

are not required to participate in the Medicaid program. Rather, participation is voluntary and drug manufacturers must affirmatively elect to participate. Novartis has chosen voluntarily to participate in the Medicaid program.

Novartis 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”) – and that it reports and causes these prices to be published by various pricing compendia, including First DataBank. Nor does Novartis dispute that it knows that state Medicaid programs obtain and rely on this pricing information from First DataBank in determining how much to pay providers (such as retail pharmacies) for Novartis’s drugs. Most importantly, Novartis admits that the AWP’s it reports and causes First DataBank to publish are not the true average prices charged by wholesalers. Novartis further admits that the WAC’s it reports and causes First DataBank to publish are not the true prices paid by wholesalers to Novartis to acquire Novartis’s drugs. Rather, Novartis admits that its WAC’s do not reflect rebates, discounts, chargebacks, and similar items that reduce the wholesalers’ true cost to purchase Novartis’s drugs.

Novartis 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 Novartis admits that no purchaser pays the published AWP for Novartis’s drugs, Novartis has violated Section 100.18(1).

Novartis 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. Novartis’s conduct

violates Section 100.18(10)(b) because retail pharmacies pay substantially less than the published AWP for Novartis's drug.

Notwithstanding these clear violations of law, the State expects Novartis 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. 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 or any individual state employee. Second, Novartis's argument is an estoppel argument that is not available to Novartis as a matter of law. Third, Novartis's argument misplaces the burdens and duties. The State has no duty to modify its Medicaid program to account for Novartis's misconduct. Rather, Novartis has a duty to be honest and truthful with the State where, as here, Novartis knows that the Wisconsin's Medicaid program obtains and relies on Novartis's AWP from First DataBank. Finally, the State expects Novartis to argue that it can escape liability because of what Novartis will characterize as "disclaimers" it made in certain documents regarding its AWP. However, these so-called "disclaimers" say nothing about whether Novartis's AWP are what they represent themselves to be, *i.e.*, the true average prices charged by wholesalers. If anything, these "disclaimers" simply create more confusion. Accordingly, they are irrelevant as a matter of law.

II. CLAIMS

Wisconsin seeks summary judgment on liability as to Counts I and II 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 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

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

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. Novartis was created in 1997 as a result of the merger of Ciba-Geigy Pharmaceuticals and Sandoz Pharmaceuticals. Transcript of June 23, 2006 deposition of Novartis corporate designee Michael Conley, Executive Director for U.S. Managed Markets, Trade Corporate Accounts, and Customer Service (“Conley Tr.”), at 68.²

2. 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. Conley Tr. at 11.

3. Novartis knows that every state, including Wisconsin, has chosen to participate in the Medicaid program. Conley Tr. at 11.

4. Drug manufacturers are not required to participate in the Medicaid program; rather, they must elect to participate. Drug manufacturers who wish to participate in the Medicaid program and have their prescription drugs reimbursed by participating state Medicaid

² Excerpts of the June 23, 2006 deposition of Michael Conley are attached hereto as Exhibit 1.

programs must sign a written contract with the federal government known as a rebate agreement. Conley Tr. at 13; 42 U.S.C. § 1396r-8, *et seq.*

5. Since 1997, Novartis has chosen voluntarily to participate in the Medicaid program. Conley Tr. at 14.

6. Novartis has chosen to participate in the Medicaid program in order to make its drugs available to Medicaid patients and to make a profit on those drugs. Transcript of August 21, 2007 deposition of Novartis corporate designee Steven Patrick Byler, Senior Associate Director for U.S. Managed Markets and Medicaid (“Byler Tr.”), at 31.³

7. By choosing voluntarily to participate in the Medicaid program, Novartis has a duty or obligation to familiarize itself with the federal Medicaid rules and regulations. Conley Tr. at 15.

8. By choosing voluntarily to participate in the Medicaid program, Novartis has a duty and obligation to be honest and truthful in its dealings with the Medicaid program as a whole and the individual Medicaid programs of each state. Conley Tr. at 16.

9. A retail pharmacy is a pharmacy with a physical location that is licensed to dispense drugs such as Walgreens or CVS. Conley Tr. at 33-34.

10. Novartis manufactures brand name drugs. Byler Tr. at 82.

11. A brand name drug is a drug that has patent protection and is not available from any other source; no other drug company can produce such a drug while it is under patent. Byler Tr. at 82.

12. Diovan, a capsule that is taken orally, is a Novartis brand name drug that treats high blood pressure. Conley Tr. at 11-12.

³ Excerpts of the August 21, 2007 deposition of Steven Patrick Byler are attached hereto as Exhibit 2.

13. The manner in which the Wisconsin Medicaid program reimburses a pharmacy for a Novartis branded drug such as Diovan is as follows. A person who is eligible for the Wisconsin Medicaid program would get a prescription from a doctor and take it to a retail pharmacy such as Walgreens to be filled. Conley Tr. at 12.

14. The retail pharmacy would fill the Diovan prescription, but because the person was eligible for Wisconsin's Medicaid program, the person would not pay for the drug. Conley Tr. at 12.

15. To receive payment, the retail pharmacy would provide information to the Wisconsin Medicaid program about the prescription. Conley Tr. at 13.

16. After the Wisconsin Medicaid program receives information from the retail pharmacy about the Diovan prescription, it makes a payment to the pharmacy. Conley Tr. at 13.

17. There are two portions to that payment – (1) the ingredient cost, and (2) the dispensing fee. Byler Tr. at 113-114. Federal regulations tell the Wisconsin Medicaid program that with respect to the ingredient cost of the Diovan prescription, it can pay no more than the lesser of the “estimated acquisition cost” or the pharmacy’s “usual and customary charge.” 42 C.F.R. § 447.331(b).

18. Novartis is aware of 42 C.F.R. § 447.331(b). Conley Tr. at 16-17.

19. Federal regulations define “estimated acquisition cost” as the Wisconsin Medicaid agency’s “best estimate of the price generally and currently paid by providers for a drug marketed or sold by a particular manufacturer or labeler in the package size of drug most frequently purchased by providers.” 42 C.F.R. § 447.301.

20. “Estimated acquisition cost” means the price the retail pharmacy paid to acquire the drug from whomever it purchased it from. Conley Tr. at 17-18.

21. Novartis is aware of 42 C.F.R. § 447.301. Conley Tr. at 17.

22. Novartis knows that information about each state Medicaid program's reimbursement formula for prescription drugs is publicly available through the website of the Center for Medicare and Medicaid Services ("CMS") of the United States Department of Health and Human Services. Byler Tr. at 36.

23. In fact, Novartis corporate designee Steven Patrick Byler has visited the portion of CMS's website that lists each state Medicaid program's reimbursement formula for prescription drugs. Byler Tr. at 108-109.

24. Novartis is aware that some state Medicaid programs rely on the average wholesale price ("AWP") of Novartis's drugs in their formulas for determining the amount of payment or reimbursement to make to providers for Novartis's brand name drugs. Byler Tr. at 111-115.

25. Novartis specifically knows that the Wisconsin Medicaid program relies on the average wholesale price ("AWP") of Novartis's drugs published by First DataBank in its formula for determining the amount of the payment or reimbursement that the Wisconsin Medicaid program makes to a provider such as a retail pharmacy for Novartis's drugs. Conley Tr. at 19, 21.

26. First DataBank is a company that publishes a variety of pharmaceutical pricing information about Novartis's drugs and other manufacturers' drugs. Conley Tr. at 19.

27. Red Book is also a company that reports a variety of pharmaceutical pricing information about Novartis's drugs and other manufacturers' drugs including average wholesale price ("AWP") and wholesale acquisition cost ("WAC"). Conley Tr. at 33, 114-115.

28. Since 1997, Novartis has reported pricing information, including average wholesale price (“AWP”) and wholesale acquisition cost (“WAC”), for its drugs to First DataBank and Red Book. Conley Tr. at 22, 114-115.

29. One of the reasons that Novartis has reported AWP and WACs to First DataBank is because Novartis knows that various payers, including state Medicaid programs like the Wisconsin Medicaid program, rely on either the AWP or the WAC published by First DataBank in determining how much to pay for Novartis drugs. Conley Tr. at 22-23.

30. In March 2005, Novartis stopped reporting AWP to First DataBank and the other pricing publications. Conley Tr. at 23-24, 116.

31. Between 1997 and March 2005, Novartis reported WACs and AWP to First DataBank for its drugs at the time it launched, or introduced a drug into the market, adjusted its prices, or changed the packaging of its products. Conley Tr. at 22-23.

32. Between 1997 and July 2002, Novartis understood that First DataBank would publish the identical AWP that Novartis reported to First DataBank. Conley Tr. at 25-26.

33. Novartis knows the WACs and AWP for its drugs that are published by First DataBank because Novartis purchases pricing information from First DataBank regarding Novartis’s drugs. Conley Tr. at 100.

34. Since 1997, with only two exceptions, Novartis has reported AWP for its drugs to First DataBank that were 20% above the WACs for those drugs. Conley Tr. at 28-30.

35. The exceptions were Famvir and Diovan, for which Novartis reported AWP that were 25% above the WACs. Conley Tr. at 31-32.

36. In July 2002, Novartis learned that First DataBank was publishing AWP for Novartis’s drugs that were 25% above the WACs for those drugs. Conley Tr. at 26-31, 100-101.

37. Novartis did not object to or otherwise oppose First DataBank's publication of AWP's for Novartis's drugs that were 25% above Novartis's WACs for those drugs. Conley Tr. at 30-31.

38. After July 2002, Novartis knew that First DataBank was publishing AWP's for Novartis's drugs that were 25% above the WACs for those drugs. Conley Tr. at 31.

39. Apart from the change that occurred July 2002, Novartis is not aware of any other instance in which First DataBank published a WAC or AWP for any Novartis drug that was different than the WAC or AWP that Novartis had reported to First DataBank. Conley Tr. at 101.

40. Novartis defines WAC or wholesale acquisition cost as the price that direct purchasers pay to Novartis. Conley Tr. at 74.

41. Direct purchasers include wholesalers or someone who buys directly from Novartis without going through a wholesaler. Conley Tr. at 75.

42. The WACs that Novartis reports and causes First DataBank to publish do not include various discounts, rebates, chargebacks and other items that lower the true price paid by wholesalers to Novartis for Novartis' drugs. For example, Novartis's WACs do not include prompt pay discounts to wholesalers equal to 2% of WAC, new product stocking arrangements of between 13-18% of WAC, rebates given as part of Novartis's "retail compliance program," or chargebacks. Conley Tr. at 37-40, 44-47, 77-78. Accordingly, the WACs that Novartis reports and causes First DataBank to publish for Novartis's drugs are not the true wholesale acquisition costs.

43. Novartis defines AWP for its drugs as the WAC times 1.2, with the exception of two drugs, Famvir and Diovan, for which Novartis defines AWP as WAC times 1.25. Conley Tr. at 68-69.

44. Novartis publishes an annual report called “Novartis Pharmacy Benefit Report: Facts and Figures” to provide information to its customers on pharmacy benefit around the country. Conley Tr. at 70-71; Byler Tr. at 131-132.

45. The glossary in both the 2000 and 2001 Novartis Pharmacy Benefit Report: Facts and Figures defines average wholesale price as follows:

Average Wholesale Price (AWP) - a published suggested wholesale price for a drug, based on the average cost of the drug to a pharmacy from a representative sample of drug wholesalers. There are many AWP's available within the industry. AWP is often used by pharmacies to price prescriptions. Health plans also use AWP – usually discounted -- as the basis for reimbursement of covered medications.

Exhibits 3-4; Conley Tr. at 69-70; Byler Tr. at 132-134.

46. Novartis has known and understood since 1997 that the AWP's it has reported to First DataBank are not the actual average prices that retail pharmacies were paying to wholesalers for Novartis' products. As Michael Conley, Novartis's corporate designee, testified at deposition:

Q: Is it Novartis's -- has it been Novartis's belief since 1997 that the AWP's that were reported to First Databank for the targeted drugs in fact represented a true price generally and currently available to retailers when purchasing these drugs from wholesalers?

A: Can you restate the question?

Q: Sure. Since 1997, has Novartis believed that the AWP's it reported to First Databank represented actual prices that were generally and currently being paid by retail pharmacies to wholesalers for Novartis's drugs?

A: I don't believe so. I mean, we publish the number, but our belief as to what that number represented, again based on the -- on the disclaimer that we put in -- in the notifications, I don't know that I can speak for everyone in the organization, but I don't believe that's the case.

Conley Tr. at 72-73.

47. Novartis has no information indicating that any wholesaler has sold any of Novartis's drugs to a retail pharmacy at a price equal to or greater than the then current AWP as published by First Databank. Conley Tr. at 49.

48. In fact, it is common knowledge in the pharmaceutical industry that wholesaler margins are thin. Conley Tr. at 52.

49. Novartis agrees that it is reasonable to believe that the prices paid by retail pharmacies to wholesaler for Novartis's drugs are close to the price at which Novartis sells its drugs to wholesalers, *i.e.*, WAC. Conley Tr. at 52-53, 56.

50. Novartis was once contacted by a wholesaler and told that Walgreens was soliciting open bids on the internet from wholesalers requesting proposals for the wholesalers' best prices to sell Novartis's line of drug products. Novartis learned that wholesalers were offering to sell Novartis's line of drug products to Walgreens for 2.7% below WAC. Conley Tr. at 48.

51. Novartis knows that when it sells its drugs directly to retail pharmacies such as Walgreens, CVS, Rite-Aid, Eckert, and Long's Drug Stores, the most the retail pharmacies pay for those drugs is the WAC. Because Novartis's AWP's have always been at least 20% higher than Novartis's WACs, these customers never paid a price equal to or great than AWP for Novartis's drugs. Conley Tr. at 34-36.

IV. ARGUMENT

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

Novartis admits that it sets and controls the AWP and WACs that are published by First DataBank. Novartis further admits that its AWP is not the true average price charged by wholesalers and that its WAC is not the true wholesaler acquisition cost for Novartis'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 2. The program is voluntary rather than mandatory. Drug manufacturers must affirmatively elect to participate. PUF 4. Since 1997, Novartis has elected to participate in the Medicaid program. PUF 5. By electing voluntarily to participate in Medicaid, Novartis must comply with certain rules. Among 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. Novartis's Unlawful Conduct.

Novartis 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 26-39. Nor does Novartis dispute that the AWP it reports and causes First DataBank to publish are not the true average prices charged by wholesalers. PUF 46-51. Rather, Novartis admits that the AWP it reports and causes First DataBank to publish are at least 20-25% above the true average prices charged by wholesalers. PUF 43, 47-50. Stated differently, Novartis admits that retail pharmacies pay far less than AWP to acquire Novartis's drugs.

In addition, Novartis admits that it sets and controls the wholesale acquisition costs ("WACs") for its drugs that are published by First DataBank. PUF 26-39. Novartis further admits that the WACs it reports and causes First DataBank to publish are not the wholesaler acquisition costs for Novartis's drugs. Rather, Novartis admits that its WACs do not reflect rebates, discounts, chargebacks, and similar items that reduce the wholesalers' true cost to purchase the drugs from Novartis. PUF 40-42.

C. Novartis's Conduct Violates Wisconsin Law.

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

a. Novartis'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. Novartis's reporting and publication of false AWP 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, Novartis made an advertisement or announcement each time it reported and caused First DataBank to publish AWP's and WAC's for Novartis's drugs. One of the reasons Novartis reports and causes First DataBank to publish AWP's and WAC's for Novartis's drugs is because Novartis knows that third party payers, including state Medicaid programs such as Wisconsin's, rely on either the AWP's or the WAC's published by First DataBank in determining how much to reimburse providers for Novartis's drugs. PUF 29.

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

Novartis'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.” Indeed, Novartis’s own documents (its Pharmacy Benefit Reports of 2000 and 2001) define average wholesale price as a true market price, *i.e.*, “based on the average cost of the drug to a pharmacy from a representative sample of drug wholesalers.” PUF 45.

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 Novartis’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 Novartis admits that the AWP's it reports and causes First DataBank to publish are not the true average prices charged by wholesalers to retailers (PUF 46-51), Novartis's statements are "untrue" and violate Wis. State. 100.18(1).⁴

Novartis'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.'") (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

⁴ For the same reason, Novartis's reporting and publication of wholesale acquisition costs that Novartis admits are not the true wholesaler acquisition costs (see PUF 40-42) also violates the statute.

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 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).⁵ 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).

⁵ To the extent that Novartis argues that its AWP’s are akin to 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.

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 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 Novartis is even more compelling than in the above cases, because Novartis did not report its prices as “suggested” or “list” prices. Rather, Novartis repeated and consistently stated that its prices were “average wholesale prices,” without any qualifying language. Yet Novartis knew that these were not the average prices charged by wholesalers to retailers. PUF 46-51. Because the undisputed facts establish that Novartis (1) made advertisements or announcements containing (2) statements that were untrue, deceptive, or misleading, it has violated Wis. Stat. § 100.18(1).⁶

Wisconsin need not demonstrate that Novartis 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 Novartis has admitted that it reported and caused First DataBank to publish its AWP’s because Novartis knows that various payers, including state Medicaid programs like Wisconsin Medicaid program, rely on either the WAC or the AWP published by First DataBank in determining how much to pay

⁶ Although Novartis’s statements are only susceptible of 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.

for Novartis's drugs. PUF 29. These facts are sufficient to demonstrate the requisite intent under the statute.

b. Novartis Cannot Escape Liability by Blaming First DataBank.

Novartis cannot escape liability by attempting to shift responsibility to First DataBank. As an initial matter, Novartis admits that it sets and controls the AWP and WACs that First DataBank publishes. PUF 26-39.

Second, the fact that First DataBank, rather than Novartis, 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).⁷

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, Novartis 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 Island, A & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920). No matter how Novartis seeks to spin its conduct, supplying false prices to First DataBank knowing that First DataBank would

⁷ *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.

not only publish these prices, but provide them to state Medicaid agencies, is not “turning square corners” with the government.

The fact that in July 2002 First DataBank began publishing AWP’s for Novartis’s drugs that were 25% above Novartis’s WACs, or that Novartis stopped reporting AWP’s to First DataBank after March 2005 is of no moment. Because Novartis expected, indeed knew, that First DataBank was applying a 25% markup to Novartis’s WACs to derive AWP’s (PUF 36-39), Novartis effectively controlled the AWP’s published by First DataBank. *See In re Pharmaceutical Industry Average Wholesale Price Litigation*, 2007 WL 1774644 *4 & *29 (D.Mass., June 21, 2007) (rejecting Bristol-Myers Squibb’s argument that because it only reported a “Wholesale List Price” (its name for WAC) for its drugs, it was not responsible for First DataBank’s publication of AWP’s for those drugs).

2. Novartis’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 Novartis reported and caused First DataBank to publish average wholesale prices for its drugs, Novartis made a “representation.” The second element is easily satisfied because Novartis uses the word

“wholesale” in its reporting of “average wholesale prices.” Finally, the third element is undisputed. As Michael Conley, Novartis’s corporate designee, testified at deposition:

Q: Is it Novartis’s -- has it been Novartis's belief since 1997 that the AWP’s that were reported to First Databank for the targeted drugs in fact represented a true price generally and currently available to retailers when purchasing these drugs from wholesalers?

A: Can you restate the question?

Q: Sure. Since 1997, has Novartis believed that the AWP’s it reported to First Databank represented actual prices that were generally and currently being paid by retail pharmacies to wholesalers for Novartis’s drugs?

A: I don't believe so. I mean, we publish the number, but our belief as to what that number represented, again based on the -- on the disclaimer that we put in -- in the notifications, I don't know that I can speak for everyone in the organization, but I don't believe that's the case.

PUF 46; *see also* PUF 47-51.

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. Novartis Has No Defense as a Matter of Law To Plaintiff’s Motion.

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

prices were false. Moreover, Novartis 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. Finally, Novartis will likely argue that it made certain statements, which Novartis will characterize as "disclaimers," that insulate it from liability. As explained below, these 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 Novartis's conduct. What State employees knew, should have known, or could have discovered is simply irrelevant to the question of liability.

In connection with the statutes at issue in this motion, liability is established by virtue of Novartis'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 Novartis of the falsity of the statements (although if required, such knowledge is established here).⁸ In sum, liability under these statutes depends solely and exclusively on the conduct of Novartis. Any efforts by Novartis to shift the

⁸ 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."

focus of the court's inquiry to the knowledge, belief, or actions of the State or its employees is improper.

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

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

Novartis’s “government knowledge” argument misplaces the burdens and duties of the parties. Novartis 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 Novartis’s drugs. *Heckler*, 467 U.S. at 63. In contrast, the State had no duty to sue Novartis earlier or to modify its

Medicaid program to account for Novartis'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 Novartis'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.").

4. Novartis's So-Called "Disclaimer" Did Not Reveal that its Prices Were False.

The State expects Novartis to argue that it can escape liability because of what Novartis will characterize as "disclaimers" it made in certain documents regarding its AWP. Although there are likely to be factual disputes as to, among other things: (1) whether such "disclaimers" were communicated to the State, (2) the date that such "disclaimers" were communicated to the State, and (3) whether such "disclaimers" pertained to each of the drugs at issue in this case, such disputes do not preclude summary judgment for the State. Even assuming that Novartis communicated such "disclaimers" to the State, such "disclaimers" are of no legal relevance.

The State expects Novartis to argue that since 1997, each time it launched or introduced a new drug into the market, it provided the State with a written announcement that identified a WAC and an AWP for the drug. The State expects Novartis to argue that in each announcement was the following language:

As used in this letter, the term AWP or Average Wholesale Price constitutes a reference for each Novartis product, and in keeping with current industry practices, is set as a percentage above the price at which each product is offered generally to wholesalers. Notwithstanding the inclusion of the term price, in Average Wholesale Price, AWP is not intended to be a price charged by Novartis for any product to any customer.

The State expects Novartis to argue that based on this “disclaimer,” the State knew that Novartis’s AWP’s were not true prices. This argument misses by a mile. The term “average wholesale price” has a plain meaning, as Judge Saris found – “the average price at which wholesalers sell drugs to their customers.” *In re Pharm. Indus. Average Wholesale Price Litig.*, 460 F.Supp.2d 277 at 278; *see also Federated Nationwide Wholesalers*, 398 F.2d at 257 n.3 (“[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*, 51 F.Supp. at 65 (“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”). Novartis’s so-called “disclaimer” says nothing about whether Novartis’s AWP’s are the true average prices charged by wholesalers. Rather, it addresses a completely different issue – the price that Novartis charges its customers.

The case law relating to disclaimers makes clear that, to be effective, a disclaimer must be *unambiguous*. As the U.S. Court of Appeals for the First Circuit has noted in the advertising context, “[d]isclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.” *Removatron Intern. Corp. v. F.T.C.*, 884 F.2d 1489, 1497 (1st Cir. 1989) (*citing Giant Food, Inc. v. F.T.C.*, 322 F.2d 977, 986 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964)). Here, Novartis’s so-called “disclaimer” does not unambiguously state that its reported AWP’s do not accurately reflect the actual average price

that wholesalers charge to pharmacies. Novartis's "disclaimer" does not even address this issue. *See also, Giant Food*, 322 F.2d at 986 (retailer Giant Food's attempt to disclaim the plain meaning of the pricing term "manufacturer's list price" was so confusing that it "only added to the deceptiveness of the term as used by Giant."). For this reason, Novartis's so-called "disclaimers" are irrelevant as a matter of law.

V. RELIEF SOUGHT

Wisconsin requests the court grant its motion for summary judgment and enter a finding of liability against Novartis on Counts I and II of plaintiff's Second Amended Complaint. Wisconsin further requests that the court enjoin Novartis from reporting and causing to be published false average wholesale prices and wholesale acquisition costs.

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