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STATE OF WISCONSIN

CIRCUIT COURT
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DANE COUNTY

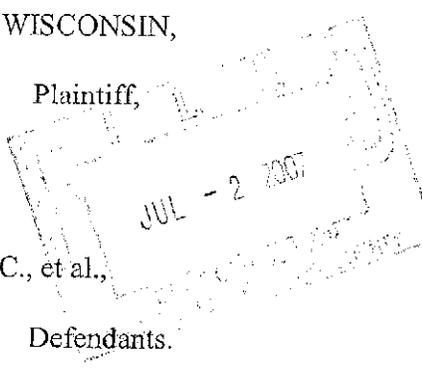
STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., et al.,

Defendants.



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

AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AGAINST DEFENDANT SANDOZ INC. WITH RESPECT TO COUNTS I AND II OF WISCONSIN'S SECOND AMENDED COMPLAINT, AND SUPPORTING MEMORANDUM FILED BY PLAINTIFF STATE OF WISCONSIN

I. INTRODUCTION

In this civil law enforcement action, plaintiff State of Wisconsin moves for summary judgment on liability against defendant Sandoz Inc. ("Sandoz") in connection with Counts I and II of the Second Amended Complaint. There are no genuine issues of material fact and Wisconsin is entitled to judgment as a matter of law. As demonstrated below, the undisputed facts establish that Sandoz has reported and caused to be published false and inflated average wholesale prices ("AWPs") and wholesale acquisition costs ("WACs") for its drugs. These facts entitle Wisconsin to summary judgment on liability as a matter of law.

Summary of Argument

Medicaid is a joint program between the federal government and participating states to provide medical assistance, including prescription drug benefits, to the neediest and most vulnerable populations in society – the poor, elderly, disabled, and blind. Drug manufacturers

are not required to participate in the Medicaid program. Rather, participation is voluntary and drug manufacturers must affirmatively elect to participate by signing a contract with the federal government. Since at least 1993, Sandoz has chosen voluntarily to participate in Medicaid.

Sandoz does not dispute that it sets and controls two different prices for its drugs – an average wholesale price (“AWP”) and a wholesale acquisition cost (“WAC”) – by reporting and causing these prices to be published by various pricing compendia, including First DataBank. Nor does Sandoz dispute that it knows that state Medicaid programs purchase electronic pricing information from First DataBank, including AWP’s and WAC’s. Most importantly, Sandoz admits that the AWP’s it reports and causes First DataBank to publish are not the true average prices charged by wholesalers. In fact, Sandoz admits that its AWP’s are not prices that any purchasers pay for Sandoz’s drugs. Sandoz further admits that the WAC’s it reports and causes First DataBank to publish are not the true net prices paid by wholesalers to Sandoz to acquire Sandoz’s drugs. Rather, Sandoz admits that its WAC’s are simply the prices that appear on invoices sent by Sandoz to wholesalers, but do not reflect rebates, discounts, chargebacks, and similar items that reduce the wholesalers’ true cost to purchase Sandoz’s drugs. These rebates, discounts, and other items reduce the true price of Sandoz’s drugs by as much as 90% below WAC.

Sandoz has violated Wis. Stat. 100.18(1), which prohibits any representation with the intent to sell that contains any assertion that is untrue, deceptive or misleading. Indeed, it is well-established that it is unlawful to publish a price of any kind, regardless of the name attributed to the price, where no significant sales are made at that price. Because Sandoz admits that no purchaser pays the published AWP for Sandoz’s drugs, Sandoz has violated Section 100.18(1).

Sandoz has also violated Wis. Stat. 100.18(10)(b), which declares it unlawful to represent a price as a “wholesale” price when retailers are in fact paying less. Sandoz’s conduct violates Section 100.18(10)(b) because retail pharmacies pay substantially less than the published AWP’s for Sandoz’s drug.

Notwithstanding these clear violations of law, the State expects Sandoz to argue that liability cannot be established because Wisconsin employees knew or should have known that discounts were being given to providers, resulting in average acquisition costs that were less than the published AWP’s. This argument fails for several reasons. First, liability under the relevant statutes exists upon the publication of a false price. No more needs to be proven, and nothing else is relevant to the determination of liability. None of the elements of these claims examines the knowledge, beliefs, action, or inaction, of the State. Second, Sandoz’s argument is an estoppel argument that is not available to Sandoz as a matter of law. Third, Sandoz’s argument misplaces the burdens and duties. The State has no duty to modify its Medicaid program to account for Sandoz’s misconduct. Rather, Sandoz has a duty to be honest and truthful with the State where, as here, Sandoz knows that the Wisconsin’s Medicaid program obtains Sandoz’s AWP’s and WACs from First DataBank.

II. CLAIMS

Wisconsin seeks summary judgment on liability as to Counts I through IV of its Second Amended Complaint.¹

A. Count I - Wis. Stat. 100.18(1)

This statute provides:

No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by

¹ The State is not at this time moving for summary judgment on Counts III-V of the Second Amended Complaint.

such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

- Elements:
- (1) an advertisement, announcement, statement or representation
 - (2) containing a statement that is untrue, deceptive or misleading
 - (3) with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service

The statement need not be made with knowledge as to its falsity or with an intent to defraud or deceive.

Sources:

State v. American TV & Applicant of Madison, Inc., 146 Wis.2d 292, 300 (1988)
Wisconsin Pattern Jury Instructions, Civil § 2418

B. Count II - Wis. Stat. 100.18(10)(b)

This statute states: "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."

- Elements:
- (1) a representation
 - (2) that the price of any merchandise is a wholesale price
 - (3) when retailers regularly pay less than the wholesale price for the merchandise

Sources: Plaintiff has been unable to locate any case law or Wisconsin pattern jury instruction that identifies the elements of this claim. The elements are evident from the plain language of the statute.

III. PROPOSED UNDISPUTED FACTS

1. Medicaid is a joint program between the federal government and participating States that provides medical assistance, including prescription drug benefits, to the poor, elderly, disabled, and blind. Transcript of January 25, 2007 deposition of Sandoz corporate designee Ronald Hartmann, Director of Government Affairs (“Hartmann Tr.”), at 28-29.²

2. Since 1991, the State of Wisconsin has participated in the Medicaid program and provided a prescription drug benefit to program participants. Hartmann Tr. at 29.

3. Drug manufacturers are not required to participate in the Medicaid program; rather, they must elect to participate. Hartmann Tr. at 29-30.

4. Drug manufacturers who wish to participate in the Medicaid program and have their prescription drugs reimbursed by participating state Medicaid programs must sign a written contract with the federal government known as a rebate agreement. 42 U.S.C. § 1396r-8, *et seq.*; Hartmann Tr. at 32-33.

5. Sandoz Inc. (“Sandoz”) is a manufacturer of generic drugs. Hartmann Tr. at 25.

6. A generic drug is the chemical equivalent to a brand named drug. Hartmann Tr. at 25-26.

7. Prior to 2002, Sandoz was known as Geneva Pharmaceuticals Inc. (“Geneva”). Hartmann Tr. at 24-25; Transcript of January 25, 2007 deposition of Sandoz corporate designee Hector Armando Kellum, Manager of Trade Pricing and Analysis (“Kellum Tr.”), at 49-50.³

² Excerpts of the deposition of Ronald Hartmann are attached hereto as Exhibit 1.

³ Excerpts of the deposition of Hector Armando Kellum are attached hereto as Exhibit 2.

8. Since 1993, Sandoz has chosen voluntarily to participate in the Medicaid program. Hartmann Tr. at 30.

9. Sandoz believes that as a corporate citizen it has a duty to know everything about the Medicaid program. Hartmann Tr. at 36-37.

10. Sandoz sets an AWP (Average Wholesale Price) and a WAC (Wholesale Acquisition Cost) for its drugs. Kellum Tr. at 75.

11. Since January 1, 1993, Sandoz has reported the AWPs and WACs that it sets for each of its drugs to price reporting services including First DataBank and the Red Book. Kellum Tr. at 37-38, 53-54.

12. Since January 1, 1993, Sandoz has reported the same AWPs and WACs to First DataBank and the Red Book. Kellum Tr. at 57; Transcript of June 11, 2007 deposition of Kevin Galownia, Sandoz's Senior Manager of Pricing and Financial Analysis from March 2002 until September 2005 ("Galownia Tr.") at 135.⁴

13. A retail pharmacy is a public pharmacy with a physical "brick and mortar" location such as Walgreens, CVS, or Wal-Mart that is open to anyone who has a prescription. Hartmann Tr. at 41-42.

14. Sandoz reports AWPs and WACs to First DataBank because its customers expect it. These customers include retail pharmacies that are reimbursed by the Wisconsin Medicaid program. Kellum Tr. at 42-47.

15. Hector Armando Kellum, Sandoz's corporate designee, testified at deposition:

Q: So, back to that, one of the reasons that Sandoz has chosen to report AWP's and WAC's, to the pricing publications like First Data Bank is because Sandoz's customers expect and want Sandoz to do that; is that correct?

A: That is correct.

⁴ Excerpts of the deposition of Kevin Galownia are attached hereto as Exhibit 3.

- Q: And that is because those prices affect the reimbursement of those customers; is that correct?
- A: I believe that's correct, yes.
- Q: And the reimbursement -- these customers by the way are reimbursed by among other entities, state Medicaid programs; is that correct?
- A: That's my understanding, that some of our customers are reimbursed by state Medicaid programs, yes.

Kellum Tr. at 46-47.

16. Sandoz also reports AWP and WACs for its drugs to First DataBank because it is necessary in order to sell Sandoz's drugs. Galownia Tr. at 108. As Mr. Galownia testified:

- Q: And would you agree with me that one of the reasons that Sandoz reported AWP and WAC to the pricing compendia, as you said, made sure that it was consistent with the AWP and WACs within the Sandoz system was because it was necessary in order to sell Sandoz products?
- A: Yes.

17. When Sandoz reports AWP and WACs to First DataBank, Sandoz intends for First DataBank to publish the identical AWP and WACs. Kellum Tr. at 55; Galownia Tr. at 130-131.

18. First DataBank publishes the identical AWP and WACs that Sandoz sets and reports to First DataBank. Kellum Tr. at 75-76; Galownia Tr. at 131-132.

19. Sandoz knows that First Data Bank takes the AWP and WACs that Sandoz reports to it and publishes those identical AWP and WACs. Kellum Tr. at 55-56; Galownia Tr. at 131-132.

20. In each of the few instances where First DataBank did not publish the identical AWP or WAC that Sandoz reported to First DataBank for a Sandoz drug, Sandoz advised First DataBank of this fact and First DataBank published the corrected AWP or WAC as requested by Sandoz. Kellum Tr. at 56-57.

21. In addition, First DataBank has asked Sandoz to verify the AWP and WACs that First DataBank intends to publish for Sandoz's drugs. Kellum Tr. at 57-58; Galownia Tr. at 135-136.

22. When First DataBank has asked Sandoz to verify the AWP and WACs that First DataBank intends to publish for Sandoz's drugs, Sandoz has in fact verified them. Kellum Tr. at 58.

23. In some instances, Sandoz determined that corrections needed to be made to the AWP or WACs that First DataBank had asked Sandoz to verify. In each of those instances, Sandoz reported the corrected AWP or WACs to First DataBank and First DataBank published the corrected AWP or WACs reported by Sandoz. Galownia Tr. at 135-137.

24. Other than these instances, Sandoz has never taken any action to stop, object to, or otherwise oppose the publication of the AWP or WAC for any of its drugs by First DataBank or two other price reporting compendia -- Red Book and Medispan. Kellum Tr. at 58, 73, 76-77.

25. Sandoz knows the AWP and WACs for its drugs that First DataBank publishes because Sandoz purchases a product called Analysource from First DataBank which includes the AWP and WACs for Sandoz's drugs. Kellum Tr. at 59-60; Galownia Tr. at 132-133.

26. Sandoz understands that state Medicaid programs purchase electronic pricing information from First DataBank, including AWP and WACs. Hartmann Tr. at 60-61, 66-67.

27. Sandoz believes that First DataBank is the largest repository of electronic pricing information for prescription drugs. Kellum Tr. at 68; Galownia Tr. at 97-98.

28. When Sandoz sends price proposals or bids to potential customers regarding Sandoz's drugs, Sandoz provides not only the proposed bid or contract price, but also the AWP

for the drugs. Sandoz does this because it knows that at least in some instances, reimbursement to those customers for Sandoz's drugs is based on AWP. Kellum Tr. at 210-212.

29. The AWPs for Sandoz's drugs that Sandoz reports to First DataBank and that are published by First DataBank are not the true average prices at which wholesalers sell Sandoz's drugs. Kellum Tr. at 90-91, 193; Galownia Tr. at 113-114, 221-222.

30. Hector Armando Kellum, Sandoz's corporate designee, testified at deposition:

Q: . . . Would you agree that the average wholesale prices that Sandoz reports and the First Data Bank publishes for the Sandoz drugs, is in fact, more than what retailers regularly pay for Sandoz drugs?

MR. GALLAGHER: Objection to the form.

A: My understanding is that you know, based on data that I have looked at, that typically, retailers pay less than the generic AWP, that we have listed with First Data Bank.

Kellum Tr. at 193.

31. Kevin Galownia testified at deposition:

Q: . . . [W]ould you agree with me that the AWPs that Sandoz reported to First Databank and that First Databank published were not the average price at which wholesalers sold Sandoz drugs to their customers?

MR. GALLAGHER: Objection to the form of the question.

A: I would agree that based on the literal -- on the literal defining of average wholesale price by somebody outside of the industry that doesn't understand the industry dynamics that Sandoz AWPs were not representative or reflective of that literal definition.

Galownia Tr. at 221-222.

32. Sandoz has no information showing that any of its drugs were purchased by retail pharmacies at a price equal to or greater than the then current AWP published by First DataBank or Redbook since 1993. Kellum Tr. at 102.

33. In those instances in which Sandoz sells its drugs directly to retail pharmacies, Sandoz knows that retail pharmacies have paid less than the AWP for the drugs that Sandoz reports to First DataBank and that First DataBank publishes because WAC is the highest contract price paid by a retail pharmacy that buys directly from Sandoz and WAC is always lower than AWP. Kellum Tr. at 109-111; Galownia Tr. at 223-224.

34. Because of various rebates and discounts offered to retail pharmacies, the true net price paid by retail pharmacies when purchasing Sandoz's drugs directly from Sandoz could be as large as 50% to 70% below WAC. Galownia Tr. at 226-232.

35. In those instances in which Sandoz sells its drugs indirectly to retail pharmacies through wholesalers and there is a contract between Sandoz and the retail pharmacy that establishes the price to be paid by the retail pharmacy, the contract price paid by the retail pharmacy is typically lower than the WAC, which is always lower than the AWP for the drugs reported by Sandoz to First DataBank and published by First DataBank. Kellum Tr. at 115-116.

36. Because the AWP for a Sandoz drug is always higher than the WAC for that drug, Sandoz knows that when it sells its drugs to retail pharmacies through wholesalers and there is a contract between Sandoz and the retail pharmacy that establishes the price to be paid by the retail pharmacy, the retail pharmacy is paying less than the AWP for the drug. Kellum Tr. at 123-124; Galownia Tr. at 232-233.

37. Sandoz defines WAC as the price on the invoice to a wholesaler. Kellum Tr. at 91, 259-260; Galownia Tr. at 112.

38. WACs that Sandoz reports and causes First DataBank to publish do not include various discounts, rebates, and chargebacks. Kellum Tr. at 91-98; Galownia Tr. at 112; 310-313.

Accordingly, the WACs that Sandoz reports and causes First DataBank to publish for Sandoz's drugs are not the true net prices paid by wholesalers to Sandoz.

39. As Mr. Kellum testified at deposition:

Q: Can you explain what a charge-back is?

A: Sure. Going through our sale to the wholesaler we sell to a wholesaler at WAC. At that point in time we don't know exactly where that product will eventually be distributed to. So he could sell it at WAC. He could sell it at a contracted price to or at a price to his source program or he could sell it to one of our customers at our contracted price with the customer. When he does that, that contracted price is typically below WAC. So, he is actually selling it to them at below his original acquisition costs. And that charge back is an accounting mechanism to make him whole for selling it at that price.

Q: And these charge backs or rather the contract price that is honored that results in the charge-back, those are not reflected in the WAC's that Sandoz reports to First Data Bank; is that correct?

A: No, they are not.

Kellum Tr. at 163-164.

40. In those instances in which Sandoz sells its drugs indirectly to a retail pharmacy through a wholesaler and there is a contract in place between Sandoz and the retail pharmacy that sets the price, that contract price is always lower than WAC. The contract price could be as much as 90% below WAC. Kellum Tr. at 115-116.

41. Sandoz sets a WAC and AWP for its generic drugs at the time it launches, or introduces, a new generic product into the market. As time passes and competition increases, the WAC and the true contract prices for Sandoz's drugs fall. Although Sandoz reports a lower WAC to First DataBank as the contract price falls, it does not report a lower AWP to First DataBank. Accordingly, the spreads between the true contract prices and the published AWP's can be thousands of percents. Kellum Tr. at 81, 126-127.

42. As an example, in October 2002, Sandoz reported and caused to be published an AWP for the drug atenolol (NDC 00781-1507-10) of \$1,188.93 and a WAC of \$154.57. Kellum Tr. at 124-125; Exhibit 4 (Redbook Product Listing Verification dated October 21, 2002).

43. As another example, in April 2004, Sandoz reported and caused to be published an AWP for atenolol (NDC 00781-1506-10) of \$792.49 even though the price to retail chain drug stores such as Walgreens and CVS was \$36.15. Kellum Tr. at 141-153; Exhibit 5 (Sandoz Price List Updated April 26, 2004).

44. Exhibits 4-5 contain numerous examples of drugs for which Sandoz reported and caused to be published AWP's that were hundreds, and in some instances, thousands of percents higher than the true average prices paid by retail pharmacies for the drugs. Exhibits 4-5.

45. There is no predictable relationship between the AWP, WAC, and contract price for a Sandoz drug except that the AWP is always higher than the WAC and the WAC is always higher than the contract price. As Mr. Galownia testified at deposition:

Q: Am I correct, then, that there is no set and predictable relationship between the WAC and the AWP for a Sandoz drug at the time of launch? That is, if I know one of them, I won't necessarily know what the other is?

A: That is correct.

Q: Am I correct there is no predictable -- I'm sorry. Does that statement hold true throughout the time period after launch? That is that there is no predictable relationship for a Sandoz drug between the WAC for that drug and the AWP for that drug after the time of launch?

A: That is correct, other than the fact that a WAC will always be lower than AWP.

Q: And am I correct there is no predictable relationship between the AWP for a Sandoz product and the actual contract price for a Sandoz product at the time of launch?

A: That's correct.

Q: Except that the contract price will be less than the AWP?

A: Correct.

Q: Does that hold true over time? That is that there is no predictable relationship between the AWP and the actual contract price for a Sandoz product after the time of launch?

A: That is correct.

Q: And am I correct that there is no predictable relationship between the WAC and the actual contract price for a Sandoz product at the time of launch, other than the fact that the contract price will be less than the WAC?

A: That's correct.

Q: And am I correct that there is no predictable relationship between WAC and the actual contract price for a Sandoz product after the time of launch, except that the contract price will be less than the WAC?

A: That is correct.

Galownia Tr. at 168-170.

46. Sandoz has no policy requiring it to lower the AWP or WAC for any of its drugs when the market price for any of its drugs drops. Kellum Tr. at 88-89; Galownia Tr. at 184.

47. Sandoz has no policy prohibiting it from raising the AWP or WAC for any of its drugs when the market price for any of its drugs has not changed. Kellum Tr. at 89.

IV. ARGUMENT

SUMMARY JUDGMENT ON LIABILITY SHOULD BE GRANTED FOR THE STATE OF WISCONSIN.

Sandoz admits that it sets and controls the AWP's and WAC's that are published by First DataBank. Sandoz further admits that its AWP's are not the true average prices charged by wholesalers and that its WAC's are not the true net prices paid by wholesalers for Sandoz's drugs. These admissions establish liability as a matter of law under Counts I and II of the State's Second Amended Complaint.

A. Factual Background Regarding the Medicaid Program.

Medicaid is a joint program between the federal government and participating states to provide medical assistance, including prescription drug benefits, to the neediest and most vulnerable populations in society – the poor, elderly, disabled, and blind. PUF 1. The program is voluntary rather than mandatory. Drug manufacturers must affirmatively elect to participate. PUF 3. Since at least 1993, Sandoz has elected to participate in the Medicaid program. PUF 8.

By electing voluntarily to participate in Medicaid, Sandoz must comply with certain rules. The first of these is the general rule applicable to all businesses benefiting from public expenditures:

Justice Holmes wrote: 'Men must turn square corners when they deal with the government.' *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920). This observation has its greatest force when a private party seeks to spend the Government's money. 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 v. Community Health Servs., 467 U.S. 51, 63 (1984).

B. Sandoz's Unlawful Conduct

Sandoz does not dispute that it sets and controls the AWP for its drugs that are published by First DataBank and which state Medicaid programs purchase. PUF 10-12, 17-26. Nor does Sandoz dispute that the AWP it reports and causes First DataBank to publish are not the true average prices charged by wholesalers. PUF 29-36. Rather, Sandoz admits that the AWP it reports and causes First DataBank to publish are far above the true average prices charged by wholesalers. PUF 41-45. Stated differently, Sandoz admits that retail pharmacies pay far less than AWP to acquire Sandoz's drugs. As an example, in October 2002, Sandoz reported and caused to be published an AWP for the drug atenolol (NDC 00781-1507-10) of \$1,188.93 when it knew that the true market price for the drug was less than \$154.57. PUF 42, Exhibit 4. This means that the AWP was more than 7 times the true price. As another example, in April 2004, Sandoz reported and caused to be published an AWP for atenolol (NDC 00781-1506-10) of \$792.49 even though the price to retail chain drug stores such as Walgreens and CVS was \$36.15. PUF 43; Exhibit 5. This means that the AWP was nearly 22 times the true price. Exhibits 4-5 contain numerous examples of additional drugs for which Sandoz reported and

caused to be published AWP's that were hundreds, and in some instances, thousands of percents higher than the true average prices paid by retail pharmacies for the drugs. PUF 44.

In addition, Sandoz admits that it sets and controls the wholesale acquisition costs ("WACs") for its drugs that are published by First DataBank. PUF 10-12, 17-25. Sandoz further admits that the WACs it reports and causes First DataBank to publish are not the true net prices paid by wholesalers to Sandoz to acquire Sandoz's drugs. Rather, Sandoz admits that its WACs are simply the prices that appear on invoices sent by Sandoz to wholesalers, but do not reflect rebates, discounts, chargebacks, and similar items that reduce the wholesalers' true cost to purchase the drugs from Sandoz. PUF 37-39. These rebates, discounts, and other items reduce the true price of Sandoz's drugs by as much as 90% below WAC. PUF 40.

C. Sandoz's Conduct Violates Wisconsin Law

1. Sandoz's Conduct Violates Wis. Stat. § 100.18(1).

a. Sandoz's Reporting and Publication of False Prices is Unlawful.

Wis. Stat. § 100.18(1) prohibits any representation with the intent to sell, distribute, or increase the consumption of merchandise when the representation contains any assertion, representation, or statement of fact that is untrue, deceptive or misleading. Sandoz's reporting and publication of false AWP's and WACs clearly violate this statute. As the Wisconsin Supreme Court held almost twenty years ago, there are only two elements to this claim: (1) an advertisement or announcement must exist; and (2) the advertisement must contain a statement which is "untrue, deceptive or misleading." It is not necessary to prove that the statement was made with knowledge as to its falsity or with an intent to deceive or defraud. *State v. American TV & Appliance of Madison, Inc.*, 146 Wis.2d 292, 300 (1988); *see also* Wisconsin Pattern Jury Instructions, Civil § 2418. Rather, the only intent that must be demonstrated is the intent to sell,

distribute or increase the consumption of the merchandise. The two required elements are easily established here.

As to the first element, Sandoz made an advertisement or announcement each time it reported and caused First DataBank to publish AWP and WACs for Sandoz's drugs. Sandoz reports and causes First DataBank to publish AWP and WACs for Sandoz's drugs because Sandoz's customers expect it. PUF 14-15. Sandoz also reports AWP and WACs for its drugs to First DataBank because it is necessary in order to sell Sandoz's drugs. PUF 16. That is, Sandoz knows that third party payers, including state Medicaid programs such as Wisconsin's, purchase pricing information such as AWP and WAC from First DataBank. PUF 26, 28. In addition, Sandoz made an advertisement or announcement each time it sent a price proposal or bid to a potential customer which contained the AWP for a Sandoz drug. PUF 28.

As to the second element, each time Sandoz reported and caused First DataBank to publish AWP and WACs for Sandoz's drugs, Sandoz made a "statement" that was "untrue, deceptive, or misleading." In fact, each statement was untrue, deceptive, and misleading.

Sandoz's statements were clearly untrue. The starting point for this analysis is the plain meaning of the term "average wholesale price." When faced with this question, Judge Saris of the United States District Court for the District of Massachusetts, who is presiding over the multidistrict litigation entitled *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456 (D.Mass.), turned to her dictionary and determined that "average wholesale price" means exactly what it says: the average price paid for goods for resale. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 460 F.Supp.2d 277, 287-88 (D.Mass. 2006); *id.* at 278 ("the Court construes the statutory term according to its plain meaning and holds that AWP means the average price at which wholesalers sell drugs to their customers."). Other

courts have defined the term “wholesale price” in a similar fashion. *E.g.*, *Federated Nationwide Wholesalers Service v. Federal Trade Commission*, 398 F.2d 253, 257 n.3 (2d Cir. 1968) (“[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 v. Montague*, 51 F.Supp. 61, 65 (E.D.S.Car. 1942) (“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”). Where a term is undefined, Wisconsin courts also turn to the dictionary. *Jauquet Lumber Co. v. Kolbe & Kolbe Millwork Co.*, 164 Wis.2d 689, 698, 476 N.W.2d 305, 308 (Ct. App. 1991). Any dictionary the court chooses confirms Judge Saris’ definition of the plain meaning of “average wholesale price.”

A statement is “untrue” within the meaning of Wis. Stat. 100.18(1) when it “does not express things exactly as they are.” *Tim Torres Enterprises, Inc. v. Linscott*, 142 Wis.2d 56, 65 n.3, 416 N.W.2d 670, 673 n.3 (Ct. App. 1987); *see also* Wisconsin Pattern Jury Instructions - Civil § 2418 (1998) (a statement is untrue “if it is false, erroneous, or does not state or represent things as they are.”). Importantly, what the public, the State, or any other purchaser understood about Sandoz’s AWP is irrelevant to the determination of truthfulness under the statute. *Tim Torres Enterprises*, 142 Wis.2d at 66; 416 N.W.2d at 674 (“When a statement is actually false, relief can be granted on the court’s own findings without reference to the reaction of the product’s buyers or consumers.”) (citing *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir.1978)); *see also Quaker State Oil Refining Corp. v. Burmah-Castrol, Inc.*, 504 F.Supp. 178, 182 (S.D.N.Y. 1980) (if advertising is false on its face, preliminary injunction may be granted without demonstrating that consumers were actually misled). Because Sandoz admits that the AWP it reports and causes First DataBank to publish are not the true

average prices charged by wholesalers to retailers (PUF 50-51), Sandoz's statements are "untrue" and violate Wis. State. 100.18(1).⁵

Sandoz's statements were also "deceptive" and "misleading" within the meaning of Wis. Stat. 100.18(1). In construing its consumer protection statutes, Wisconsin looks to federal law interpreting the Federal Trade Commission Act, 15 U.S.C. § 45(a). *Tim Torres, Inc.*, 142 Wis.2d at 66-67, 416 N.W.2d at 674. That Act gives the Federal Trade Commission the power to bring suit to enjoin the dissemination "unfair" and "deceptive" acts or practices. To implement "the prophylactic purpose of the statute" it is not necessary to show that the misleading or deceptive statement was relied upon for there to be a violation of the law. *Tim Torres, Inc.*, 142 Wis.2d at 66-67; 416 N.W.2d at 674 (citing *Federal Trade Commission v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir.1963)). Rather, "[i]t is enough to show that the 'representations made have a capacity or tendency to deceive, i.e., when there is a likelihood or fair probability that the reader will be misled.'" *Id.*

Pricing information is material as a matter of law. *Federal Trade Commission v. Crescent Publ'g Group, Inc.*, 129 F.Supp.2d 311, 321 (S.D.N.Y. 2001) ("The materiality of [pricing] information cannot be denied. Information concerning prices or charges for goods or services is material, as it is "likely to affect a consumer's choice of or conduct regarding a product.") *Id.* (citing *In re Thompson Medical Co.*, 104 F.T.C. 648, 816 (1984), *aff'd*, 791 F.2d 189 (D.C.Cir. 1986)). As a consequence, it has been the law for over forty years that it is unlawful to publish a price, regardless of the name attributed to the price, where that price does not truly represent a price at which significant sales are made. This principle even applies to characterizations of prices as "suggested," "suggested list," or "manufacturer's list" prices. For

⁵ For the same reason, Sandoz's reporting and publication of wholesale acquisition costs that Sandoz admits are not the true net prices paid by wholesalers to acquire drugs from Sandoz also violates the statute.

example, in *Giant Food, Inc. v. Federal Trade Commission*, 322 F.2d 977 (D.C.Cir. 1963), the D.C. Circuit affirmed the Federal Trade Commission's determination that the use of the term "manufacturer's list price" represented to the public that that was the price at which the product was usually and customarily sold by other stores in the area. Because this was not the case, Giant Food violated the Federal Trade Commission Act:

The Commission here has determined that the use of the term 'manufacturer's list price' represents to the public that that was the price at which the product was usually and customarily sold by other stores in the area. This determination was within its power, unless it was 'arbitrary or clearly wrong.' * * * If a manufacturer can be prevented from placing a deceptive price on its product, we see no reason to permit a retailer to make reference to a deceptive *suggested price*.

977 F.2d at 981-982 (emphasis added).⁶ Numerous decisions of the Federal Trade Commission and federal courts are in accord. *E.g., In re Regina Corporation*, 61 F.T.C. 983, 1962 WL 75514 (F.T.C. 1962) (dissemination of "suggested list prices" for products which were not the usual and customary prices at which the products were sold violated the Federal Trade Commission Act); *Regina Corp. v. Federal Trade Commission*, 322 F.2d 765 (3d Cir. 1963); *In re George's Radio and Television Company, Inc.* 62 F.T.C. 179, 1962 WL 75744 (F.T.C. 1962) (finding it unlawful to advertise "manufacturer's suggested list prices," which conveys the impression that merchandise was usually and customarily sold at retail at such prices, where no substantial sales were made at that price).

Subsequent to these decisions, the Federal Trade Commission revised its pricing guidelines to provide that if a "list price" is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer

⁶ To the extent that Sandoz argues that its AWP's are akin to an automobile "sticker prices," *Giant Food* explains why automobile manufacturers can attach a "manufacturer's suggested retail price" to their cars regardless of whether substantial sales are made at that price -- they are required to do so by a specific federal statute, 15 U.S.C. § 1231, *et seq.* *Giant Food*, 322 F.3d at 982. The pharmaceutical industry enjoys no similar protection.

being misled by an advertised reduction from this price. FTC Guides Against Deceptive Pricing, 16 C.F.R. § 233.3(d). In *Helbros Watch Co. v. Federal Trade Commission*, 319 F.2d 868, 870 n.4 (D.C. Cir. 1962), the D.C. Circuit affirmed a determination by the Federal Trade Commission that where 40% of all sales of respondent's products were made at prices substantially less than the preticketed price, this was sufficient to establish "fictitious pricing" in violation of the Federal Trade Commission Act.

Liability against Sandoz is even more compelling than in the above cases, because Sandoz did not report its prices as "suggested" or "list" prices. Rather, Sandoz repeated and consistently stated that its prices were "average wholesale prices," without any qualifying language. Yet Sandoz knew that these were not the average prices charged by wholesalers to retailers. PUF 29-36, 41-45. Because the undisputed facts establish that Sandoz (1) made advertisements or announcements containing (2) statements that were false, misleading, or deceptive, it has violated Wis. Stat. § 100.18(1).⁷

Wisconsin need not demonstrate that Sandoz acted with an intent to deceive or defraud. The only intent that must be demonstrated is an intent to sell, distribute, or increase the consumption of merchandise. Such intent is amply demonstrated here, where Sandoz has admitted that it reported and caused First DataBank to publish its AWP's because Sandoz's customers, including retail pharmacies that are reimbursed by the Wisconsin Medicaid program, expect it, as they know that third party reimbursement depends on publication of Sandoz's AWP's and because it was necessary to report AWP's and WAC's in order to sell Sandoz's drugs. PUF 14-16. Sandoz provides its AWP's directly to potential purchasers (along with its proposed

⁷ Although Sandoz's statements are only susceptible to one meaning, even where a statement is capable of two meanings, one of which is false, it is unlawful. See *Giant Food*, 322 F.2d at 981.

contract or bid price) for the same reason. PUF 28. These facts are sufficient to demonstrate the requisite intent under the statute.

b. Sandoz Cannot Escape Liability by Blaming First DataBank.

Sandoz cannot escape liability by attempting to shift responsibility to First DataBank. As an initial matter, Sandoz admits that it sets and controls the AWP and WACs that First DataBank publishes. PUF 10-12, 17-25. Indeed, in every instance in which First DataBank published an AWP or WAC that was different than the AWP or WAC that Sandoz had reported to it, Sandoz brought this to First DataBank's attention and requested that the AWP or WAC be changed. In every instance, First DataBank did what Sandoz asked it to do. PUF 17-25.

Second, the fact that First DataBank, rather than Sandoz, published the pricing information is irrelevant as a matter of law. "[D]irect participation in the fraudulent practices is not a requirement for liability. Awareness of fraudulent practices and failure to act within one's authority to control such practices is sufficient to establish liability." *Federal Trade Commission v. Windward Marketing, Ltd.*, 1997 WL 33642380 at 13 (N.D.Ga. 1997) (citing *Federal Trade Commission v. Atlantex Assocs.*, No. 87-45, 1987 WL 20384, at *9 (S.D.Fla. Nov.25, 1987), *aff'd*, 872 F.2d 966 (11th Cir. 1989)). Moreover, "[i]t is settled law that 'one who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act. . .'" *In re Coro, Inc.*, 63 F.T.C. 1164, 1963 WL 66825 (1963) (citing *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F.2d 273, 281 (3d Cir. 1952)); *see also Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922) ("That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition."); *Coca Cola Co. v. Gay-Ola Co.*, 200 F. 720 (6th Cir. 1912) (finding liability where defendant

“deliberately furnished to the dealers the material for practicing the fraud”); *Von Mumm v. Frash*, 56 F. 830 (2d Cir. 1893) (finding liability where “defendants knowingly put into the hands of the retail dealers an article of the defendants’ manufacture, so dressed up that, in the hands of the retail dealers, it is an effective means of deceiving the ultimate purchaser . . .”); *Idaho v. Master Distributors, Inc.*, 101 Idaho 447, 458 (1980) (finding liability where defendant created and furnished the sales program, participated in the hiring and training of sales personnel, and was involved on a nearly daily basis with the ongoing operation of the sales program that was unfair or deceptive).

For this reason, a defendant may be liable where it provides the means by which a false, deceptive, or misleading act or practice may be carried out. For instance, in *Baltimore Luggage Company v. Federal Trade Commission*, 296 F.2d 608 (4th Cir. 1961), respondent preticketed its luggage with prices that the retailers were free to retain or remove. These prices were higher than the prices at which the luggage was actually being sold. As the court explained:

Although Baltimore’s pretickets were sometimes removed by the retailers who sold the luggage at less than the preticketed price when the luggage was put on sale, generally the retailers left Baltimore’s tickets on the luggage. Some stores also exhibited cards furnished by Baltimore showing the same price as that printed on Baltimore’s tickets. The hearing examiner found, and the Commissioner adopted his findings, that by preticketing its luggage, and in some instances also by furnishing customers with display cards showing retail prices, Baltimore represented that the prices on the tickets and cards were the usual and regular retail prices, for its luggage, and that this representation was false in those trade areas where the luggage was usually and regularly sold at retail at approximately \$2.00 less.

Id. at 609. The court had no difficulty affirming the Federal Trade Commission’s determination that this conduct was unlawful. *See also Clinton Watch Co. v. Federal Trade Commission*, 291 F.2d 838, 840 (7th Cir. 1961) (“[P]etitioners’ practice [of preticketing] places a means of misleading the public into the hands of those who ultimately deal with the consumer.

Notwithstanding the prevalence of these practices and the familiarity therewith among members of the trade, these activities are proscribed to protect the interest of the public.”)

Similarly, in *In re Regina*, the Federal Trade Commission squarely rejected respondent Regina’s argument that its conduct was lawful because it merely furnished suggested list prices to distributors and retailers but did not make any representations directly to the purchasing public:

Respondent Regina furnished its said suggested list prices to distributors and to retailers. In the period covered by the complaint it did not make any representations as to customary and usual prices directly to the purchasing public. Regina, however, placed in the hands of retailers and others the means and instrumentalities by and through which they may mislead the purchasing public as to the usual and customary prices for Regina [products].

61 F.T.C. 983, 1962 WL 75514; *see also Regina Corporation*, 322 F.2d at 768 (“With respect to those instances where petitioner did not contribute to the cost of misleading advertising, it is settled that ‘One who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act.’ . . . Proof of petitioner’s intention to deceive is not a prerequisite to a finding of a violation . . . ; it is sufficient that deception is possible.”) (citations omitted).⁸

The principles set forth in the above case law have special resonance here. As Justice Holmes long ago made clear, by electing voluntarily to participate in the Medicaid program, Sandoz subjected itself to a greater standard of care than if it were operating in the private marketplace. “Men must turn square corners when they deal with the Government.” *Rock*

⁸ *See also* Restatement of Tort, Sections 876, which provides, in relevant part:

For harm resulting to a third person from the tortious conduct of another, a person is liable if he:

(b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Island, A & L.R. Co. v. United States, 254 U.S. 141, 143 (1920). No matter how Sandoz seeks to spin its conduct, supplying false prices to First DataBank knowing that First DataBank would not only publish these prices, but provide them to state Medicaid agencies, is not “turning square corners” with the government.

2. Sandoz’s Conduct Violates Wis. Stat. § 100.18(10)(b).

Wis. Stat. § 100.18(10)(b) provides a specific example of conduct that is *per se* deceptive. The statute states: “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.” Although the State has not located any case law or pattern jury instruction that articulates the elements of a claim under this section, the elements are evident from the plain language of the statute:

- (1) a representation
- (2) that the price of any merchandise is a wholesale price
- (3) when retailers regularly pay less than the wholesale price for the merchandise

As to the first element, as demonstrated earlier, each time Sandoz reported and caused First DataBank to publish average wholesale prices for its drugs, Sandoz made a “representation.” Similarly, Sandoz made a “representation” each time it provided an actual or potential customer with an average wholesale price for a Sandoz drug. The second element is easily satisfied because Sandoz uses the word “wholesale” in its reporting of “average wholesale prices.” Finally, the third element is undisputed. As Hector Armando Kellum, Sandoz’s corporate designee, testified at deposition:

Q: Would you agree that the average wholesale prices that Sandoz reports and the First Data Bank publishes for the Sandoz drugs, is in fact, more than what retailers regularly pay for Sandoz drugs?

MR. GALLAGHER: Objection to the form.

A: My understanding is that you know, based on data that I have looked at, that typically, retailers pay less than the generic AWP, that we have listed with First Data Bank.

PUF 30. Similarly, Kevin Galownia, Sandoz's Senior Manager of Pricing and Financial

Analysis from March 2002 until September 2005, testified at deposition:

Q: . . . [W]ould you agree with me that the AWPs that Sandoz reported to First Databank and that First Databank published were not the average price at which wholesalers sold Sandoz drugs to their customers?

MR. GALLAGHER: Objection to the form of the question.

A: I would agree that based on the literal -- on the literal defining of average wholesale price by somebody outside of the industry that doesn't understand the industry dynamics that Sandoz AWPs were not representative or reflective of that literal definition.

PUF 31.

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. Sandoz Has No Defense as a Matter of Law To Plaintiff's Motion.

The State expects Sandoz 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, Sandoz is likely to argue that certain Wisconsin employees knew or should have known that Sandoz's average wholesale

prices were false. Moreover, Sandoz 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. This 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 Sandoz's conduct. What State employees knew, should have known, or could have discovered is simply irrelevant to the question of liability.

First, Sandoz's liability under Counts I and II is established by virtue of Sandoz'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 Sandoz of the falsity of the statements (although if required, such knowledge is established here).⁹

In sum, liability under Counts I and II depends solely and exclusively on the conduct of Sandoz. Any efforts by Sandoz to shift the focus of the court's inquiry to the knowledge, belief, or actions of the State is improper.

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

⁹ 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.").

Sandoz'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 Sandoz as a matter of law. Even assuming that certain state Medicaid employees negligently or purposely looked the other way as Sandoz violated the law, such conduct cannot estop Wisconsin from establishing liability against Sandoz 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 Sandoz. *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. Sandoz’s Argument Misplaces the Duties of the Parties

Finally, Sandoz’s argument misplaces the burdens and duties of the parties. Sandoz 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 Sandoz’s drugs. *Heckler*, 467 U.S. at 63. In contrast, the State had no duty to sue Sandoz earlier or to modify its Medicaid program to account for Sandoz’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 Sandoz’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.").

V. RELIEF SOUGHT

Wisconsin requests the court grant its motion for summary judgment and enter a finding of liability against Sandoz on Counts I and II of plaintiff's Second Amended Complaint.

Wisconsin further requests that the court enjoin Sandoz from reporting and causing to be published false average wholesale prices and wholesale acquisition costs.

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