State’s general theory against AstraZeneca must be viewed in light of the undisputed facts of the contract between the State and EDS. Against the backdrop of the contract, the State’s lawyers’ theory is truly peculiar. In the contract, the State specified, and got, what it wanted—First DataBank’s “AWPs” – from its contracting party (EDS). The lawyers assert that a non-contracting party (AstraZeneca) should have given a non-contracting party (First DataBank) information (actual average net retail prices) so a contracting party (EDS) would give the State

at which Wisconsin governmental entities were able to purchase AstraZeneca’s drugs pursuant to these contracts. (AZPUF ¶ 107). Further, Wisconsin Medicaid received wholesaler invoices from providers that demonstrated the actual prices at which the providers purchased AstraZeneca drugs from wholesalers. (AZPUF ¶ 108; DAPUF ¶ 25). Finally, from 1999 to the present, except for a brief time period, Wisconsin Medicaid had access to the actual prices at which retailers purchased AstraZeneca drugs from F. Dohman or Cardinal, two major drug wholesalers in Wisconsin. (AZPUF ¶ 103).

¹³ The political dynamic at work in Wisconsin also defeats the State’s attempt to prove causation. The fact that there have been proposals over the years to adopt alternative reimbursement methodologies that have been rejected, as well as proposals to decrease provider reimbursement as part of every bi-annual budget since 1999 that have been either rejected or amended, indicates that it was political will and competing policy goals, rather than reliance on a misrepresentation, that dictated what the State reimbursed for pharmaceutical drugs. *See* Joint Resp. at VI.A.2; (DAPUF ¶¶ 50-62, 68-73, 105-191). Moreover, the evidence indicates that the State has purposefully chosen to provide a margin to providers on the ingredient cost of its reimbursement formula because the State significantly under-compensates providers for their costs to dispense drugs. *See* Joint Resp. at VI.A.3; (DAPUF ¶¶ 74-104).

information the State had not contracted to receive, did not ask for, and did not want. No authority whatsoever supports that “logic” or result.¹⁴ See, e.g., *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169, 184 (8th Cir. 1971) (holding that “it is clear that a party to an executory contract, who prior to its performance discovers fraud, may not go forward with performance of the contract and subsequently sue for damages.”); *Commodity Credit Corp. v. Rosenberg Bros. & Co.*, 243 F.2d 504, 512 (9th Cir. 1957) (same); *Amoco Oil Co. v. Gomez*, 125 F. Supp. 2d 492, 507 (S.D. Fla. 2000) (a defrauded party “waives a fraud claim by entering into a subsequent agreement respecting the same subject matter after he or she is put on notice of the fraud.”).

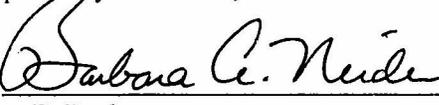
V. RELIEF SOUGHT

For the foregoing reasons and all the reasons discussed in the Joint Response which is incorporated as if set forth fully herein, AstraZeneca respectfully requests this Court to deny The State of Wisconsin’s Motion for Partial Summary Judgment On Liability With Respect to Counts I and II of Wisconsin’s Second Amended Complaint. AstraZeneca suggests the absence of admissible evidence necessary to prove the claims against AstraZeneca as to Counts I and II and respectfully requests that the Court grant summary judgment against the State and in favor of AstraZeneca. AstraZeneca joins the Defendants’ Joint Cross-Motion for Summary Judgment.

¹⁴ Based on cases interpreting the Federal Trade Commission Act, the State claims that any misconduct by First DataBank in publishing “false AWP’s” should be imputed to AstraZeneca. Pl.’s Br. at 25-28. This is wrong for two reasons. First, First DataBank is not guilty of misconduct, as it has abided by its contractual obligations to provide the data requested by the State, which the State continues to use, without alteration, in its Medicaid reimbursement formula. Second, the cases cited by the plaintiff are inapposite, because § 100.18 only applies to affirmative misrepresentations made by a defendant, as opposed to a failure to disclose. See *State v. McGuire*, 2007 WI App 139, ¶ 21, ___ Wis. 2d ___, 735 N.W.2d 555; see also Novartis Resp. at 46-49 (explaining that manufacturers had no duty to monitor the conduct of First DataBank).

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