

STATE OF WISCONSIN

CIRCUIT COURT
Branch 7

DANE COUNTY

STATE OF WISCONSIN,
Plaintiff,

v.

AMGEN INC., ET AL.,
Defendants.

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Case No.: 04 CV 1709

**DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF
THEIR JOINT MOTION TO DISMISS THE AMENDED COMPLAINT**

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INTRODUCTION

Plaintiff's Memorandum in Opposition to Defendants' Joint Motion to Dismiss the Amended Complaint ("Pl. Opp.") evades rather than confronts the many reasons why the Amended Complaint should be dismissed. Faced with its complete failure to plead the alleged fraud with particularity, plaintiff argues that the particularity requirement is limited to claims of common-law fraud, an argument that has been overwhelmingly rejected by courts around the country. Faced with the irrefutable public record showing plaintiff's longstanding knowledge of what it now claims is fraud, plaintiff tries to shift its theory of the alleged fraud to one that is unsupported by any allegations in the Amended Complaint. Faced with its failure to state valid claims under any of the counts in the Amended Complaint, plaintiff tries to distort the relevant statutes and legal standards to fit an alleged wrong to which, read plainly, they do not apply. As discussed more fully below, rather than squarely address defendants' arguments, plaintiff employs various contortions in an effort to avoid them.

ARGUMENT

I. THE AMENDED COMPLAINT FAILS TO PLEAD FRAUD WITH PARTICULARITY.

Section 802.03(2) requires that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Wis. Stat. § 802.03(2). Plaintiff makes no serious attempt to show that it has complied with this requirement. Rather, plaintiff contends that "§ 802.03(2) applies only to common law fraud claims" and that, because plaintiff "has asserted no such claim . . . ordinary notice pleading rules apply to the entire complaint." (Pl. Opp. at 38.) However, the statute

speaks of *averments* of fraud, not claims of fraud, and courts have routinely rejected the same argument that plaintiff advances here.

A. Plaintiff's Claims Are Grounded in Fraud and Must Therefore Be Pleaded with Particularity.

The Amended Complaint plainly rests on “averments of fraud,” a fact that plaintiff’s 50-page opposition brief does not deny. Counts I and II both allege violations of section 100.18, which is entitled “Fraudulent Representations.” In support of those claims plaintiff alleges that the State and other payers “have been harmed by defendants’ deceptive conduct”; that defendants “falsely inflat[ed]” wholesale prices; and that payers would have paid less “had the defendants truthfully reported the average wholesale prices of their drugs.” (Am. Compl. ¶¶ 79, 83.) Count IV alleges a violation of the “Medical Assistance Fraud” statute, Wis. Stat. § 49.49(4m)(a)(2). Count V alleges that payers were overcharged “as a direct result of defendants’ misleading pricing information.” (Am. Compl. ¶ 95.) The Amended Complaint further alleges that defendants “publish[ed] false and inflated wholesale prices”; kept “their true wholesale price secret”; and “*knowingly* enabled providers of drugs to Medicaid recipients to charge Wisconsin false and inflated prices.” (Am. Compl. ¶ 60, emphasis added.) Thus, plaintiff’s claims plainly rest on averments of fraud, and must be pleaded with particularity. *See Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777, 783 (7th Cir. 1999); *Friedman v. Rayovac Corp.*, 295 F. Supp. 2d 957, 978 (W.D. Wis. 2003) (“Rule 9(b) applies to all ‘averments’ of fraud.”).

Ignoring that section 802.03(2) applies to all *averments* of fraud, plaintiff first asserts that the particularity requirement “applies only to common law fraud *claims*.”

(Pl. Opp. at 38, emphasis added.) Courts construing similar deceptive trade practices statutes have emphatically and overwhelmingly rejected this argument.¹ The few cases cited at page 40 of plaintiff's brief are a distinct minority.

As a fallback, the plaintiff suggests that the particularity requirement should not apply to *its* statutory DTPA claims, because the elements of a claim under section 100.18 are not identical to the elements of common law fraud. (Pl. Opp. at 39 (DTPA claims “are wholly distinct from common law fraud claims”).) But “the fact that the elements of proof in common law fraud and [state Consumer Fraud Act] violations differ does not exempt [the plaintiff] from the requirement of particularized pleading.” *Naporano Iron & Metal Co. v. American Crane Corp.*, 79 F. Supp. 2d 494, 510 (D. N.J.

¹ See, e.g., *Fidelity Mortgage Corp. v. Seattle Times, Co.*, 213 F.R.D. 573 (D. Wash. 2003)(dismissing state Consumer Protection Act claim because plaintiff failed to plead with particularity); *Rouse v. Philip Morris Inc.*, No. 2:03-2159, 2003 WL 22850072, at *5 (S.D. W.Va. Nov. 18, 2003)(particularity required for fraudulent and deceptive business practices or unfair deceptive acts or practices); *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 252 (D. Md. 2000)(state deceptive trade practices claim “must satisfy Rule 9(b)"); *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313, 1322 (M.D. Fla. 2002) (“Most courts construing claims alleging violations of the Federal Deceptive Trade Practices Act or its state counterparts have required the heightened pleading standard requirements of Rule 9(b)"); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1107 (S.D. Ind. 2001)(particularity required for state consumer protection claims); *Patel v. Holiday Hospitality Franchising Inc.*, 172 F. Supp. 2d 821, 825 (N.D. Tex. 2001)(same); *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 464 (D.D.C. 1997) (“courts in other jurisdictions analyzing similar provisions of similar [state consumer protection] statutes have concluded that allegations supporting the claim “must be pleaded with particularity because they are akin to allegations of fraud”); *Burton v. R.J. Reynolds Tobacco, Inc.*, 884 F. Supp. 1515, 1524 (D. Kan. 1995)(holding that “allegations of deceptive trade practices under the [Kansas Consumer Protection Act] are subject to Rule 9(b)’s requirement of particularity”); *Duran v. Clover Club Foods Co.*, 616 F. Supp. 790, 893 (D. Col. 1985) (particularity required under the Colorado Consumer Protection Act); *TLH Int’l v. Au Bon Pain Franchising Corp.*, No. Civ A. No. 86-2061-MA, 1986 WL 13405 (D. Mass. Nov. 13, 1986) (dismissing state deceptive trade practices claim because they were not pleaded with particularity); *Chandler v. American Gen. Fin., Inc.*, 768 N.E.2d 60, 65 (Ill. App. 2002) (“a complaint alleging a violation of the [state Consumer Fraud and Deceptive Business Practices Act] must be pled with the same particularity and specificity as that required under common law fraud”).

2000).² The reason is that “although fraud is not an element of the action, the action is nonetheless based on fraud.” *McKinney v. State*, 693 N.E.2d 65, 72 (Ind. 1998). Thus, claims such as the plaintiff’s that are “grounded in fraud” must be pleaded with particularity:

In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be “grounded in fraud” or to “sound in fraud,” and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).

Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003).

See also, e.g., *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 593 (Ill. 1996) (“[A] complaint alleging a violation of consumer fraud must be pled with the same particularity and specificity as that required under common law fraud.”); *Humphries v. West End Terrace, Inc.*, 795 S.W.2d 128 (Tenn. Ct. App. 1990) (applying particularity requirement to claim under Tennessee Consumer Protection Act).³

The two cases that plaintiff relies on in support of its notice pleading argument illustrate precisely why a more particularized pleading is required here.

² See also, e.g., *Crowhorn v. Nationwide Mutual Ins. Co.*, No. Civ. A. 00C-06-010WLW, 2002 WL 1767529, at *9 (Del. Super. Jul. 10, 2002). (“Although the elements of a cause of action for consumer fraud under the CFA are significantly different than those elements of common law fraud, a particularity requirement still applies”); *Tuttle v. Lorillard Tobacco Co.*, 118 F. Supp. 2d 954, 963 (D. Minn. 2000) (“Notwithstanding the relative breadth of the consumer protection statutes, Rule 9(b) applies where, as here, the gravamen of the complaint is fraud.”)

³ Similarly, federal courts have concluded that civil claims for false statements under the False Claims Act must be pleaded with particularity. See *U.S. ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1309-10 (11th Cir. 2002) (agreeing with the district court that it was “‘well-settled’ and ‘self-evident’ that the False Claims Act is ‘a fraud statute’ for the purposes of Rule 9(b),” and collecting cases).

Plaintiff first cites to the unpublished opinion in *Wisconsin v. Publishers Clearing House*, in which the Columbia County Circuit Court declined to apply § 802.03(2) to a consumer protection claim. (Pl. Opp. at 38.) The complaint in *Publishers Clearing House* alleged that a single defendant engaged in a pattern of direct consumer solicitations that were misleading. The complaint attached 179 exhibits and incorporated portions of various mailings. The complaint and exhibits specified the communications that were alleged to be misleading, and identified numerous specific examples. The complaint in *Publishers Clearing House* thus supplied the specificity that is missing here, and stands in sharp contrast to the sweeping and undifferentiated allegations directed at “all defendants” that appear in plaintiff’s Amended Complaint.⁴

Equally unpersuasive is plaintiff’s reliance on a chancery court decision from Delaware which ruled that heightened pleading requirements did not apply to Delaware’s consumer fraud statutes. (Pl. Opp. at 39-40, discussing *State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111 (Del. Ch. 2001).) The chancery court’s decision in *Brady* conflicted with prior decisions of the Delaware Superior Court (the

⁴ Plaintiff’s reference to the 1978 Judicial Council Committee Note is also unavailing. (See Pl. Opp. at 38.) As the note makes clear, a pleader in a consumer protection case must “plead a pattern of business transactions, occurrences or events leading to a claim for relief rather than having to specifically plead each and every transaction, occurrence or event when the complaint is based on a pattern or course of business conduct.” Plaintiff has failed to sufficiently plead a “pattern” as to any of the defendants and therefore fails to even meet the pleading requirements of section 802.02(1). Furthermore, although a consumer protection claim may not generally require pleading with specificity, plaintiff’s claims here are entirely grounded in fraud, requiring plaintiff to meet the heightened pleading standard in section 802.03(2).

chancery judge acknowledge the conflict, *id.* at 115),⁵ and the Superior court rejected *Brady's* holding just a year after it was decided.⁶

In short, claims that are “grounded in fraud” are subject to heightened pleading requirements, even when fraud is not an essential element of the statute. Because the DTPA claims asserted by plaintiff here are indisputably “grounded in fraud,” they must satisfy the heightened pleading requirements of section 802.03(2).

B. The Amended Complaint Fails To Comply with Section 802.03(2).

Plaintiff's inability to show that it complied with the pleading requirements of section 802.03(2) explains its unsupported attempt to convince the Court that it does not apply. Plaintiff cannot and does not assert that it has pleaded its claims against each specific defendant with particularity; indeed, plaintiff effectively concedes that it relies on the kind of group pleading that is consistently held to violate the particularity requirement. (*See* Defs. Mem. at 10-12.) However, plaintiff contends that group pleading is acceptable here because “each defendant misleadingly represented the published prices of *all* of its drugs, *all* of the time,” without variation. (Pl. Opp. at 42.) Aside from being incredible on its face, this contention is at odds with the Amended Complaint, which admits the very kinds of “variation” that plaintiff's brief denies.

⁵ *See J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012, at *16 (Del. Super. Mar. 30, 1988) (explaining that “Superior Ct. Civ. R. 9(b) also requires that the circumstances constituting fraud be stated with particularity” with respect to the Deceptive Trade Practices claims); *Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 WL 1442014, at *7 (Del. Super. Sept. 3, 1999) (ruling that “[p]laintiffs have failed to plead with particularity the time, place, and contents [of their statutory consumer fraud claim] as required by Rule 9(b).”).

⁶ *See Crowhorn*, 2002 WL 1767529, at *9 (Del. Super. 2002) (“Although the elements of a cause of action for consumer fraud under the CFA are significantly different than those elements of common law fraud, a particularity requirement still applies”) (acknowledging *Brady* but declining to follow).

Among other things, the Amended Complaint acknowledges that (a) providers are reimbursed based on AWP for only “some of the drugs they sell or administer” (Am. Compl. ¶ 53),⁷ (b) reimbursement under the Wisconsin Medicaid Program is not always based on AWP (Am. Compl. ¶ 58),⁸ and (c) private payers reimburse for drugs pursuant to varying contractual arrangements, privately negotiated contracts, which by their very nature would have varying provisions (Am. Compl. ¶¶ 67-74).⁹ Thus, plaintiff’s attempt to be relieved of the requirement to plead the “who, what, when, where and how” of the alleged fraud on the basis that there are no factual variations in this case finds no support in its own Amended Complaint, much less in the law.

Similarly, plaintiff contends that it need not specify the drugs at issue because its complaint encompasses *all* drugs manufactured by each defendant spanning a period of more than twelve years. (Pl. Opp. at 42.) Yet, plaintiff acknowledges that there are thousands of drugs in the marketplace representing more than 65,000 NDC codes. (See Pl. Opp. at 4.) As with its attempt to avoid differentiating among defendants, plaintiff’s attempt to avoid differentiating among their products necessarily rests on the premise that there are no variations in the way in which these thousands of drugs are priced, marketed and reimbursed. At the same time, plaintiff’s brief belies this very argument. Plaintiff describes the prescription drug market as “dauntingly complex,” and

⁷ Plaintiff’s brief also concedes that the “complaint does not allege that providers were reimbursed on the basis of AWP for every drug defendants market in Wisconsin.” (Pl. Opp. at 30.)

⁸ As explained in defendants’ opening brief, there are a substantial number of instances in which this is the case. (See Defs. Mem. at 23-24 (discussing Wisconsin’s use of reimbursement formulae that are unrelated to AWP for over a thousand drugs).)

⁹ For instance, the Amended Complaint acknowledges that “[s]ome of the fees and rebates” that manufacturers pay PBMs “are revealed publicly and passed on to the clients of the PBMs.” (Am. Compl. ¶ 71; see also Pl. Opp. at 11.)

notes the changes and variations in pricing that may occur “at any time.” (Pl. Opp. at 4.) This acknowledgement cannot be squared with plaintiff’s assertion that all of the manufacturers committed the same fraud for all of their drugs at all times over a twelve-year period. Indeed, the very complexity that plaintiff acknowledges makes it impossible for defendants to defend against—or for any court to effectually manage—such massive, undifferentiated claims. Neither defendants nor this Court should be required to try.

Courts that have squarely considered the issue have agreed. In the multi-district AWP litigation, Judge Saris ruled that:

[T]o the extent the complaint seeks to encompass all ‘brand name drugs,’ named drugs without a specific fraudulent AWP, or generic multi-source drugs, the motion to dismiss is ALLOWED. In the event any such amendment is filed, plaintiffs shall clearly and concisely allege with respect to each defendant: (1) the specific drug or drugs that were purchased from defendant, (2) the allegedly fraudulent AWP for each drug, and (3) the name of the specific plaintiff(s) that purchased the drug.

In re Pharmaceutical Average Wholesale Price Litigation, 263 F. Supp. 2d 172, 194 (D. Mass. 2003). In *State of Connecticut v. Pharmacia Corp.*, the Court required the plaintiff to amend its complaint to identify each drug at issue, the AWP, and the ‘spread’ allegedly created by the discounting for each such drug. (Defs. Appx., Exh. 7). That requirement forced Connecticut to limit its amended complaint to just a few drugs.¹⁰

In *Commonwealth v. TAP Pharmaceutical Products, Inc.*, 868 A.2d 624 (Pa. Commw. Ct. 2005), the Attorney General of Pennsylvania alleged that various pharmaceutical manufacturers engaged in unfair and deceptive marketing schemes and

¹⁰ In other AWP cases, many of which are cited by plaintiff, the courts did not require such repleading because the complaints already specified a limited number of drugs at issue.

conspiracies with regard to AWP. The Commonwealth Court dismissed the complaint in its entirety. As plaintiff correctly notes, Pennsylvania is a “fact pleading,” rather than a notice pleading state. Pennsylvania’s rule 1019(b), however, is nearly identical to Wisconsin’s section 802.03.¹¹ The court held that “[i]n order for the Court properly to consider the fraud claims, and in order for the Defendants to know how to defend themselves, the Plaintiff must describe with particularity the precise acts the Defendants took with regard to their specific products. Simply using the broad language suggesting that all Defendants manipulated the AWP or provided free samples with regard to drugs they manufacture or distribute is not enough.” *Id.* at 637. The court concluded that the complaint’s failure “to discriminate with regard to the conduct of each Defendant, as to the manner of fraud, and their drugs,” required that the fraud claims be dismissed. *Id.*

Similarly, in *Commonwealth of Massachusetts v. Mylan Laboratories*, Civ. A. No. 03-11865-PBS (D. Mass. Apr. 5, 2005), Judge Saris concluded that the plaintiff failed to provide sufficient “details about how or by whom the allegedly fraudulent WACs were calculated if the Defendant did not state WACs. Thus, the Complaint is not sufficient to meet the requirements that Massachusetts plead the ‘time, place, and content of the alleged false or fraudulent representations.’” *Id.* at 2. Accordingly, the court ordered that the plaintiff amend its complaint “to state, drug-by-drug, the allegedly false representations” or it would be dismissed pursuant to Fed. R. Civ. P. 9(b). *Id.*

¹¹ Pa. R. Civ. P. 1019(b) provides: “Averments of fraud or mistake shall be averred with particularity. Malice, intent, knowledge, and other conditions of mind may be averred generally.”

Judge Saris also recently dismissed nearly twenty defendants named in the complaint in *County of Suffolk v. Abbott Labs.*, MDL 1456, Civ. Action No. 1:03-cv-10643 (D. Mass. Apr. 8, 2005), when the plaintiff in that case failed “to present more particular information about its allegation that the published Average Wholesale Price (‘AWP’) for each drug was fraudulent.” Noting that “there are approximately 60,000 prescription drugs in the United States,” the Court held that sweeping, generalized allegations as to all drugs were insufficient to withstand dismissal. *Id.*¹²

In an attempt to avoid this same result, plaintiff distorts its own claims. Plaintiff contends that the fact that many drugs are not reimbursed based on AWP is irrelevant, because false AWP’s are just “part of a larger deceptive scheme, the purpose of which is to disguise the true cost of defendants’ drugs.” (Pl. Opp. at 30.) Plaintiff contends that this purported scheme “interfered with Wisconsin’s ability to set reasonable reimbursement rates for their drugs, *whether or not reimbursement was explicitly or implicitly linked to a listed AWP or WAC.*” (Pl. Opp. at 30.) The italicized language (or any language to support this argument) is found nowhere in the Amended Complaint. That should not come as a surprise, because this new assertion is directly contrary to plaintiff’s position with respect to its DTPA claims. Specifically, in support of its DTPA claims, plaintiff argues that “this is not a ‘nondisclosure’ case” (Pl. Opp. at 28), and stresses that the Amended Complaint rests on alleged false representations regarding AWP’s (Pl. Opp. at 29). Plaintiff’s contradictions fatally undercut any suggestion that the specificity requirements of section 802.03(2) have been satisfied in this case.

¹² Defendants will provide the Court with copies of Judge Saris’s two recent opinions upon request of the Court.

Finally, in response to defendants' argument that the Amended Complaint does not articulate the nature of the allegedly fraudulent conduct at issue, plaintiff relies entirely on the pendency of other actions in other jurisdictions. (Pl. Opp. at 43.) Plaintiff provides no authority for the notion that it can meet its pleading burdens by referring to complaints filed in other jurisdictions under different laws, sometimes against different defendants. *Cf. Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1280 (3d Cir. 1994) (affirming Rule 11 sanctions against law firm that filed securities law suit based on allegation of another complaint). Moreover, the shifting nature of plaintiff's theory of fraud reinforces the need to require plaintiff to plead with the particularity that is lacking in the Amended Complaint. As a result of the plaintiff's failure to plead with the requisite specificity, the fraud based allegations in the Amended Complaint should be dismissed with prejudice.

II. THE COURT MAY APPROPRIATELY CONSIDER THE MATERIALS SUBMITTED IN SUPPORT OF DEFENDANTS' MOTION.

Defendants' opening brief demonstrated that, as a matter of law, plaintiff will be unable to establish a causal link between the alleged misconduct and any claimed injury. (*See* Defs. Mem. at 18-25.) Defendants supported this position with over twenty years of court decisions, government agency reports and legislative history showing the widespread knowledge of what plaintiff now claims is fraud. More importantly, defendants also presented the State's own legislative action, as well as statements by the State itself, to support this position.

Plaintiff does not directly challenge the accuracy of any of this information. Indeed, some of the reports are referred to in paragraph 55 of plaintiff's

Amended Complaint. Nor does plaintiff even attempt to explain how it can prove its case in the face of this public record. Instead, plaintiff urges this Court to simply ignore it.

Tellingly, plaintiff directs this argument entirely to the government reports described in defendants' opening brief. (*See* Pl. Opp. at 17-19.) Even if plaintiff were correct in asserting that the Court may not consider these reports—and plaintiff is not—the Amended Complaint still must be dismissed.

First, a substantial portion of defendants' Appendix consists of legislative materials.¹³ Even plaintiff concedes that legislative history “could be considered on a motion to dismiss.” (Pl. Opp. at 17.) *See Freedom From Religion Found., Inc. v. Thompson*, 164 Wis. 2d 736, 740 n.4, 476 N.W.2d 318, 320 n.4 (Ct. App. 1991).

Second, plaintiff provides no basis for this Court to ignore the statements of the State itself, acknowledging that a drug's published AWP “does not reflect the actual cost of acquiring the drug” and citing various studies confirming that AWP substantially exceeded acquisition cost. (*See* Defs. Mem. at 21-22.) Similarly, plaintiff provides no basis for this Court to ignore the State's own legislative efforts to maintain a “spread” between reimbursement and acquisition costs in order to ensure the willingness of pharmacies to serve Medicaid patients. (*See* Defs. Mem. at 22-23.)¹⁴

Finally, plaintiff provides no basis for this Court to ignore the fact that, for well over a thousand drugs, Wisconsin has opted to abandon AWP entirely and base

¹³ *See, e.g.*, Defs. Appx., Exhs. 2, 25, 28, 31, 37, 39, 41, 43-45

¹⁴ Indeed, the Amended Complaint acknowledges that, absent a sufficient profit margin, “providers would simply stop supplying the drugs, to the detriment of Wisconsin citizens.” (Am. Compl. ¶ 55.)

reimbursement on measures such as Maximum Allowable Cost (“MAC”), which average approximately 65% below AWP. (*See* Defs. Mem. at 23-25.)

Defendants are not asking the Court, at this stage of the proceedings, to consider and “notice” every possible factual item contained in the materials that they have included in the Appendix. Instead, the materials are submitted for a much more limited, and appropriate, purpose—to demonstrate as a matter of law that plaintiff cannot establish the causal link between defendants’ alleged conduct and the harm claimed in the Amended Complaint. The materials in defendants’ Appendix are appropriate for the Court’s consideration for this purpose.

III. THE ATTORNEY GENERAL LACKS AUTHORITY TO BRING SEVERAL OF THE CLAIMS ALLEGED IN THE COMPLAINT.

If the allegations of the complaint are insufficient to provide a basis for standing, the complaint must be dismissed. *See, e.g., Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, ¶ 1, 275 Wis. 2d 533, 685 N.W.2d 573.

Plaintiff does not contest that it may only sue where it is authorized by statute to do so, even where such action is “intended to protect or promote the interests of the state or its citizens.” *State v. City of Oak Creek*, 2000 WI 9, ¶ 50, 232 Wis. 2d 612, 605 N.W.2d 526. (*See* Defs. Mem. at 25-26.) Plaintiff also does not contest the showing made in defendants’ opening brief that plaintiff lacks general *parens patriae* authority under Wisconsin law. (*See* Defs. Mem. at 25-26.) Rather, plaintiff argues that it has statutory authority to bring its claims. This argument rests on convoluted statutory interpretations that are at odds with the plain language of the relevant statutes, unsupported by the case law, and inconsistent with the Amended Complaint.

Plaintiff asserts that it may bring DTPA claims (Counts I and II) because section 100.18(11)(d) empowers a court to enter orders “necessary to restore to any person any pecuniary loss.” (Pl. Opp. at 30.) Section 100.18(11)(d), however, expressly limits the Attorney General’s authority to bring a DTPA claim to seeking a temporary or permanent injunction of violations of the statute in the name of the state. *See also State v. Excel Mgmt. Servs., Inc.*, 111 Wis. 2d 479, 486, 331 N.W.2d 312, 316 (Wis. 1983) (explaining Attorney General has authority to bring actions to enjoin violations of DTPA statutes). Plaintiff does not even address this clear limitation or explain how this Court’s remedial powers somehow supply it with standing to bring its claims on behalf of private citizens and entities.

With respect to Count III, plaintiff concedes that it lacks standing to bring a claim for monetary relief under the Trusts and Monopolies Act. (*See* Pl. Opp. at 47.) Like the DTPA, the Attorney General’s authority under this statute is expressly limited to actions for injunctive relief. However, plaintiff asserts that the Governor of Wisconsin directed it to bring this action, and that plaintiff therefore derives the statutory authority to maintain this suit under Sections 14.11 and 165.25 and *State ex rel. Reynolds v. Smith*, 19 Wis. 2d 577, 120 N.W.2d 664 (Wis. 1963). (Pl. Opp. at 48.) *Smith* does not provide support because there the legislature had been silent on the authority of the Attorney General to bring the action in question. *See id.* at 585. Here, the legislature has clearly spoken—the Attorney General is limited to bringing claims for injunctive relief only. *Smith* should not be used to allow the Attorney General to sidestep the explicit, limited grant of authority from the legislature, nor does plaintiff cite to any case law suggesting *Smith* permits an expansion of the Attorney General’s authority under the current

circumstances.¹⁵ Accordingly, the Amended Complaint fails to allege a valid basis for standing, and Count III must be dismissed.

Plaintiff does not address the fact that it has no authority to bring any unjust enrichment claim; Count V should therefore be dismissed.¹⁶

IV. PLAINTIFF FAILS TO ALLEGE KEY ELEMENTS OF THE CLAIMS ASSERTED.

A. Plaintiff Fails To Adequately Plead a Claim for False Advertising Under Section 100.18 (Counts I and II).

1. Plaintiff Fails To Allege Adequately Causation and Reliance.

As noted in defendants' opening brief (*see* Defs. Mem. at 28), the Amended Complaint does not allege that any recipient of the allegedly false pricing information relied on that information in deciding whether and what to pay for defendants' products. Plaintiff does not claim otherwise. Rather, plaintiff claims its allegations are sufficient to support its false advertising claims because it must only allege causation (which it has failed to do) and that reliance is not part of the causation analysis. (Pl. Opp. at 22.)¹⁷ Plaintiff simply ignores the fact that Wisconsin courts recognize that false advertising claims under section 100.18 require a showing that consumers relied on the allegedly false advertising and that those consumers suffered a pecuniary loss as a result. *See Tim Torres Enters., Inc. v. Linscott*, 142 Wis. 2d 56, 69-

¹⁵ Furthermore, plaintiff's Amended Complaint nowhere mentions sections 14.11 and 165.25, nor alleges the existence of any directive by the Governor authorizing the Attorney General to file this suit.

¹⁶ Plaintiff does not assert that it has authority to bring a claim on behalf of Wisconsin's citizens for Medical Assistance Fraud. (Count IV, Wis. Stat. § 49.49(m)(a)(2).)

¹⁷ Plaintiff refers to a 2003 law review article that lists states whose consumer statutes dispense with proof of reliance. (Pl. Opp. at 22-23, n.7.) Wisconsin is notably absent from that list.

72, 416 N.W.2d 670, 675-76 (Ct. App. 1987); *Werner v. Pittway Corp.*, 90 F. Supp. 2d 1018, 1033-34 (W.D. Wis. 2000). In reviewing a false advertising claim on appeal, the *Tim Torres* court pointed approvingly to the trial court's instruction to the jury that "there must be some actual consumer reliance on the [misrepresentation] before awarding pecuniary damages." *Tim Torres*, 142 Wis. 2d at 70, 416 N.W. 2d at 676;¹⁸ *see also Valente v. Sofamor*, 48 F. Supp. 2d 862, 874 (E.D. Wis. 1999) (failure to show reliance on allegedly fraudulent representations resulted in failure to demonstrate causal connection and failure to state a claim under *Tim Torres*); *Werner*, 90 F. Supp. 2d at 1033-34 (consumer's failure to observe allegedly fraudulent statements precluded false advertising claims). Here, plaintiff fails to allege that private consumers or private insurers relied on AWP or WAC when making purchasing or reimbursement decisions, and thus fails to adequately plead its DTPA claims.

2. Plaintiff Fails To Allege Adequately that Published AWPs or WACs Are False.

Plaintiff's false advertising claims also fail to allege adequately that the defendants made statements that were false or misleading. *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶¶ 39-48, 270 Wis. 2d 146, 677 N.W.2d 233. Merely asserting that the statements were false is not sufficient.

In apparent recognition of the fact that its allegations of affirmative misrepresentations are insufficient, plaintiff now asserts that the "thrust of the complaint

¹⁸ This instruction is consistent with the standard Wisconsin jury instruction for such claims, which provides that the plaintiff must allege and prove that "it sustained a monetary loss as a result of the [representation]," and that the representation was a "significant factor contributing to [plaintiff's] decision" to buy or use the relevant product. Wis. JI-Civil 2418 (2002).

is that defendants have successfully hidden their true prices.” (Pl. Opp. at 43.)¹⁹ To the extent that plaintiff seeks to state a claim for non-disclosure, section 100.18 does not apply. That statute “does not purport to impose a duty to disclose, but, rather, prohibits only affirmative assertions, representations, or statements of fact that are false, deceptive, or misleading.” *Tietsworth*, 2004 WI 32, ¶ 40, 270 Wis. 2d at 170, 677 N.W.2d at 170. Plaintiff provides no support for the contention that defendants had a duty to disclose the actual acquisition cost of their drugs. The false advertising claims must therefore be dismissed under *Tietsworth*.

B. The State Fails To Plead a Valid Claim for Violation of the Wisconsin Trust and Monopolies Act (Count III).

Plaintiff does not contest that the Wisconsin Trusts and Monopolies Act, on its face, requires proof that the alleged conduct destroys competition. Plaintiff’s attempt to explain how the Amended Complaint meets this requirement is so convoluted that it defies understanding. (See Pl. Opp. at 45-46.) Perhaps this is because the attempt is flatly at odds with the Amended Complaint itself. Indeed, far from alleging anti-competitive conduct, the Amended Complaint begins by alleging that defendants use the spread between AWP and acquisition cost “competitively to encourage providers to buy more of their drugs.” (Am. Compl. ¶ 1.) The entire complaint is built on this premise. (See Am. Compl. ¶¶ 37-40, 71.) The Trusts and Monopolies Act plainly does not apply here, and Count III should be dismissed.

¹⁹ Elsewhere, plaintiff flatly asserts that this “is not a ‘nondisclosure’ case.” (Pl. Opp. at 29.)

C. The State Fails To Plead a Claim for Medical Assistance Fraud (Count IV).

Plaintiff claims that defendants have violated the provision of the Public Assistance Act that makes it unlawful to “[k]nowingly make or cause to be made any false statement or representation of a material fact for use in determining rights to a benefit or payment.” Wis. Stat. § 49.49(4m)(a)(2). However, the Amended Complaint does not identify a particular “false statement or representation,” single out any defendant that made such a representation, or explain why the statement or representation is false. (Defs. Mem. at 35). The State’s response to these deficiencies is merely to claim that Count IV pleads the necessary elements. (Pl. Opp. at 49). As with Count III, the statute cited as the sole basis for Count IV simply does not apply here.

D. The State Fails To Plead a Claim for Unjust Enrichment (Count V).

As explained in the defendants’ Opening Brief, the Attorney General has no statutory authority to maintain an action for unjust enrichment, and this claim fails on this basis alone. (Defs. Mem. at 25-27, 36.) However, even assuming *arguendo* that there is a basis for bringing this claim, plaintiff fails to allege—even in a cursory fashion—the necessary elements for an unjust enrichment claim: (1) that a benefit was conferred upon the defendant *by the plaintiff*; (2) an appreciation or knowledge by the defendant of the benefit; and (3) that the acceptance or retention by the defendant of the benefit under the circumstances would be inequitable. *Tri-State Mech., Inc. v. Northland Coll.*, 2004 WI App 100, ¶ 14, 273 Wis. 2d 471, 681 N.W.2d 302. Plaintiff asserts, without legal authority, that the “benefit” in an unjust enrichment claim need not be conferred directly from the plaintiff to the defendant. In this case, plaintiff asserts that “Wisconsin, its Medicare Part B participants, and private payers were . . . overcharged by

pharmacy providers and physicians.” (Am. Compl. ¶ 95.) This allegation does not support an unjust enrichment claim against defendants, who received nothing from the State or those whom it purports to represent.

V. THE CLAIMS ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATION.

Plaintiff makes only a fleeting attempt to show why its claims, which date back to 1992, are not barred entirely or in substantial part by the applicable statutes of limitations.

Plaintiff concedes that its DTPA claims relating to publications before June 16, 2001 are time-barred by the three-year statute of repose in section 100.18(10)(b)(3). (Pl. Opp. at 34-37.) As explained by plaintiff, each time a defendant published information about AWP or WAC prices a new claim accrued against the defendant. (Pl. Opp. at 34.) Thus, any claim for publications before June 16, 2001²⁰ are time-barred.

Plaintiff’s DTPA claims within the three-year period, i.e., between June 16, 2001 and the present, are also barred. Plaintiff alleges an “ongoing course of conduct . . . starting well before the three-year period of the DTPA.” (Pl. Opp. at 34.) As explained in defendants’ Opening Brief, plaintiff was well aware—before June 16, 2001—that actual acquisition prices for prescription medicines were significantly less than the published AWP. This is evident through the September 8, 2000 HCFA report upon which the Amended Complaint relies, and more importantly, on the 1999

²⁰ For the 17 defendants who were added with the filing of the Amended Complaint, any claim for publications before November 1, 2001 are time-barred.

Wisconsin report stating “AWP is the manufacturer’s suggested wholesale price of a drug and is analogous to the ‘sticker price’ of a car. It does not reflect the actual cost of acquiring the drug.” Legislative Fiscal Bureau, Joint Committee on Finance, Paper #479, ¶ 4 at 3 (June 1, 1999) (Defs. Appx. Ex. 2) (<http://www.legis.state.wi.us/lfb/1999-01budgetdocuments/99-01BudgetPapers/479.pdf>).²¹ The same report discussed several studies confirming that AWP substantially exceeded actual drug acquisition costs. *Id.* at ¶ 4, at 3-4.²² The plaintiff cannot walk away from the fact that its own agency’s document demonstrates the State’s knowledge.

Citing *Kolpin v. Pioneer Power & Light Co.*, 162 Wis. 2d 1, 24, 469 N.W.2d 595 (Ct. App. 1991), plaintiff argues that it should be entitled to damages at least for the period after June 2001. Neither *Kolpin*, nor the “continuous tort” doctrine addressed therein, apply to this case. First, *Kolpin* involved a statute of limitation, not a statute of repose. *Id.* at 9, 469 N.W.2d at 597. Second, the *Kolpin* court found that, even using reasonable care, the Kolpins could not have discovered the source of the injury to their cows before they did; therefore the action was commenced within the statute of limitations period. *Id.* at 27, 469 N.W.2d at 605. Here, there is no question that the plaintiff knew about AWP and pharmaceutical pricing but nevertheless did not pursue the

²¹ As explained at the Committee’s website: “The Joint Committee on Finance is a statutory, standing committee of the Wisconsin Legislature. The Committee’s primary responsibility is to serve as the principal legislative committee charged with the review of all state appropriations and revenues.” (<http://www.legis.state.wi.us/lfb/jfc.html>)

²² Furthermore, Wisconsin’s State Medicaid agency received numerous reports from the Inspector General of HHS, including a 1984 report that stated “[w]ithin the pharmaceutical industry, AWP means non-discounted list price. Pharmacies purchase drugs at prices that are discounted significantly below AWP or list price.” *Medicare Action Transmittal No. 84-12*, reprinted in *Medicare and Medicaid Guide* (CCH) § 34,157 at 2 (1984) (Defs. App. Ex. 9).

alleged claims for years. The plaintiff should not be allowed to assert such claims after failing to act for such an extensive period of time.

As set forth in the defendants' Opening Brief, each of the remaining claims are governed by a six-year limitations period. *See* Wis. Stat. § 133.18 (Secret Rebate action under § 133.05); *Boldt v. State*, 101 Wis. 2d 566, 305 N.W.2d 133 (1981) (unjust enrichment governed by six-year limitations period applicable to contract claims under predecessor to § 893.43); Wis. Stat. § 893.93 (six-year limitations period applies for all statutory claims that do not otherwise provide a limitations period). Plaintiff offers nothing to counter the argument that its claims are barred by the applicable statutes of limitations. Thus, Counts III through V thus should be dismissed, at a minimum, as to all claims arising before June 16, 1998.²³

VI. THE CLAIMS ARE BARRED BY THE FILED RATE DOCTRINE

Plaintiff misconstrues defendants' position concerning the applicability of the filed rate doctrine to this case and essentially ignores the controlling authority of *Servais v. Kraft Foods, Inc.*, 2001 WI App 165, 246 Wis. 2d 920, 631 N.W.2d 629 (Ct. App. 2001), *aff'd*, 2002 WI 42, 252 Wis. 2d 145, 643 N.W.2d 92 (2002).

Plaintiff argues that the doctrine does not apply because “the case does not concern a ‘regulated entity.’ Wisconsin does not regulate the defendant drug companies prices.” (Pl. Opp. at 32.) Defendants do not contend that the published AWP for particular drugs are regulated or are the filed rates. Rather, it is the payment amounts to *medical providers* (*i.e.* doctors and pharmacies) that *are* regulated by both the federal

²³ For the 17 defendants who were added with the filing of the Amended Complaint Counts III through IV should be dismissed as to all claims arising before November 1, 1998.

government under Medicare and Wisconsin under Medicaid. Even if the regulated rates paid to doctors and pharmacies for some drugs are based on the unregulated AWP (e.g. AWP-5% for Medicare and AWP-13% for Medicaid²⁴), the payments to these medical providers are clearly filed rates that cannot be attacked in judicial proceedings.

Plaintiff's (and its citizens') alleged damages will necessarily be measured by the amounts that the providers were reimbursed versus what they allegedly "should have" been reimbursed, but for defendants' alleged inflation of AWP. (Am. Compl. ¶¶ 61, 66.) Thus, the question is whether plaintiff can evade the filed rate doctrine by purporting to attack the unregulated AWP upon which the regulated Medicaid and Medicare rates that they actually paid to doctors and pharmacists were calculated. *Servais* mandates that the answer be "no."

In *Servais* there were three relevant groups for present purposes: plaintiffs (milk producers), defendants (unregulated cheese manufacturers, Kraft, Borden, Alpine, and the National Cheese Exchange) and third parties (the regulated milk "handlers"). The prices received by the plaintiff/milk producers from the unnamed milk handlers were the subject of government "milk orders," which were based in part on the unregulated activity of the defendant cheese manufacturers at the National Cheese Exchange. Plaintiffs argued that the collusion of the defendant cheese manufacturers at the Exchange artificially lowered the prices that plaintiffs were paid by, among others, "handlers, who were subject to milk orders." 2001 WI App 165, ¶ 2, 246 Wis. 2d 920, 924, 631 N.W.2d 629, 631. The court rejected plaintiffs' claim on filed rate grounds because: "a court would have to conclude that the USDA minimum pay price [for milk]

²⁴ Wisconsin's reimbursement rate is AWP-13% (as of July 2004). (See Defs. Mem. at 5, n.5.) Plaintiff claims this rate is AWP-12%. (Pl. Opp. at 14.)

is not reasonable and to speculate what price the USDA would have set for milk orders if the alleged [unregulated] price manipulation at the National Cheese Exchange had not occurred.” *Id.* at ¶ 14, 246 Wis. 2d at 930, 631 N.W.2d at 634.

The *Servais* case is controlling. Here, the plaintiff is asking this Court to declare that the regulated prices that it and its citizens actually paid pharmacies and doctors under Medicaid and Medicare were wrongfully inflated because of defendants’ unregulated and allegedly fraudulent AWP’s, and to speculate what the payment rates to the pharmacies and doctors would have been had the AWP’s been “true.”

Other courts have applied the filed rate doctrine in similar circumstances. For example, in *Daleure v. Commonwealth of Kentucky*, 119 F. Supp. 2d 683 (W.D. Ky. 2000), relatives of county prison inmates, sued both telephone companies and county prisons for conspiring to exact excessive fees from collect calls by the inmates to the relatives. The telephone companies were the entities whose rates were approved by state and federal regulatory agencies, yet the filed rate doctrine also applied to bar damages suits against the “unregulated” county prison defendants allegedly conspiring with the telephone companies. *See also County of Stanislaus*, No. CV-F-93-5866, 1995 WL 819150, at *11 (E.D. Cal. 1995), *aff’d* 114 F.3d 858 (9th Cir. 1997) (“after agency approval of filed rates, even unregulated conduct which results in fixing the amount of the rate cannot be the subject of an antitrust complaint.”); *Ciamaichelo v. Independence Blue Cross*, 814 A.2d 800, 804-05 (Pa. Commw. Ct. 2002) (filed rate doctrine bars claims where the complaint collaterally attacks the filed rate); *County of Suffolk v. Long Island Power Auth.*, 154 F. Supp. 2d 380, 386 (E.D.N.Y. 2000), *aff’d sub nom., Town of Huntington v. Long Island Power Auth.*, 11 Fed. Appx. 24, 2001 WL 604181 (2d Cir.

2001) (“filed rate doctrine is construed broadly; it bars any claim that in any way seeks relief based on the payment of rates”).

Plaintiff also argues against the application of the filed rate doctrine on the ground that the AWP is not “filed” with any regulatory agency. (Pl. Opp. at 33 (citing three decisions in AWP cases).) As the portions of the decisions cited by the plaintiff show, this again deliberately confuses a drug’s AWP in a publication (which is merely a component of the filed rate) with the plaintiff’s or its citizens’ statutorily-prescribed payments to Medicare and Medicaid providers (which are rates set by government agencies).²⁵ In *Servais*, there was no allegation of a “filing” by the defendant cheese manufacturers; yet, that did not prevent the government-set milk orders which were *derived* from the unfiled National Cheese Exchange prices from being filed rates. Clearly, the fact that a regulated rate may be based on, derived from or even adopted wholly by an administrative agency from an unregulated market-based price does nothing to change the fact that the administrative agency has established the rate. *See In re California Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d 1072, 1080 (S.D. Cal. 2003) (“[p]laintiff’s complaint cannot be characterized as anything but a direct attack on rates

²⁵ As defendants pointed out in their moving papers, the word “filed” is merely a historical anachronism based on the origins of the doctrine in the 19th century. As the Supreme Court has held, it is of no significance to the doctrine whether the rate in question is (i) filed by a private party and merely “accepted” by the regulator or (ii) “determine[d]” or “fixed” by the regulator itself. *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951); *see also Transmission Agency of N. California v. Sierra Pac. Power Co.*, 295 F.3d 918, 929-31 (9th Cir. 2002) (filed rate doctrine applies to situations where an agency sets rules for allocating transmission capacity and rates are not filed). Thus, there can be no question that payments to providers for drugs set by Medicare and Medicaid are filed rates.

or an attack on matters *underlying* wholesale electricity rates”) (emphasis added), *aff’d*, 384 F.3d 756 (9th Cir. 2004).²⁶

Finally, plaintiff offers only a tortured grammatical analysis of *Prentice v. Title Ins. Co. of Minnesota*, 176 Wis. 2d 714, 500 N.W.2d 658 (1993), in support of its argument that the filed rate doctrine does not bar its suit for damages. Plaintiff offers no authority for its incongruous position that although private suits for rate-related damages would be barred, it can evade the filed-rate doctrine by bringing a cause of action on behalf of private citizens and private interests.

CONCLUSION

For the reasons stated herein and in defendants’ opening brief, the Amended Complaint should be dismissed in its entirety and with prejudice.

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²⁶ See also *Public Util. Dist. No. 1 of Grays Harbor County Wash. v. IDACORP*, 379 F.3d 641, 651 (9th Cir. 2004) (applying filed rate doctrine to bar suit for damages despite plaintiff’s argument that market-based rates had not been “filed” with FERC); *T & E Pastorino Nursery v. Duke Energy Trading & Mktg., L.L.C.*, No. CV-02-2059, 2003 WL 22110491, at *4 (S.D. Cal. Aug. 27, 2003), *aff’d* No. 03-56793, 2005 WL 434485 (9th Cir. Feb. 25, 2005) (applying filed rate doctrine to market based rate scheme where wholesale energy rates are not filed).

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