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July 3, 2008

VIA HAND DELIVERY

CLIENT/MATTER NUMBER
045152-0101

Honorable Richard Niess
Dane County Circuit Court, Branch 9
215 South Hamilton Street, Room 5103
Madison, WI 53703-3289

Re: *State of Wisconsin v. Abbott Labs., et al.*
Case No. 04-CV-1709

Dear Judge Niess:

Enclosed for filing in the above-referenced matter please find Defendants' Submission in Response to the Court's Request for Briefing Regarding Plaintiff's Right to a Jury Trial.

All counsel of record have been served with a copy of the same via Lexis Nexis File & Serve.

Sincerely yours,

FOLEY & LARDNER LLP

Matthew D. Lee

Enclosure

- cc: Attorney Frank D. Remington (w/enclosure, via U.S. Mail)
- Attorney Charles J. Barnhill, Jr. (w/enclosure, via U.S. Mail)
- Attorney P. Jeffrey Archibald (w/enclosure, via U.S. Mail)
- All Counsel of Record (w/enclosure, via Lexis Nexis File & Serve)

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equitable remedies. Wisconsin courts have consistently held that no right to a jury trial exists when a plaintiff is seeking equitable relief because such a claim would have been pursued at equity before the passage of the state constitution in 1848, not at law.³

With respect to *statutory* claims, the Wisconsin Supreme Court, in the seminal case, *Village Food & Liquor Mart v. H&S Petroleum, Inc.*, concluded that a party has a constitutional right to have its claim tried to a jury when: (1) “the cause of action created by the statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848” and (2) was regarded “at law in 1848.”⁴ In *Village Food*, the defendant’s claim to a jury trial was affirmed because the plaintiff relied on Unfair Sales Act provisions that were “essentially counterparts” to certain common-law crimes recognized in 1848, and the plaintiff limited its claimed relief to legal damages.⁵ Here, by contrast, Plaintiff relies on statutory provisions that had no common-law counterparts at statehood and seeks relief that is equitable in nature. Moreover, recent Wisconsin Supreme Court decisions *State v. Schweda* and *Dane County v. McGrew* have applied the *Village Food* test narrowly, and have rejected the right to a jury trial for

³ See *Bender v. Town of Kronenwetter*, 2002 WI App 284, ¶¶ 17-18, 258 Wis.2d 321, 654 N.W.2d 57 (holding no right to jury trial where plaintiff sought to invalidate special assessment because the relief sought was equitable, even though the underlying claims for breach of contract and fraud were considered “at law”); *Spensley Feeds v. Livingston Feed & Lumber*, 128 Wis. 2d 279, 288, 381 N.W.2d 601 (Ct. App. 1985) (same); *Neff v. Barber*, 165 Wis. 503, 162 N.W. 667 (1917) (“That the right to a trial by jury does not extend to equitable actions is too well settled in our jurisprudence to be now successfully questioned. In an action in equity all the issues, whether legal or equitable, are triable by the court.”).

⁴ *Village Food*, 2002 WI 92, ¶ 28. For statutes that do not reflect the common law as it existed prior to 1848, the legislature retains the flexibility to create the right to a jury trial if the legislature finds it appropriate. *Village Food*, 2002 WI 92, ¶ 14 (citing *Bergren v. Staples*, 263 Wis. 477, 483, 57 N.W.2d 714 (1953)). None of the statutes at issue in this case expressly include a right to a jury trial.

⁵ *Village Food*, 2002 WI 92, ¶¶ 28, 32-33.

modern statutory claims that are more than “slightly different” from 1848 common-law actions.⁶ Therefore, Wisconsin’s demand for a jury trial should be denied for all its claims.

ARGUMENT

I. PLAINTIFF HAS NO RIGHT TO TRY ITS STATUTORY CLAIMS TO A JURY.

A. Plaintiff has no right to try its Wis. Stat. § 100.18 claim to a jury.

This Court’s analysis of the State’s right to a jury trial under § 100.18 begins and ends with the Wisconsin Court of Appeals ruling in *State v. Ameritech Corp.*, which flatly holds that the State has no right to a jury trial when pursuing a claim under Wis. Stat. § 100.18.⁷ There is no statutory provision explicitly providing for right to a jury trial in § 100.18. Nor is there a constitutionally guaranteed right because, as the Court of Appeals found, no 1848 common-law action granted the State the right to collect forfeitures for deceptive advertising, the relief provided for in § 100.18.⁸ Although *Village Food* subsequently refined the test used in *Ameritech*, *Ameritech*’s holding that the right to a jury trial does not attach to a § 100.18 claim has not been overruled.⁹

Regardless, *Ameritech*’s result would be the same under the *Village Food* test because there is no action in 1848 that was “essentially [a] counterpart” to Wis. Stat. § 100.18. Section 100.18 cannot be considered a “counterpart” to any of the historical common-law actions discussed in *Village Food*. That case compared Wis. Stat § 100.30,

⁶ See *Dane County v. McGrew*, 2005 WI 130, ¶ 21, 285 Wis. 2d 519, 699 N.W.2d 890 (finding no right to a jury trial under a speeding regulation, despite the existence of 1848 actions to ensure safety on public highways); *State v. Schweda*, 2007 WI 100, ¶¶ 29-35, 303 Wis.2d 353, 736 N.W.2d 49 (finding no right to jury trial under an environmental regulation, despite the existence of 1848 nuisance claims for pollution and other environmental infractions).

⁷ *State v. Ameritech Corp.*, 185 Wis. 2d 686, 698, 417 N.W.2d 705 (Ct. App. 1994), *aff’d* 193 Wis.2d 150, 532 N.W.2d 449 (1995).

⁸ *Id.*

⁹ See *State v. Schweda*, 2007 WI 100, ¶ 20; *McGrew*, 2005 WI 130, ¶18 n.13 (characterizing the refinement as only a slight modification of the *Ameritech* test). The Wisconsin Supreme Court in *Village Food* did not find *Ameritech*’s result erroneous or suggest that it would have been decided differently had the *Village Food* test been used. See *Village Food*, 2002 WI 92.

which prohibits price-cutting to eliminate weaker competitors in a controlled market (specifically the market for motor vehicle fuel), to the common-law actions for “forestalling the market,” “regrating,” and “engrossing” as described by Blackstone, and found that Wis. Stat. § 100.30 was “of the same nature” as those common-law actions.¹⁰ Section 100.18, conversely, prohibits false or deceptive advertising to the public. None of the historical common-law actions referenced in *Village Food*, nor any Defendants could find, are “of the same nature” as the conduct prohibited under § 100.18, because none of those actions relate to false or deceptive advertising.¹¹

Nor is § 100.18 a counterpart to common-law fraud.¹² The Wisconsin Court of Appeals has recognized that §100.18 creates a “distinct statutory cause of action,” which is “new” (i.e., did not exist at common law) because it provides “protection and remedies for false advertising that d[id] not exist at common law.”¹³ Section 100.18, for instance, prohibits making deceptive statements *to the public*, an element that is not required under

¹⁰ *Village Food*, 2002 WI 92, ¶¶ 26-28. The historical common-law action of “forestalling the market” prohibited dissuading merchants from bringing their goods to market in order to drive up prices. “Regrating” and “engrossing” prohibited buying up goods with the intent of flipping them for a profit, thereby driving up prices in the marketplace. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 12, at 158- 59 (1778).

¹¹ See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 12 (defining common law “Offenses Against Public Trade”).

¹² As argued in Defendants’ Motion to Dismiss, factual allegations of fraud underlie each of Plaintiff’s claims, but the fact that the factual assertions of these claims are “grounded in fraud” does not render the statute under which the State seeks to recover an “essential counterpart” to common law fraud as it existed in 1848. See Defendants’ Memorandum of Law In Support of Their Joint Motion to Dismiss the Amended Complaint at 9-10 (Jan. 20, 2006) (arguing that Plaintiff failed to plead its fraud-based claims with sufficient particularity); Partial Decision and Order at 12-13 (Apr. 3, 2006).

¹³ *Kailin v. Armstrong*, 2002 WI App. 70, ¶ 40, 252 Wis.2d 676, 643 N.W.2d 132 (The elements of [§ 100.18] differ from those of the common law claims of intentional misrepresentation, strict liability misrepresentation, and negligent misrepresentation; each of those has elements not necessary for a claim under this statute, and the statute has elements none of those have-such as the requirement that the statement be made “to the public.” There is no indication in these subsections, or any of the other many and detailed subsections that make up § 100.18, that the legislature intended to add a remedy for common law misrepresentation claims rather than to create a distinct statutory cause of action.”) (internal citations omitted).

common-law fraud, and provides a mechanism for collecting forfeitures, a form of relief not provided for under common law.¹⁴ While § 100.18 may “find its roots” in common-law fraud, just as the environmental regulations discussed in *State v. Schweda* were rooted in nuisance, having “doctrinal roots” is insufficient for a modern cause of action to be “essentially a counterpart” to an 1848 cause of action.¹⁵

Even if there were a common-law analog to § 100.18, the State’s demand for a jury trial on its § 100.18 claim should be denied for the independent reason that it fails to satisfy the second prong of the *Village Food* test; namely, that the action and remedies sought must have been “at law” in 1848. As the State has made abundantly clear, it is seeking injunctive relief pursuant to § 100.18(11)(d).¹⁶ And, the Court has already concluded that “this is an enforcement action seeking to enjoin violation of § 100.18, Stats., as well as other appropriate relief,” and that the relief sought by the State is of an “equitable nature.”¹⁷

¹⁴ *Id.* at ¶¶ 39-40. Compare *K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, ¶ 19, 301 Wis.2d 109, 732 N.W.2d 792 (setting forth the elements of §100.18, and stressing the requirement that the statement be made “to the public”) with *Smith v. Mariner*, 1856 WL 2075, *1 (Wis. 1856) (setting forth the elements of common-law fraud).

¹⁵ *Schweda*, 2007 WI 100, ¶¶ 31-35 (finding no right to jury trial because “[m]odern environmental regulatory laws, however, regulate more subtle and attenuated harms than the common law of nuisance does[.]”) (internal citations omitted).

¹⁶ See Plaintiff State of Wisconsin’s Reply Brief In Support of Its Motions for Summary Judgment and Response Brief In Opposition To Defendants’ Cross-Motions for Summary Judgment at 7- 10 (Mar. 7, 2008) (discussing the difference between the State’s right to sue for injunctive relief under §100.18 and a private plaintiff’s right to sue for legal damages, and stressing that the State is seeking injunctive relief); *Village Food*, 2002 WI 92, ¶¶ 15-16 (noting that while actions to contest a referendum election and to garnish non-leviable assets may have been existed in 1848, no right to a jury trial attached because such actions would have been pursued through equitable proceedings). Although the *Ameritech* court disposed of the jury trial issue under the first prong of the test, it stated in *dicta* that the State’s pursuit of equitable relief also would support denying the plaintiff a jury trial. See *Ameritech*, 185 Wis. 2d at 697.

¹⁷ Decision and Order on Plaintiff’s Motions for Partial Summary Judgment Against Defendants Novartis, AstraZeneca, Sandoz and Johnson & Johnson at 6 n.3, 7 (May 20, 2008). In addition to the injunctive relief and forfeitures that were claimed in *Ameritech*, Plaintiff seeks restitution, costs and “such other and further relief as this Court deems just and equitable.” Second Amended Complaint, ¶ 82 (June 28, 2006).

Injunctive relief is an equitable remedy,¹⁸ which in 1848 must have been tried to a court at equity, not at law.¹⁹

B. Plaintiff has no right to try its Wis. Stat. §§ 133.05 and 49.49 claims to a jury.

Likewise, Plaintiff has no right to a jury trial for its statutory claims under Wis. Stat. § 133.05 and Wis. Stat. § 49.49. Neither statute expressly provides for a right to a jury trial. Nor do Plaintiff's claims under these statutes meet the requirements of the *Village Food* test. Neither can be considered a counterpart to any 1848 cause of action, and both seek equitable relief.

While counterparts to other portions of Wisconsin's antitrust statutes can be found,²⁰ there is no such counterpart for Wis. Stat. § 133.05, which prohibits the secret payments of rebates, refunds, commissions or unearned discounts.

Similarly, there is no common-law analog to Wis. Stat. § 49.49(4m)(a)(2), which makes unlawful certain conduct in connection with Wisconsin's medical assistance program. That program did not even exist in 1848.²¹ Plaintiff may argue that § 49.49(4m) is "essentially a counterpart" of a common-law action for fraud, but § 49.49(4m) contains elements that are not required for common-law fraud. Specifically, §49.49 requires that a

¹⁸ See *Schweda*, 2007 WI 100, ¶ 140 (noting that an injunction is an equitable remedy); *Village Food*, 2002 WI 92, ¶ 33 (same); *Ameritech*, 185 Wis.2d at 696, 517 N.W.2d at 708 ("Historically, injunctive proceedings have been deemed actions in equity, and must still be regarded as such for the purpose of determining [the right to jury trial].").

¹⁹ The fact that Plaintiff arguably may be seeking both legal and equitable relief under its § 100.18 claim is irrelevant, because claims seeking both legal and equitable relief would have been tried by an equity court in 1848, and would not have been considered "at law." See, e.g., *USM Corp. v. GKN Fasteners, Ltd.*, 574 F.2d 17, 22 (1st Cir. 1978) ("Because USM prayed for both legal and equitable relief in its original complaint, the case would have been filed in the equity court. That court, having jurisdiction over the equitable claims, would have asserted jurisdiction over the entire complaint under the doctrine known as 'equitable clean up.'"), citing 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1045, at 156-157 (1969).

²⁰ For example, Wis. Stat. § 133.03 (conspiracies in restraint of trade and unlawful monopolies), has a counterpart found in Blackstone's commentaries. See *Village Food*, 2002 WI 92, ¶¶ 26-27, 45.

²¹ See Wis. Stat. §49.45; 1965 Wis. Act 590, § 17 (eff. July 1, 1966).

statement be made “in connection with medical assistance” and “for use in determining rights to a benefit or payment.”²² As such, the legislature must have intended it to be a new cause of action distinct from common-law fraud.²³

The Wisconsin Supreme Court has rejected similar attempts to expand the right to a jury trial to other statutory claims loosely based on historical common-law actions, and has repeatedly and explicitly warned against the “temptation to carve out a constitutional right to a jury trial based on broad analogies between modern causes of action and causes of action at statehood.”²⁴ In its post *Village Food* decisions in *Dane County v. McGrew* and *State v. Schweda*, the Court has stressed the need for narrow analogies to causes of action that existed at statehood,²⁵ “lest we render the *Village Food* test a nullity because ‘present causes of action of all sorts assessed under this test will only have to be compared generally ... in order to invoke the constitutional protection to a trial by jury.’”²⁶ Interestingly, in *State v. Schweda*, the State of Wisconsin also endorsed a narrow approach, maintaining that “there were no other causes of action at statehood that are essential counterparts to the regulatory violations at issue.”²⁷ Wisconsin courts have specifically declined to extend the right to a jury trial to statutory claims with fraud-based elements.²⁸

²² Wis. Stat. §49.49(4m)(a)(2).

²³ Cf. *Kailin*, 2002 WI App. 70, ¶ 40 (suggesting that when the legislature adds elements to an existing common-law claim, it intends to create a new and distinct cause of action).

²⁴ *Schweda*, 2007 WI 100, ¶ 21.

²⁵ See *Schweda*, 2007 WI 100, ¶¶ 21, 27; *McGrew*, 2005 WI 130, ¶¶ 25, 28.

²⁶ *Schweda*, 2007 WI 100, ¶ 40 (quoting *Village Food*, 2002 WI 92, ¶ 46); see also *McGrew*, 2005 WI 130, ¶¶ 25, 37.

²⁷ *Schweda*, 2007 WI 100, ¶ 41. In *McGrew*, Dane County also endorsed a narrow approach, arguing that the court “should narrowly frame [its] inquiry as whether a cause of action . . . existed in 1848.” *McGrew*, 2005 WI 130, ¶ 19.

²⁸ See *Ameritech*, 185 Wis. 2d at 698 (refusing to recognize a right to jury trial for §100.18, which incorporates several elements of common law fraud); *Village Food*, 2002 WI 92, ¶¶ 23-25 (explicitly rejecting the plaintiff’s attempt to analogize its Unfair Sales Act claim to a common law fraud).

Finally, even if §§ 133.05 and 49.49 *were* counterparts to actions known to common law in 1848, the statutes provide for (and Plaintiff is seeking) equitable relief, including forfeitures and injunction, which clearly were not regarded as “at law” in 1848.²⁹ Consequently, these claims also do not satisfy the second prong of the *Village Food* analysis.

II. PLAINTIFF HAS NO RIGHT TO TRY ITS UNJUST ENRICHMENT CLAIM TO A JURY.

The constitutional right to a jury trial does not extend to equitable claims,³⁰ such as Plaintiff’s unjust enrichment claim.³¹ Were there any doubt as to the equitable nature of this claim, the Court need only look to the *remedies* the State is seeking—an injunction and the disgorgement of profits retained by Defendants (as opposed to damages based on Plaintiff’s alleged loss)³²— which are quintessentially equitable in nature.³³

Plaintiff may point to the existence of pattern jury instructions for unjust enrichment and *dicta* from one Wisconsin decision suggesting that unjust enrichment

²⁹ See Second Amended Complaint at ¶¶ 91, 95; *see also Ameritech*, 185 Wis.2d at 696 (“Historically, injunctive proceedings have been deemed actions in equity, and must still be regarded as such for the purpose of determining [the right to jury trial].”).

³⁰ *Bender*, 2002 WI App. 284, ¶¶ 17-18 (holding no right to jury trial where plaintiff sought to invalidate special assessment because the relief sought was equitable, even though the underlying claims for breach of contract and fraud were considered “at law”); *Spensley Feed*, 128 Wis. 2d at 288 (same); *Neff*, 165 Wis. at 503 (“That the right to a trial by jury does not extend to equitable actions is too well settled in our jurisprudence to be now successfully questioned. In an action in equity all the issues, whether legal or equitable, are triable by the court.”).

³¹ See *Ludyjan v. Continental Cas. Co.*, 2008 WI App 41, ¶ 6, ___ Wis.2d ___, 747 N.W.2d 745 (“unjust enrichment is an equitable doctrine”); *The Kinetic Co., Inc. v. Svetovanje*, 361 F. Supp. 2d 878, 883 (E.D. Wis. 2005) (applying Wisconsin law, and noting that “unjust enrichment is an equitable claim”), *citing General Split Corp. v. P&V Atlas Corp.*, 91 Wis. 2d 119, 124, 280 N.W.2d 765 (1979).

³² See Second Amended Complaint at ¶ 100 (June 28, 2006) (requesting that the Court “enjoin the defendants from continuing the unlawful practices” and “require the defendants to disgorge all profits they realized as a result of their unlawful conduct”).

³³ See, e.g., *Schweda*, 2007 WI 130, ¶ 140 (noting that an injunction is an equitable remedy); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (“we have characterized damages as equitable where they are restitutionary, such as in ‘action[s] for disgorgement of improper profits’”(internal citations omitted); *U.S. v. Universal Management Services, Inc., Corp.*, 191 F.3d 750, 760 (6th Cir. 1999) (citing numerous cases for the proposition that disgorgement of profits is an equitable remedy).

claims *can* be tried to a jury.³⁴ Although it is true that unjust enrichment claims have been tried to juries, no cases appealing judgments in such cases have specifically addressed the issue of whether a constitutional right to a jury trial attaches to an unjust enrichment claim.³⁵

CONCLUSION

For the foregoing reasons, Defendants request that the Court deny Plaintiff's demand for a jury trial on all remaining counts of the Second Amended Complaint.

July 3, 2008

Respectfully submitted,



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³⁴ See 2 Wis. JI-Civil No. 3028; *Dahlke v. Dahlke*, 2002 WI App 282, ¶ 20, 258 Wis. 2d 764, 654 N.W.2d 73.

³⁵ See *Lawlis v. Thompson*, 137 Wis.2d 490, 505, 405 N.W.2d 317 (1987) (affirming a jury verdict for unjust enrichment, but not reaching the issue of whether a right to a jury exists for unjust enrichment claims); *Watts v. Watts*, 152 Wis.2d 370, 382, 448 N.W.2d 292 (Ct. App. 1989) (same). Notably, these cases were decided before *Ameritech* and *Village Food*.

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2008, a true and correct copy of the foregoing was served upon all counsel of record via electronic service pursuant to Case Management Order No. 1 by causing a copy to be sent to LexisNexis File & Serve for posting and notification.


