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**THE STATE OF WISCONSIN'S MEMORANDUM IN OPPOSITION TO  
DEFENDANTS' JOINT MOTION TO DISMISS THE AMENDED COMPLAINT**

The defendant pharmaceutical manufacturers reap enormous benefits from the Medicare and Medicaid programs. Those programs enable tens of millions of low-income and elderly Americans to buy billions of dollars of defendants' products every year. Both programs reimburse "providers" – the physicians, pharmacies and other entities who buy defendants' drugs and dispense them to patients – through rules whose starting point is the cost of the drugs to the providers. Unless States know what those costs are, they may unwittingly underwrite windfall profits for providers by reimbursing them for far more than the providers paid to buy the drugs.

Defendants owe a duty not to mislead States who are trying to establish providers' actual acquisition costs. However, defendants have violated that duty. They have engaged in a complex and sophisticated scheme to misrepresent what providers' real acquisition costs have been and to make it impossible for States to discover those costs. One important purpose of this scheme is to create an artificial, State-financed profit for providers, and thereby to induce them to buy and dispense defendants' products.

Through recent government investigations, indictments, and civil litigation, information has emerged about the purpose of this scheme and the huge overpayments that have resulted from it. As a result, numerous Attorneys General have sued defendants under State consumer protection and other laws. These lawsuits have become known as "AWP litigation," taking this name from one aspect of defendants' scheme – their publication of fictitious "Average Wholesale Prices" which the States, for lack of better information, have used as a starting point to try to determine what providers' actual acquisition costs for most drugs are. In the present lawsuit, Wisconsin seeks to have this scheme declared unlawful and to recover appropriate damages for

itself, for Wisconsin citizens who have overpaid for drugs from their own pockets, and for Wisconsin organizations who have overpaid for their members' drugs.

Defendants have filed a Joint Motion to Dismiss and a plethora of individual (and largely duplicative) motions. This brief responds to the Memorandum in support of the Joint Motion. Wisconsin will address the individual motions in a separate brief.

Defendants' Joint Memorandum (cited "DJM") makes two fundamental arguments. First, attaching a large number of documents, defendants assert, in effect: "Even if we tried to deceive you and continue trying to do so, you can't recover from us, because these documents show that you were able to find out from other sources what we were doing." This is an unattractive argument, and not one of the many courts considering it to date has accepted it. As this brief will show, the complaint adequately alleges severe damage from the violations of Wisconsin law it pleads. And although defendants' documents can play no role on this motion to dismiss, many of them, far from negating such damage, show the sophistication of defendants' scheme and the difficulty States like Wisconsin have had in responding to it.

Defendants' second fundamental argument is that Wisconsin's complaint is not "particularized" enough, and therefore fails to "afford notice to a defendant for the purposes of a response" or to "protect defendants whose reputation could be harmed." DJM 10. As this brief will show, this argument is empty. In particular, it ignores the big picture of which this lawsuit is a part. Defendants' conduct has resulted in investigations by Congress and by the National Association of Attorneys General, almost a score of lawsuits, at least three criminal indictments, and an overhaul of the Medicare payment system. Few defendants have been better informed about what they are accused of doing wrong, and any "harm to their reputation" has been self-

inflicted.

## FACTS

On this motion, “the facts pleaded by the plaintiff, and all reasonable inferences therefrom, are accepted as true.” *Prah v. Maretti*, 108 Wis.2d 223, 229, 321 N.W.2d 182 (1982). Those facts must be given “a liberal interpretation in favor of the plaintiffs.” *American Med. Transp. of Wis., Inc. v. Curtis-Universal, Inc.*, 154 Wis.2d 135, 144, 452 N.W.2d 575 (1990). The complaint can be dismissed only if “it is quite clear that under no conditions can the plaintiff recover.” *Evans v. Cameron*, 121 Wis.2d 421, 426, 360 N.W.2d 25 (1985).

Defendants’ Joint Memorandum flouts these rules. Defendants avoid the complaint’s allegations like the plague. Instead, in the name of “judicial notice,” defendants offer a huge compendium of documents and demand that the Court use them to make findings that Wisconsin was not deceived by defendants’ conduct and can never prove damage from their scheme. In its Argument below, Wisconsin will show that this tactic is so plainly improper that it justifies summary denial of defendants’ motion. The complaint’s allegations control this motion, not defendants’ documents. Wisconsin will now summarize those allegations.

### **1. The complexity of the prescription drug market makes Wisconsin, in reimbursing drug costs, dependent on the honesty of defendants**

Defendants are enormous and hugely profitable manufacturers of prescription drugs. They sell them (with varying numbers of intermediaries and agents) to “providers” – physicians, hospitals, and pharmacies – who then resell the drugs to patients. Most patients’ prescription drugs will be paid for in whole or part by a “payer” – a private insurance company, a self-insured entity, or a government entity in the case of Medicare and Medicaid programs. First Amended

Complaint, ¶¶28, 31. (Henceforth, all paragraph-number citations refer to that Complaint.)

The prescription drug market is dauntingly complex. A “National Drug Code” (“NDC”) exists for each quantity and packaging of each drug made by each manufacturer, resulting in over 65,000 NDCs. The published (purported) wholesale price of any NDC-numbered drug may, and often does, change at any time. Thus, to track the current published prices of drugs utilized by a State’s citizens requires resources and expertise that most States do not have. ¶¶28, 35, 46.<sup>1</sup>

## 2. **Wisconsin is required to determine providers’ actual acquisition costs**

**Medicaid.** Medicaid is a joint federal and state health care entitlement program authorized by federal law, with mandatory and optional provisions for eligibility and benefits

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<sup>1</sup> The materials in Defendants’ Appendix confirm that many States have been overwhelmed by the difficulty of determining providers’ actual drug acquisition costs. For example, Defendants’ Ex. 6 is a consultant’s report submitted to the federal Centers for Medicare and Medicaid Services (“CMS”) in June, 2004. Among other things, it discusses:

- the difficulty States have had in figuring out who is paying what prices within the prescription drug market, since drug manufacturers have been “hiding behind the wholesaler or the drug price database as the source of their prices” (p. 31);
- how the States’ reliance on defendants’ published AWP prices “generated high profit margins for oncologists, urologists, and other physicians,” causing them to respond “by tending toward administering more (and more expensive drugs) than might be medically necessary or optimal for the health of the patient” (p. 9);
- how defendant drug manufacturers have set “transaction prices high (to increase their profits directly) and AWPs even higher (to increase physician profits and thereby the demand for their drug)” (p. 9), and “have ‘gamed’ the pricing policies of both Medicare Part B and the Medicaid drug rebate program in a manner that creates economic incentives that lead to increased rather than decreased drug expenditures” (pp. 2, 26);
- how manufacturers can elude cost-control measures by States through a “relabeling” technique under which most Medicaid programs will pay higher prices “and the program won’t even know that it was an inflated AWP” (*id.*).

covered, including prescription drugs. Wisconsin Medicaid now costs Wisconsin some \$4.4 billion annually and provides assistance for about 14% of Wisconsin's population. Since 2001, the cost of prescription drugs in the Wisconsin Medicaid program has increased approximately 49%, from \$408 million to \$610 million. ¶57.

Federal regulations limit the amounts that Wisconsin can pay for prescription drugs under the Medicaid program. Under regulations in effect since 1980, drugs are divided into two categories for reimbursement-limit purposes: "single-source" drugs, meaning drugs that are still subject to patent protection from imitation, and "multiple source" drugs, in which the same essential drug is available from more than one different manufacturer. In both cases, the essential idea behind the federal regulations is that in most cases, States should reimburse providers for their drugs at a price consisting of no more than (1) the "ingredient cost" – that is, the provider's cost of acquiring the drug, plus (2) a reasonable fee to cover the costs of the provider associated with dispensing the drug to patients.<sup>2</sup>

To comply with these regulations, Wisconsin must try to identify *what the providers are paying to acquire their drugs*. Without cooperation from defendants, Wisconsin has extreme difficulty obtaining actual data on most of these prices. Instead, Wisconsin is forced to guess what those prices are. In Medicaid lingo, Wisconsin must determine the "Estimated Acquisition

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<sup>2</sup> 42 C.F.R. §447.331(b) provides that the upper limit at which Wisconsin can reimburse a single-source drug, or a multiple-source drug when the physician certifies that a particular brand of that drug is necessary, is the lower of (1) "estimated acquisition costs plus reasonable dispensing fees established by the agency" or (2) "providers' usual and customary charges to the general public." For certain multiple-source drugs where the physician does *not* specify a particular brand name, 42 C.F.R. §447.332 now sets the upper limit at an amount fixed by the federal agency, CMS, using a formula in which the most important variable is the "published price" for the least costly version of the drug.

Cost” (“EAC”) of a huge number of drugs for which it reimburses providers.

**Medicare.** Medicare is a health insurance program created by the federal government for the elderly and disabled, and certain other groups. Medicare Part B is an optional program that provides coverage for Wisconsin’s participating elderly and disabled citizens for some healthcare services not covered by Part A. Part B provides a limited benefit for drugs which are provided (a) incident to a physician’s service and cannot generally be self-administered, or (b) in conjunction with the medical necessity of an infusion pump or nebulizer or other durable medical device payable under Medicare’s “durable medical equipment” benefit. ¶¶62-63.

Like Medicaid, Medicare’s essential methodology for reimbursing drug costs is to start by estimating the acquisition costs of providers. For Part B benefits, the Medicare program has generally relied upon the “Average Wholesale Price” (AWP) of defendants’ drugs, *as reported by defendants*. From January 1, 1999, the allowable cost for “multiple source” drugs and biologicals has been 95% of the lesser of (1) the median AWP for all sources of the generic forms of the drug or biological or (2) the lowest AWP of the brand name form. 42 C.F.R. § 405.517. Medicare then pays 80% of the allowable cost; the beneficiary co-pays the remaining 20%. If the beneficiary is eligible for Medicaid, the State Medicaid program pays this copayment. Single-source drugs are reimbursed at 95% of AWP. ¶¶64-65.

**3. Defendants have engaged in a scheme to mislead Wisconsin into paying excessively for prescription drugs**

For the reasons stated above, without cooperation and candor from the defendants, Wisconsin cannot accurately determine the provider acquisition costs that are the key variable in its Medicaid reimbursement formula for most drugs. Instead, defendants have engaged in a

scheme to provide false and misleading information about these prices.

**Meaningless and false AWP prices.** Each of the defendants and/or its subsidiaries has for years identified an “Average Wholesale Price” for most of its drugs. Defendants disseminate these prices to the public through publication in certain medical compendiums, such as the Drug Topics Red Book and First DataBank Annual Directory of Pharmaceuticals. These publications rely on the prices reported to them by the defendants. These are the only prescription drug prices that defendants make public. ¶34.

For many years Wisconsin, as a payer under the Medicaid program, has based its reimbursement formula for prescription drugs on the defendants’ published AWPs. Wisconsin uses AWPs in its formula for many reasons. First, as discussed above, simplified and reliable estimates of the cost of drugs to providers are needed because the huge number of different drugs and the non-transparency of the marketplace make it impracticable for Wisconsin to track the drug price changes drug by drug on a daily basis. Second, the AWPs come from defendants, the most knowledgeable source. Third, by using the term “Average Wholesale Price,” defendants convey that term’s commonly understood meaning – that the price is an average of actual prices that are charged by wholesalers. Fourth, the compendia in which these prices are published are widely used and respected. Fifth, these published prices are the only prices publicly available. Sixth, Wisconsin relies on the honesty of those who profit from its Medicaid assistance programs and other State programs. ¶35. As a result, Wisconsin’s drug reimbursement system has been, and remains, almost completely dependent on defendants’ reported wholesale prices. Defendants know this fact and rely on it to make their scheme work. ¶36.

However, all of the defendants have inflated their reported average wholesale prices to

levels far beyond any real average wholesale price of their drugs and those of their subsidiaries. One high-ranking industry executive has described it as the industry practice to do so. ¶40.

The complaint makes clear the meaninglessness of defendants' reported AWP's with specific examples and general lists. For example, defendant Pharmacia reported an AWP of \$241.36 for Adriamycin in April 2000 when the drug was actually selling at wholesale for as low as \$33.43. ¶39. Exhibit A to the complaint lists drugs manufactured by the defendants and/or their subsidiaries for which the U.S. Department of Justice, after an investigation, found inflated AWP's. The federal Department of Health and Human Services, reviewing extensive data, found that there is a level of overstatement in the list AWP for *all* drugs. ¶41. The complaint gives examples of drugs manufactured by several defendants in which the published AWP's were anywhere from 297% to 1,119% of the providers' real acquisition costs. ¶42. Exhibit B to the complaint contains a long additional list of examples of drugs manufactured by defendants with inflated AWP's.

**Meaningless and inflated "Wholesale Acquisition Costs."** While the most common way States determine drug reimbursements is to start from "Average Wholesale Price," another price that plays an increasing role is "Wholesale Acquisition Cost" (WAC). Like the name "Average Wholesale Price," the name "Wholesale Acquisition Cost" carries a specific meaning: the cost at which wholesalers acquire drugs. WAC's are lower than the corresponding AWP's, and have been playing an increasing role in State formulas to estimate providers' actual acquisition costs and determine fair reimbursement levels.<sup>3</sup>

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<sup>3</sup> The materials in defendants' evidentiary appendix emphasize this point. *See, e.g.,* Defs. App., Ex. 24, Appendix 3, p. 2 of 2.

The defendants have misrepresented and inflated their drugs' WACs, making it appear that any reduction in wholesalers' purchase prices beyond listed WACs would result in a loss to the wholesaler and was hence unachievable. In fact, WACs were secretly discounted to purchasers other than the Medicaid and Medicare programs through an elaborate charge back system. ¶44. Upon agreeing on a quantity and price of a drug with a provider or group of providers, the defendants purport to sell the agreed-upon drugs to wholesalers with whom they have a contractual arrangement, at a price they call the WAC. The WAC may be, and usually is, higher than the price actually agreed upon by the provider and the drug manufacturer. The wholesaler then ships the product to the provider, charging the provider the (lower) price originally agreed upon by the drug manufacturer and the provider. When the wholesaler receives payment from the provider, it charges the manufacturer for handling, and any applicable rebates and discounts, and sends a bill to the manufacturer, called a "charge back," for the difference between the WAC and the lower price actually paid by the provider. These charge backs are kept secret, so that it appears that the wholesaler actually purchased the drug at the higher WAC price. This practice creates the impression that the "wholesale price" of the drug is higher than it really is. ¶48.<sup>4</sup>

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<sup>4</sup> One way for States to try to keep tabs on whether AWP is a meaningful, stable price is to compare the ratio of WAC to AWP. However, as material from Defendants' Appendix confirms, defendants manipulate these WAC/AWP ratios. The June 2004 report to CMS (quoted above at p. 4, fn. 1) notes: "There is evidence to suggest that a number of major drug manufacturers increased the AWP:WAC ratio for the vast majority (90 percent or more) of their drug products between October 2001 and July 2002. The shift resulted in most drug products of these firms moving their AWP from 20 percent to 25 percent above the WAC. This move means that for drug products reimbursed by Medicaid or private third party programs based on a percent off of AWP, these programs paid 5 percent more for each prescription. This change was initiated and driven by drug manufacturers, even though most of the benefit may accrue to the pharmacy. This is an example of the type of 'gaming' that a payment system should be routinely

**Other actions by defendants to keep States from discovering providers' real**

**acquisition costs.** At the same time as they have misrepresented their drugs' AWP and WACs, defendants have concealed from Wisconsin and other States the true prices to providers in other ways. First, they wrap their sales agreements with providers in absolute secrecy, terming them trade secrets and proprietary, to preclude providers from telling others the price they paid. ¶49. Second, defendants obscure the true prices for their drugs with their policy of treating different classes of trade differently. Thus, for the same drug, pharmacies are given one price, hospitals another and doctors yet another. ¶50. Third, some defendants have hidden their real drug prices by providing free drugs and phony grants to providers as a means of discounting the overall price of their drugs. For example, defendant TAP has pled guilty to a federal criminal indictment for engaging in such conduct, as have defendants AstraZeneca and Pfizer. ¶51. Fourth, defendants have taken steps to give all of the entities purchasing drugs directly from the defendants (and, hence, knowledgeable about the true price of their drugs) an incentive to keep defendants' scheme secret. Defendants' scheme permits all providers – pharmacies, physicians, and hospitals/clinics – to make some profit off defendants' inflated spread, because all of them are reimbursed in some manner on the basis of the AWP for at least some of the drugs they sell or administer. For providers, therefore, the greater the difference between the actual price and the reported AWP, the more money they make. Thus, providers willingly sign drug sales contracts requiring them to maintain secrecy about the prices they pay for drugs. ¶53.

**Defendants' manipulation of reimbursements for prescription drugs by Wisconsin private payers.** Another aspect of defendants' scheme is directed at Wisconsin organizations

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monitoring.” Defs. App., Ex. 6, p. 26.

who pay their members' prescription drug costs. Because of the expense and complication of the drug reimbursement process, most of these "private payers" have turned to outside companies called Pharmacy Benefit Managers ("PBMs") to handle the mechanics of drug reimbursements, including negotiating the price of drugs with drug manufacturers. ¶69. Four PBMs – Express Scripts, Medco Health Solutions, Inc., Caremark RX and Advanced PCS – now control 70% of the market, consisting of in excess of 210 million people. Although they purport to work for payer clients to help them obtain lower drug costs for their clients, the four major PBMs are severely conflicted. Defendants pay them huge fees and rebates, in part to secure placement of defendants' drugs on the PBMs' "formularies" – the list of drugs available for purchase by the private payers' members. Some of these fees and rebates are revealed publicly and passed on to the clients of the PBMs. But substantial rebates, and other economic inducements such as data access fees, research fees, education grants and promotional fees, are kept secret from the private payer clients of PBMs. Defendants know this. Indeed, the total of the fees and rebates paid to the four major PBMs by the defendants significantly exceeds the income PBMs receive from their clients, conflicting their relationship. ¶70.<sup>5</sup>

Defendants' inflated AWP's are a significant source of revenue for PBMs, as defendants know. ¶72. This comes about as follows. A person insured by a private payer buys a prescription drug at a pharmacy and pays a co-pay. The remaining balance is paid by the PBM that is under contract with the private payer. The private payer then reimburses the PBM for the PBM's payment to the pharmacy. The PBM negotiates the price of a drug both with its client

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<sup>5</sup> Materials in defendants' evidentiary appendix again support Wisconsin on this issue. See Defs. Ex. 6, p. 14, discussing the conflicts that are perceived on the part of PBMs because of the high percentage of their revenues they get from manufacturers as opposed to clients.

(the private payer) and the pharmacy that it reimburses. The PBM negotiates with pharmacies to reimburse them at the AWP less a discount, for example, AWP less 15 percent. At the same time, the PBM negotiates with its private payer clients to reimburse the PBM at a higher price, for example, AWP less 10%. The PBM then keeps the 5% spread. The higher the AWP, the more this 5% spread is worth and the more money the PBM makes. ¶73. This system gives PBMs an incentive to construct their private payer contracts around AWPs. Defendants know this fact. For the same reason, PBMs have an incentive to put drugs with the most inflated AWPs on their formularies, further increasing the costs to private insurers. *Id.*

#### **4. Defendants' hidden motive: marketing the "spread"**

The complaint states *why* defendants have gone to such lengths to conceal the true price of their drugs to providers and to "game" the system with artificially inflated prices. By doing so, defendants used Wisconsin's money to market their drugs to providers not on the basis of competition based on price or efficacy of the drugs, but on the basis of an artificial profit to the providers that was created by the State-paid "spread" between providers' actual acquisition costs and the amounts Wisconsin reimbursed them for the drugs. ¶¶33, 37.

This motive arose because of the unusual nature of the prescription drug market. Defendants essentially compete for the business of *providers*, not *patients*, because for the most part it is the providers whose decisions determine what drug will be prescribed for or dispensed to the patient. ¶30. If a defendant drug manufacturer can cause a "payer" to reimburse for defendant's drug at a higher price than the price the provider paid to buy the drug from the defendant, there will be a "spread" between the two prices, and that "spread" is retained by the provider as profit. ¶32. As described above, reimbursements by Wisconsin and other payers are

largely tied to formulas using AWP. Thus, by publishing false and inflated AWPs and by concealing the true prices of their drugs to providers through the scheme described above, defendants deliberately created this “spread” between the true wholesale price of a drug and the reimbursement cost. Defendants thereby increased the incentive for providers to choose the drug for their patients, or to counteract the same tactic used by a competitor, since if competing manufacturers are also publishing false and inflated AWPs for their drugs, a given defendant will be at a competitive disadvantage unless it does the same for its own drugs. ¶37.

Defendants often market their products by pointing out (explicitly and implicitly) that their drug’s spread is higher than a competing drug’s. For example, as noted above, defendant Pharmacia reported an AWP of \$241.36 for Adriamycin in April 2000 when the drug was actually selling at wholesale for as low as \$33.43, creating a spread of \$207.93. These spreads were then advertised to oncologists in promotions which emphasized a wide margin of profit.

¶39. Defendant Dey brought a lawsuit against First DataBank, the publisher of the medical compendium that Wisconsin Medicaid relies on for prescription drug pricing, because it published the *actual* average wholesale price of Dey’s drugs instead of the false average wholesale price sent to the publisher by Dey. Dey’s principal allegation in that lawsuit was that the publication of its actual prices for drugs was inconsistent with the practice in the industry of accepting and publishing reported, inflated AWPs, and that such publication put Dey at a competitive disadvantage because it had no “spread” to advertise. ¶40.

Defendants have hidden this motive for utilizing inflated AWPs. Only with the disclosure of materials secured by litigants in recent discovery has it become apparent that one reason defendants were intentionally manipulating the nation’s drug reimbursement system was

to compete for market share on the basis of a phony price spread, instead of the true selling price of their drugs or the medicinal value of these drugs to their users. ¶52.

**5. Defendants' scheme has damaged Wisconsin, its citizens, and its private payers**

**Damage to Wisconsin through Medicaid overpayments.** With some exceptions, reimbursement to pharmacies and physicians for drugs covered by the Wisconsin Medicaid Program is made at the AWP minus a percentage (currently 12%). By publishing false and inflated wholesale prices, and by keeping true wholesale prices secret, defendants have knowingly enabled providers of drugs to Medicaid recipients to charge Wisconsin inflated prices for these drugs, and interfered with Wisconsin's ability to set reasonable reimbursement rates for these drugs. As a consequence, Wisconsin's Medicaid program has paid more for prescription drugs than it would have paid if defendants had published their true wholesale prices. ¶¶60-61.

Although from time to time reports have emerged which indicate that one drug or another, at one time or another, could be purchased for less than AWP (¶55), that does not solve Wisconsin's problem. It is one thing to believe that providers can get drugs at less than AWP. It is quite another to know what prices providers actually pay. To this day Wisconsin does not know those prices. As a public policy matter, it is impracticable to respond effectively to evidence that some drugs, at some time, for some reason, have AWP's higher than their actual purchase price. Wisconsin does not have the resources continually to investigate each drug company to validate the reported prices of 65,000 NDCs on an ongoing basis. And Wisconsin is not at liberty simply to slash its drug reimbursement levels in the dark. If it unknowingly reduced its levels of reimbursement to below that which the providers actually pay for drugs, the

providers would simply stop supplying the drugs, to the detriment of Wisconsin citizens. Thus, although Wisconsin has now uncovered the outline of defendants' scheme, the damage resulting to Wisconsin and its citizens from that scheme continues unabated and will continue until Wisconsin learns the true wholesale prices of defendants' drugs. ¶55.

**Damage to Wisconsin citizens and to Wisconsin from co-payments under Medicare.**

Since Wisconsin citizens co-pay 20% of the allowable cost of drugs covered by Medicare (see above, p. 6), the higher that allowable cost is, the higher is the co-pay. Unless citizens are eligible for Wisconsin Medicaid or have supplemental insurance, they pay the co-pay from their own pockets. Likewise, as discussed above, Medicare generally pegs its allowable cost to defendants' AWP. Thus, inflated AWP costs mean that Wisconsin citizens and Wisconsin are paying substantially more for these co-payments than they would pay if defendants published their true wholesale prices. Indeed, as a result of inflated AWP, with respect to at least some drugs, the 20% co-pay for Medicare Part B participants exceeds the entire cost of the drug. ¶66.

**Damage to Wisconsin private payers.** As described above at pp. 10-12, pharmacy benefit managers structure their arrangements with their private payer clients in such a way that the spread paid to the benefit manager depends directly on defendants' AWP. The higher the AWP for a drug, the more money the spread produces for the benefit managers. Thus, as a result of defendants' conduct, private payers pay much more for drugs than they would if defendants published the true wholesale prices for their drugs. ¶74.

**ARGUMENT**

Defendants' Joint Memorandum does not argue on a blank slate. In moving to dismiss the many other State and federal AWP cases, defendants have trotted out huge bundles of

supposed “public reports,” demanded that the courts take “judicial notice” of them, and asked the courts to find as a fact that the plaintiffs saw or should have seen through their scheme and therefore cannot prove that it caused damage. To date, no court has agreed with this argument. As of the present writing, all thirteen courts who have ruled to date on motions to dismiss AWP cases on the merits have denied those motions. In all or nearly all those cases, defendants tried the same “documentary appendix” tactic they try here. The footnote below lists this avalanche of authority rejecting defendants’ position.<sup>6</sup>

Defendants’ Wisconsin motion deserves the same response. As Section I will show, their use of evidentiary materials abuses Wisconsin procedure for motions to dismiss, and justifies summary denial of this motion. Section II will show that Counts I and II of the complaint state valid claims for violation of the Deceptive Trade Practices Act (“DTPA”), Wis. Stat. §100.18 *et seq.* This Section will answer not only arguments limited to the DTPA claims but also the principal arguments relating to the other claims as well. Section III answers defendants’ attacks

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<sup>6</sup> See *In re Lupron Marketing and Sales Practices Litig.*, 295 F.Supp.2d 148 (D. Mass. 2003); *In re Pharm. Indus. Average Wholesale Price Litig.*, 307 F.Supp.2d 196 (D. Mass. 2004); *Swanston v. TAP Pharm. Prods. Inc.*, No. CV 02-4988 (Super. Ct. Maricopa Cty. Ariz., Nov. 25, 2002); *Arkansas v. Dey, Inc.*, No. CV-04-634 (Cir. Ct. Pulaski Cty. Ark., June 24, 2004); *Connecticut v. Dey, Inc.*, No. X07 CV03-0083296 S (CLD) (Super. Ct. Complex Litig. Docket at Tolland (Conn. Super. Ct., July 26, 2004)) (and three companion cases in which similar motions to strike were denied the same day); *Florida ex rel. Ven-A-Care of the Florida Keys, Inc. v. Boehringer Ingelheim Corp.*, No. 03-CA-3032A (Cir. Ct. Leon Cty. Fla., April 22, 2004); *Massachusetts v. Mylan Labs.*, No. 03-11865, 2005 WL 352556 (D. Mass., Feb. 4, 2005); *Nevada v. Abbott Labs., Inc.*, No. CV02-00260 (Dist. Ct. Washoe Cty. Nev., July 16, 2004); *Walker v. TAP Pharm. Prods., Inc.*, No. CPM L 682-01 (Super. Ct. Cape May Cty. N.J., March 7, 2002); *New York v. Pharmacia Corp.*, No. 905-04 (Supr. Ct. Albany Cty N.Y., June 1, 2004); *Stetser v. TAP Pharm. Prods. Inc.*, No. 01 CVS 5268 (Gen. Ct. Just. New Hanover Cty. N.C., May 6, 2002); *Texas ex rel. Ven-A-Care of the Florida Keys, Inc. v. Dey, Inc.*, No. GV0-02327 (Dist. Ct. Travis Cty. Tex., Aug. 15, 2003); *West Virginia ex rel. McGraw v. Warrick Pharms. Corp.*, No. 01-C-3011 (Cir. Ct. Kanawha Cty., W.V., Oct. 31, 2003). These orders and opinions are attached in the Appendix of Authorities filed with this brief.

on Count III's claim for violation of the Trusts and Monopolies Act. Section IV answers the attack on Count IV's claim for violation of the Medicaid Act. Section V answers the attack on Count V's unjust enrichment claim.

**I. DEFENDANTS' "JUDICIAL NOTICE" ARGUMENT ABUSES WISCONSIN'S PROCEDURE FOR MOTIONS TO DISMISS AND JUSTIFIES SUMMARY DENIAL OF THE JOINT MOTION**

Defendants demand that this Court find as a fact, on a motion to dismiss, that Wisconsin could not have been misled by defendants' scheme and therefore cannot prove that the scheme caused any damage. Defendants ask the Court to make that finding by ignoring the complaint and by taking "judicial notice" of hundreds of pages of reports. DJM, pp. 1 n.2, 18 n.12.

Defendants' *entire* Wisconsin authority for this demand consists of a footnote in *Freedom From Religion Found. v. Thompson*, 164 Wis.2d 736, 476 N.W.2d 318 (Ct. App. 1991).

Defendants can only have cited this case in the belief that this Court would not read it. In *Thompson*, the plaintiffs, in moving for judgment on the pleadings, cited a note from the legislative history of the statute in question. Defendants contended that this reference to legislative history converted the motion to a motion for summary judgment. The trial court disagreed. In affirming, the Court of Appeals wrote:

The phrase "matters outside the pleadings" should not be read so broadly so as to include items of legislative history, which do not concern evidentiary facts and which could be introduced without supporting affidavits.

164 Wis.2d at 740 n.4. Thus, all the Court held was that "items of legislative history, which do not concern evidentiary facts and which could be introduced without supporting affidavits" could be considered on a motion to dismiss. To cite this footnote as authority for deciding a motion to dismiss based on a huge unauthenticated documentary appendix can only be called breathtaking.

Moreover, defendants never mention Wis. Stat. §902.01, which governs judicial notice of adjudicative facts. Under §902.01, the Court can take judicial notice of an adjudicative fact only if it is “one not subject to reasonable dispute in that it is any of the following: (a) a fact generally known within the territorial jurisdiction of the trial court, or (b) a fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” The facts defendants demand this Court accept fit into no such categories. The documents deal with matters of extreme controversy. They are stuffed with facts which defendants themselves are certain to deny vehemently. That these reports are from or to public agencies does not make their assertions appropriate for wholesale judicial notice. No Wisconsin case has held that the mere fact that a report is issued to or by a government agency makes it appropriate to use its contents to override a complaint’s allegations on a motion to dismiss. Nor do the non-Wisconsin cases cited by defendants support their breathtaking wholesale use of these documents. For example, in *Erickson v. Wisconsin Department of Corrections*, No. 04-C-265-C, 2004 WL 1629537 (W.D. Wis. July 19, 2004) (cited at DJM 18, n.12), the issue was whether the Department’s sexual harassment policy could be considered on a motion to dismiss; the court expressly refrained from deciding that question. *Id.* at \*1.

Moreover, even if Wisconsin law allowed the Court to take “judicial notice” of assertions in defendants’ documents, there would be no basis to demand that the Court draw inferences against Wisconsin from these reports and find as a fact that Wisconsin was not deceived by defendants’ scheme. As the Court of Appeals has said:

However, the trial judge not only judicially noticed those facts but drew an inference from them and concluded that the orders contained, or had attached to them, the required warnings. He did this despite “realiz[ing] that there was a

question raised” regarding the required notice. Where the statute directs that certain facts be shown and those facts are in dispute, the inferences to be drawn from those facts are not appropriate for judicial notice. They are for the trier of fact. *See Acme Equip. Corp. v. Montgomery Coop. Creamery Ass’n*, 29 Wis.2d 355, 363, 138 N.W.2d 729, 733 (1966).

*In Interest of J.A.B.*, 153 Wis.2d 761, 768, 451 N.W.2d 799 (Ct. App. 1989).

Defendants’ breach of the rules governing motions to dismiss in itself justifies summary denial of their Joint Motion – not to mention their individual motions. (In one wild example, Johnson & Johnson asks the Court to find that it did nothing wrong because of Congressional testimony of one Zachary Bentley, who says that he does not think that Johnson & Johnson “games” the system as the rest of the defendants do. J & J Supplemental Memorandum, p. 5.) Almost every argument in defendants’ Joint Memorandum depends on their documentary materials, to the point where Solomon himself could not separate arguments that depend on them from arguments that do not. That defendants had to resort so massively to outside materials shows why a motion to dismiss is the wrong vehicle to make their arguments. Once discovery is completed, if defendants think they can win a motion for summary judgment, they can make it.

## **II. WISCONSIN STATES A CLAIM FOR VIOLATION OF THE DECEPTIVE TRADE PRACTICES ACT**

The Deceptive Trade Practices Act (DTPA) is the principal Wisconsin statute governing unfair and deceptive practices aimed at consumers. James Jefferies, *Protection for Consumers Against Unfair and Deceptive Business*, 57 Marq. L. Rev. 559, 560-61 (1974). Wisconsin alleges two separate violations of that Act. First, it alleges a violation of Wis. Stat. §100.18(1), which reads, in relevant part:

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

. . . merchandise . . . 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 . . . merchandise . . . 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 . . . announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such . . . merchandise . . . 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.

Count I clearly pleads a cause of action under this prohibition. It alleges that defendants disseminated to the public statements about the prices of their drugs that were untrue and, particularly given defendants' efforts to hide the real prices of their drugs, deceptive and misleading.

Count II of the Complaint sets out a separate violation of the DTPA under §100.18(10)(b). In the subsections following §100.18(1), the DTPA specifies particular conduct that the Legislature has found to be so misleading that it is considered deceptive as a matter of law. Thus, §100.18(10)(b) states that it is deceptive per se to advertise that a product is being sold at a wholesale price when wholesalers are actually selling the product to retailers for less than the announced wholesale price. Wis. Stat. §100.18(10)(b) 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.

Count II states a violation of §100.18(10)(b), alleging that defendants have represented the price of their drugs as wholesale prices when they were in fact far greater than the prices that

“retailers” (the providers) regularly pay for the drugs.

The practice of representing a price as a wholesaler’s price when it is more than retailers regularly pay has been condemned by the Wisconsin legislature (and many other States), for an obvious reason. That practice encourages consumers and payers to believe that markups are smaller than they actually are, and therefore prevents them from negotiating with full information. Defendants’ publication of false “average wholesale prices” is a textbook example of this forbidden practice. The practice hinders Wisconsin’s and others’ ability to negotiate reasonable reimbursement amounts for drugs on the basis of full information.

Defendants hardly deny their liability under this section. In over 100 pages of briefing, they do not once mention the prohibition of §100.18(10)(b). Defendants’ failure even to *mention* this section speaks volumes about their motion in general.

The arguments defendants do offer against Counts I and II, some of which apply to the remaining three Counts as well, include the following: (1) that their documentary appendix shows that Wisconsin cannot prove that their violations caused damage to anyone; (2) that this is a case of “nondisclosure,” which is not actionable under the DTPA; (3) that Wisconsin reimburses some drugs without reference to AWP; (4) that the Attorney General cannot bring these DTPA claims; (5) that the “filed rate doctrine” precludes the DTPA (and all other) claims; (6) that the DTPA claims are time-barred; and (7) that the DTPA (and all other) claims are “fraud” claims that must be pled with particularity and that Wisconsin has not done so. As will now be shown, all these arguments are without merit.

**A. Defendants' "No Causation" Argument Has No Merit**

Relying on their documentary Appendix, defendants argue that Wisconsin can never prove "causation" of damage and the Court should dismiss the case with prejudice. DJM 18-24. They argue that (1) AWP's and WAC's are analogous to the "sticker price" of an automobile (DJM 21, 30) and do not reflect the real prices providers pay to acquire drugs; (2) Wisconsin knew or should have known this "fact"; and (3) hence it did not rely on inflated AWP's or WAC's. In a variation on this "sticker price" argument, defendants argue that Wisconsin fails to allege that "published AWP's or WAC's are false," because "[s]ticker prices by their nature exceed market prices, but that does not make them false or misleading." DJM 30.

As Section I showed, this argument is improper on a motion to dismiss, since it is based on defendants' documentary appendix. But it also has no substantive merit.

We begin with the controlling standards on causation and reliance, which defendants never discuss. In Wisconsin, proof of causation simply requires that the plaintiff prove that defendants' conduct was a "substantial factor" in causing the plaintiff's injuries. *Steinberg v. Jensen*, 204 Wis.2d 115, 124, 553 N.W.2d 820 (Ct. App. 1996). Under the DTPA, what must be proved is causation, not "reliance." The statute nowhere mentions "reliance." What it requires is "a causal connection between the practices found illegal and the pecuniary losses suffered." *Tim Torres Enterprises, Inc. v. Linscott*, 142 Wis.2d 56, 70, 416 N.W.2d. 670 (Ct. App. 1987). In this regard, the DTPA is like other States' consumer protection laws.<sup>7</sup> Thus, while the complaint

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<sup>7</sup> As one particularly thoughtful opinion put it:

Defendant mistakenly contends that the statutory requirement for a causal connection between the deceptive practice and the claimant's damages equates to a requirement that the claimant prove detrimental reliance. However, causation and

(as shown below) amply alleges Wisconsin's reliance on defendant's scheme, it was not required to allege that reliance, but only that the scheme was a substantial factor causing injury.

Considered under these standards, the defendants' "sticker price" argument for making a finding of "no causation" on this motion to dismiss plainly lacks merit.

**1. Defendants' "sticker price" analogy is false.** The complaint's allegations show that defendants' AWP's and WAC's differed fundamentally from a real "sticker price."

First, the name "sticker price" or "suggested retail price" does not misrepresent itself. A sticker price or suggested retail price is indeed a suggestion to retailers, one they may or may not follow. It is not deceptive to call such a price by this name. But both factually and legally, the name "Average Wholesale Price" is deceptive. Factually, by reporting these prices under this name, defendants represent that they are *prices*; that they are an *average* of prices; and that they are an average of prices at the *wholesale level*. As the complaint alleges, all three representations are false. They are not prices at all; they are not averages of anything; and they represent no reality at the wholesale level. ¶35. Defendants never provide a clue as to why they chose, and still use, this misleading and deceptive name. Notably, while defendants cite reports that AWP

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reliance are distinct concepts. "Causation requires a nexus between a defendant's conduct and a plaintiff's loss; reliance concerns the nexus between a defendant's conduct and a plaintiff's purchase or sale." Seth William Goren, *A Pothole on the Road to Recovery: Reliance and Private Class Actions Under Pennsylvania's Unfair Trade Practices and Consumer Protection Law*, 107 Dick. L.Rev. 1, 11 (2002) (internal quotation marks and footnote omitted) [ . . . ]; see also *id.* at 11 n. 45 and authorities cited therein.

*Smoot v. Physicians Life Ins. Co.*, 87 P.3d 545, 550-51 (N.M. 2003). As *Smoot* said, "there appears to be a national trend to interpret consumer protection statutes, like the [Unfair Practices Act] and the [Unfair Insurance Practices Act], such that plaintiffs need not prove reliance." *Id.*, citing Goren, 107 Dick. L.Rev. at 13-14 nn. 50-51 (listing States whose consumer statutes dispense with proof of reliance).

prices are discounted, not one of these reports comes from defendants. Legally, through Wis. Stat. §100.18(10)(b), the legislature has decreed that it is *per se* deceptive to announce that a price is an “average wholesale price” unless that price is “not more than the price which retailers [here, providers such as pharmacies] regularly pay for the merchandise.”

Second, “suggested retail prices” from auto manufacturers have a legitimate business function. For example, they can be a method for manufacturers to try to influence their retailers’ prices. But according to the complaint, defendants’ “average wholesale prices” have no legitimate business function. They are not suggested prices for wholesalers to charge. To the contrary, defendants really want wholesalers to charge far less than these prices. They reach agreements with wholesalers to assure that this will happen. ¶¶34-43.

Third, when auto manufacturers give their cars “sticker prices,” those prices do not result in fleecing governments. Governments do not reimburse anybody for anything based on an auto manufacturer’s announcement of a car’s “sticker price.” But Wisconsin supports the market for defendants’ drugs, to the tune of hundreds of millions of dollars a year, through formulas based on false and inflated AWP as announced by defendants.

For these reasons, defendants’ “sticker price” argument has not prevailed in any of the many motions on which it has been made in AWP cases. The argument received a particularly caustic reply from the federal judge hearing AWP litigation involving the drug Lupron:

In support of this argument, defendants cite a number of government reports acknowledging that the published AWP for prescription drugs often exceed their acquisition cost. The argument is ultimately unpersuasive. There is a difference between a sticker price and a sucker price. If one were confronting a modest markup of the actual AWP for Lupron® (which 300% is not), intended to make sales of the drug for the treatment of Medicare patients commercially viable (given the 95% of AWP reimbursement rate), it is unlikely that there would have

been a government investigation of TAP's marketing practices . . . Finally, the recognition on the part of government regulators of inefficiencies in the administration of Medicare does not, as defendants contend, amount to condonation of fraudulent conduct.

*In re Lupron Marketing and Sales Practices Litig.*, 295 F.Supp.2d 148, 168 n.19 (D. Mass. 2003).

The fact that a few of the reports in Defendants' Appendix referred to AWP's as "list prices," as defendants' Joint Memorandum frequently states, proves nothing. *See, e.g.*, DJM 19, citing Defs. App. Ex. 1. By using the term "list price" to describe AWP's, the authors of these reports reveal themselves to have been confused (like Wisconsin) about the real nature of these prices. As discussed above, the AWP's published by defendants were not "list prices" at all. They were not even prices. The confusion about "list prices" reflected in these reports illustrates why material in defendants' documentary appendix cannot be used to decide a motion to dismiss.

**2. Knowing that AWP's can be discounted is not equivalent to knowing that they are meaningless.** It is one thing to understand that an announced price can be discounted. It is quite another to understand that the price has been set purely for the purpose of "gaming" reimbursement levels for providers, in order to keep ahead of any efforts the States make to discount from it. As the complaint makes explicit, it was only recently that States discovered this fundamental fact about defendants' behavior, and their secret motive for engaging in it. ¶55. None of the documents defendants rely on (with the exception of a report from June 2004, Defs. Ex. 6, noted several times in the Statement of Facts above) contains any useful discussion of this fact. Thus, as the complaint alleges, even as it discounted from AWP's, Wisconsin continued to rely on the inflated prices reported by defendants. ¶37.

To see through defendants' "no causation" argument, suppose that instead of publishing prices under the names "average wholesale price" or "wholesale acquisition cost," the defendants had published prices together with the following notice:

Although we call these prices "Average Wholesale Prices," each such price published below is really not a price at all, since it is not charged to any serious number of providers by any wholesaler we know of. Moreover, it is not an average of anything. We did not start out from any economically determined base in setting this price. Instead, we made up a number. We set it high enough so that under current State formulas using this price as a variable, the reimbursement levels for the drug will be far above what providers pay for it. Nor are we suggesting that a wholesaler charge the provider this price. In fact, we have contractual arrangements in effect to assure that wholesalers charge providers far less than this price. That way, providers will be able to make as much money as possible, courtesy of federal, State and private payers, if they choose to prescribe or dispense our drug. We also wish it to be understood that each time that States increase the discount from this price, we have adjusted and plan to continue adjusting this price and others like it upward, so as to keep ahead of the game.

Wisconsin alleges, and is prepared to prove, that if defendants had told this truth, rather than simply published these prices under the names "Average Wholesale Price" or "Wholesale Acquisition Cost," Wisconsin would have paid far less in reimbursements. It is hard to imagine any set of facts under which Wisconsin would *not* have paid less if this truth had been told. Yet defendants want this Court to find as a fact, on this motion to dismiss, that if defendants had told this truth, Wisconsin would still have paid exactly what it actually paid.

The above discussion likewise refutes defendants' oft-repeated argument that Wisconsin never alleges that it believed the AWP's represented the actual prices that providers were paying for drugs. *See, e.g.*, DJM 18, 28, 29. First, as discussed above, Wisconsin need not prove "reliance" to satisfy the DTPA's causation requirement. Second, in any case, Wisconsin does allege reliance on defendants' deceptive conduct. Wisconsin's damage from that conduct does

not depend on the details of what it believed about the level of providers' actual payments. Instead, it depends on the fact that by misrepresenting these prices as real prices, defendants kept Wisconsin from learning that behind those prices lay an elaborate and carefully tailored scheme to assure that whatever use the States made of those prices, defendants would "game" them to make sure that the States reimbursed providers at vastly inflated levels.

**3. Government knowledge of discounting would not be a defense in any event.**

Defendants' "no causation" argument assumes that knowledge by government officials of discounting from AWP is a *per se* defense to a DTPA claim by that government. Defendants cite no authority for this argument, which implicitly treats governments in the same way as the law might treat an individual who was considering purchasing a horse. This is an invalid analogy. Those who deal with a sovereign entity have learned that they cannot defend deceptive behavior simply by alleging that certain government officials knew about the deception.

An example is the federal False Claims Act ("FCA"), which allows suits to recover money paid out under false claims to the federal government. That a governmental official knew of the fraud is not a defense to a FCA claim. *U. S. ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1156 (2d Cir. 1993); *U.S. ex rel. Hagood v. Sonoma Cty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). If knowledge of wrongdoing by governmental officials cannot immunize a defendant from liability under the FCA, which requires proof of fraudulent intent, it cannot immunize defendants from liability under a consumer protection statute like the DTPA, whose text does not even require proof of intent to mislead.

The holding of these cases is sound. Sovereign entities cannot be compared to

individuals or private corporations when it comes to responding to deceptive behavior. It can take years for a State to put a reimbursement structure into place for a program like Medicaid, and years to change the structure once in place. A State cannot simply pass a law overnight once facts come to light suggesting that defendants are “gaming” its reimbursement formulas.

Defendants’ scheme has created huge interest groups who will fight reform efforts because of the inflated profits defendants’ scheme produces for them. Even within the Executive branch, agencies do not speak with one voice.<sup>8</sup> Defendants know these facts, as the complaint makes clear. ¶53.

In summary: even if the documents submitted by defendants could be relied upon by the Court at this stage of the proceeding, they would not justify dismissal unless they conclusively showed that defendants’ scheme made absolutely no contribution to raising Wisconsin’s reimbursements for prescription drugs. Defendants come nowhere close to showing such a thing.

**B. This Is Not A “Nondisclosure” Case**

Defendants rely on *Tietsworth v. Harley-Davidson, Inc.*, 270 Wis.2d 146, 677 N.W.2d 233 (2004), which held that mere nondisclosure does not violate the DTPA. *Tietsworth* was a class action filed after Harley-Davidson announced that a bearing in a small number of its engines had failed and that it was therefore extending the bearing warranty. Plaintiffs asserted that failure to disclose this defect at the time of sale had damaged purchasers. The Supreme

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<sup>8</sup> Defendants’ documentary appendix dramatizes these facts. Even as the Office of Inspector General of the federal Department of Health and Human Services issued reports to the Health Care Financing Authority (now CMS) or others criticizing the levels of reimbursement to providers, HCFA downplayed the significance or accuracy of these findings and urged “further study.” At the level of States, the same materials show that providers and physicians mounted political pressure to paralyze or slow down any changes as new information became available. See Defs. App. Ex. 1, pp. 16-17; Ex. 2, pp. 4-5; Ex. 8, pp. 7-10; Ex. 11, p. 7.

Court held that the requirement in §100.18(1) of an “announcement, statement or representation” could not be met by a mere failure to disclose.

Defendants argue that Wisconsin alleges mere “nondisclosure of prices” and that hence the claim is barred by *Tietsworth*. DJM 31. The argument has no merit. Not only does Wisconsin allege affirmative misrepresentations, but misrepresentations that the DTPA explicitly forbids: representing drug prices as being “a wholesaler’s price” when the price is “more than the price which retailers regularly pay for the merchandise.” The complaint then provides elaborate factual support to show how false these representations were. Thus, as the court put it in *Lupron Marketing and Sales Practices Litigation*, 295 F.Supp.2d at 167:

[T]his is not a case of nondisclosure. Defendants did not stand mute. As alleged in the Amended Complaint, defendants trumpeted a lie by publishing the inflated AWP, knowing (and intending) them to be used as instruments of fraud.

It is no answer to argue, as defendants do, that their actual prices are trade secrets and need not be disclosed. DJM 32. Defendants are beneficiaries of enormous government programs, including Wisconsin’s, which underwrite a substantial percentage of their drug sales. Those programs use “Average Wholesale Price” or “Wholesale Acquisition Cost” as essential elements in calculating reimbursements. To have providers take advantage of these programs, defendants *must* affirmatively announce these prices and costs; silence is not an option. Their only choice is to tell the truth or to give phony prices. They did the latter.

**C. That Some Drugs’ Reimbursement Does Not Depend On AWP Is Irrelevant**

Relying again on their documentary appendix, defendants say that some of the drugs they sell were not or are not reimbursed by formulas that depend on AWP. DJM 23-25. Hence, they

say, Wisconsin's claims "do not even purport to apply" to these drugs. DJM 30. The answer to this argument is: "So what?" The complaint does not allege that providers were reimbursed on the basis of AWP for every drug defendants market in Wisconsin.

Moreover, this argument ignores an important part of the complaint. False AWPs and WACs are part of a larger deceptive scheme, the purpose of which is to disguise the true cost of defendants' drugs. Wisconsin alleges, and will show at trial, that false AWPs and WACs, and the rest of defendants' scheme to hide their actual wholesale prices, 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. ¶60.

**D. The Attorney General May Bring All DTPA Claims**

The DTPA's authority to the Attorney General to enforce the statute could hardly be broader. Wis. Stat. §100.18(11)(d), provides, in part:

The department [of agriculture, trade and consumer protection] or the department of justice, after consulting with the department, or any district attorney, upon informing the department, may commence an action in circuit court in the name of the state to restrain by temporary or permanent injunction any violation of this section. The court may in its discretion, prior to entry of final judgment, make such orders or judgments as may be necessary to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action, provided proof thereof is submitted to the satisfaction of the court.

Defendants do not dispute that this provision gives the Attorney General authority to recover excess amounts Wisconsin itself has paid to reimburse providers. However, defendants argue that the Attorney General "has no authority to pursue claims or recover damages on behalf of Wisconsin citizens" under the DTPA. DJM 26. This argument is inexplicable. According to Wis. Stat. §100.18(11)(d), once the Attorney General proves a violation of DTPA, the court may

award any relief “as may be necessary to restore *any person* any pecuniary loss suffered because of the acts or practices involved in the action.” §100.18(11)(d) (emphasis added.) If “any person” does not include Wisconsin citizens, whom does it include?

Second, defendants argue that Wis. Stat. §100.18(11)(d) “does not authorize the Attorney General to seek penalties under Wis. Stat. §100.262(2) [*sic*], as alleged in Count II,” because there is “no statutory provision or other authority authorizing the Attorney General to pursue this claim.” DJM 26-27. Defendants are confused about Wisconsin’s forfeiture claims. Both Counts I and II seek the same forfeitures, pursuant to (1) §100.26(4), which provides for civil forfeiture of from \$50 to \$200 for each violation of §100.18(1) to (8) or (10); and (2) §100.264(2) (which defendants mis-cite as 100.262(2)), which provides that if any forfeiture is imposed for a DTPA violation, the defendant is subject to a supplemental forfeiture not to exceed \$10,000 for that violation if it knew or should have known that its conduct was perpetrated against an elderly person. Under both provisions, the Attorney General is the appropriate person to seek such a forfeiture. §100.264(3) makes this clear by imposing the order of payment as between restitutionary damages and forfeitures if “the court orders restitution under §100.18(11)(d).” As discussed above, Wis. Stat. §100.18(11)(d) authorizes the Attorney General to enforce the DTPA. So these forfeitures are authorized in a lawsuit by the Attorney General.

**E. The “Filed Rate” Doctrine Has No Application To This Case**

In an argument applicable not only to the DTPA claims but to all claims, defendants claim that their reimbursement rates have been “set by a government body” and that the “filed rate doctrine” prevents Wisconsin from retroactively challenging those rates in judicial proceedings. DJM 37-41. The argument has no merit.

“Under the filed rate doctrine, also known as the filed tariff doctrine, the legal rights of a regulated entity and its customers in respect to a rate are measured solely by the filed rate.” *Prentice v. Title Ins. Co. of Minnesota*, 176 Wis.2d 714, 719 n.3, 500 N.W.2d 658 (1993). The doctrine “prohibits a plaintiff from claiming a lower rate than the one filed by a regulated entity with the appropriate regulatory agency because the filed rate alone governs the relationship between the parties.” *Id.* at 721.

As this formulation makes clear, the doctrine cannot apply to this case. First, the case does not concern a “regulated entity.” Wisconsin does not regulate the defendant drug companies’ prices. Second, the case is not one in which the “legal rights” of defendants and their customers (the drug providers) in respect to a rate “are measured solely by the filed rate.” In fact, just the opposite is alleged. The “rate” at issue here – the defendants’ AWP and WAC – are alleged *not* to have been the rates paid by the providers, but phantom numbers created to deceive third party payers.

Moreover, the filed rate doctrine does not apply to suits brought by the State. In *Prentice*, the Supreme Court noted that the doctrine “does not protect against suits by the government or private suits which do not seek rate-related damages.” 176 Wis.2d at 727 n.7. Defendants try to fend this off by asserting that the clause “which do not seek rate-related damages” modifies both “suits by the government” and “private suits,” in other words, *all* suits. Under defendants’ interpretation, only suits by the government that do not seek damages are exempted from the doctrine. DJM 40-41 n.21. This interpretation is unconvincing. If the exemption applied to all suits that sought damages, there would be no need for *Prentice* separately to identify government and private suits. Moreover, *Prentice* elsewhere says that “the existence of a regulatory remedy

bars a private rate-related suit for damages . . . .” 176 Wis.2d at 725. This statement clearly implies that all suits by the government are exempt from the doctrine.

Defendants have regularly trotted out their “filed rate” argument in AWP cases and have regularly lost. The court wrote in *In re Pharmaceutical Industry AWP Litigation, supra*:

Pharmaceutical companies do not “file” their AWP’s with any federal regulatory agency. Rather, the pharmaceutical companies publish their wholesale pricing information in independent, publicly available trade publications that are used by the government and others to implement the statutorily defined reimbursement rates. The “filed rate” doctrine is thus inapplicable here.

263 F.Supp.2d at 192. In *Lupron Marketing and Sales Practices Litigation, supra*, the court rejected the argument because “(1) drug manufacturers are not regulated entities within the meaning of the doctrine, (2) the AWP is not a tariff filed with any regulatory agency, and (3) there is no formal regulatory approval of the AWP.” 295 F.Supp.2d at 163 n.16. In *Swanston v. TAP Pharmaceutical Prods., Inc.*, No. CV 2002-004988 (Super. Ct. Ariz., Nov. 25, 2002), the court rejected the argument because AWP’s “are not statutorily required to be filed with any regulatory agency nor is it the product of any agency’s regulatory expertise. Rather, it is a rate set by the Defendants.” *Id.* at 2.

Defendants claim that *Servais v. Kraft Foods, Inc.*, 246 Wis.2d 920, 631 N.W.2d 629 (Ct. App. 2001), *aff’d by an equally divided court*, 252 Wis. 2d 145, 643 N.W.2d 92 (Ct. App. 2002), is “controlling” on the filed-rate issue. To the contrary, *Servais* is irrelevant. It was a classic “filed rate” case. The plaintiffs were dairy farmers discontented with the low prices that had been paid to them for raw milk by defendant food manufacturers. Those prices had been set by a “federal milk marketing order” issued by the United States Department of Agriculture and controlled how much farmers were paid for their milk. 246 Wis.2d at 932. Here, as discussed

above, the AWP's and WAC's do not reflect what the providers pay for defendants' drugs, but are simply phantom numbers used to induce governments and others to overpay providers.

**F. The "Statute of Limitations" Argument Has No Merit**

Defendants assert that all DTPA claims are time-barred. The argument has no merit.

The three-year limitations period of the DTPA is a statute of repose which begins to run upon the occurrence of the false or deceptive representation on which the claim is based. *Kain v. Bluemound East Indus. Park, Inc.*, 248 Wis.2d 172, 182-83, 635 N.W.2d 640 (Ct. App. 2001). Wisconsin alleges a continuous and ongoing course of conduct, involving the continuous publication of constantly changing average wholesale prices and wholesale acquisition costs that were false and misleading, starting well before the three-year period of the DTPA, and continuing into that period to the present day. As the complaint makes clear, this was not a single publication that occurred years ago and then never changed. Rather, defendants are constantly changing these phony prices and constantly causing their new prices to be published in the publications in question. ¶¶46, 55.<sup>9</sup>

Each time any defendant caused a false and misleading figure to be published about "average wholesale prices" or "wholesale acquisition costs," that act caused a DTPA claim to accrue against that defendant for purposes of this statute. Thus, at a minimum, all DTPA claims arising out of any such publication on or after June 16, 2001, are timely as to that defendant.

Defendants argue, however, that Wisconsin knew its alleged factual basis for the claims

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<sup>9</sup> Again, defendants' Appendix supports Wisconsin on this score. Time after time those materials suggest that defendants are continuously changing their published prices, and recent materials make clear they are doing so to try to stay one step ahead of States as they try to figure out what defendants are really charging providers for their drugs. See, for example, the June 2004 report (Defs. App. Ex. 6), quoted at p. 4, n.1.

prior to June 16, 2001 (the date three years before the date the complaint was filed), and that these claims are therefore time-barred by the DTPA's three-year statute of repose. DJM 41-42.

For two reasons, this argument has no merit.

First, under Wisconsin law, whether a person should have "discovered" his or her claim is a question of fact. *Jacobs v. Nor-Lake, Inc.*, 217 Wis.2d 625, 634, 579 N.W.2d 254 (Ct. App. 1998). A defendant asserting a limitations defense based on a plaintiff's supposed "discovery" of his cause of action faces a rigorous standard:

Wisconsin law does not require a plaintiff to bring a lawsuit before the plaintiff has sufficient information to reach an objective conclusion as to cause. *Borello [v. U.S. Oil Co.]*, 130 Wis.2d 397, 411-12, 388 N.W.2d 140, 146 (Wis. 1986). This is because Wisconsin courts "have consistently recognized the injustice of commencing the statute of limitations before a claimant is aware of all the elements of an enforceable claim," including the discovery of the identity of the defendant and the cause of the injury. *Spitler [v. Dean]*, 148 Wis.2d 630, 636, 436 N.W.2d 308, 310 (Wis. 1989)].

*Jacobs*, 217 Wis.2d at 636-37. As discussed above, the allegations of the complaint, which must be accepted as true on this motion, defeat any ruling on the pleadings that Wisconsin had "reached an objective conclusion," more than three years before the complaint was filed, about defendants' scheme, much less that it was "aware of all of the elements" of its claim. As also discussed above, defendants cannot substitute their documentary appendix for the allegations of the complaint. And in any case, those documents do not show, much less as a matter of law, that defendants can meet the rigorous *Jacobs* standards. As discussed above, it is one thing to allege that information was available to show that AWP's were often discounted. It is another thing to allege that Wisconsin knew that these prices were fictitious and were being "gamed" to stay ahead of Wisconsin as it sought properly to control its Medicaid reimbursements.

Second, even if it were true that Wisconsin discovered or should have discovered more than three years before the complaint was filed that it had DTPA claims, that would not affect Wisconsin's right to recover for DTPA claims based on events that took place *within* the three-year period preceding the filing of the complaint. Defendants cite no case, and none exists, holding that if a plaintiff who is subjected to a continuing course of conduct discovers that conduct outside of the repose period, he cannot sue for that part of the course of conduct that occurs inside of the repose period.

Any such holding would be contrary to Wisconsin's "continuous tort" doctrine. That doctrine developed in negligence cases. It provides that "if a defendant engages in a continuum of separate negligent acts which cause the plaintiff damage, the cause of action is not complete until the last act of negligence occurs." *Kolpin v. Pioneer Power & Light Co.*, 162 Wis.2d 1, 24, 469 N.W.2d 595 (1991). Under this theory, the Supreme Court has affirmed damage awards for continuous courses of conduct that began long before the limitations period began. *See Kolpin, supra* (limitations period of six years, but judgment awarding damages for a ten-year period of continuous conduct affirmed); *Vogel v. Grant-Lafayette Elec. Co-op.*, 195 Wis.2d 198, 213-14, 223, 536 N.W.2d 140 (Ct. App. 1995) (six year limitations period, but judgment awarding damages for continuous conduct over seventeen-year period affirmed). It would be utterly inconsistent with those cases to hold that a person who discovers his cause of action before the repose period begins is barred from suing for that part of the continuous course of conduct that occurs inside of the period.<sup>10</sup>

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<sup>10</sup> In some states, the continuous tort doctrine allows the plaintiff to recover damages not only for that part of the continuous course of conduct occurring within the repose period, but also for that part of the continuous course of conduct occurring *outside* of the repose period. *See*

At bottom, defendants' argument is not really a limitations argument, but a rehashing of their often-repeated assertion that Wisconsin knew about defendants' efforts to mislead it and therefore cannot recover. That is a *merits* argument, not a limitations argument. Wisconsin has answered the argument above at pp. 22-28. As shown there, the argument provides no basis for dismissing the complaint.

**G. Even If The "Particularity" Requirement Applied To The States' Claims, The Complaint Would Satisfy That Requirement**

Neither the DTPA claim nor any other claim Wisconsin pleads is based on common-law fraud. Nonetheless, defendants spend ten pages (DJM 9-18) arguing that all these claims are subject to the requirement of Wis. Stat. §802.03(2), which provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Defendants have lost this "particularity" argument under other jurisdictions' similar rules on almost all the AWP motions to dismiss cited above at p. 16, n.6. The only exceptions to date have been in Pennsylvania and Connecticut, which are "fact pleading" rather than "notice pleading" jurisdictions (*ABB Automation, Inc. v. Zaharna*, 823 A.2d 340, 344 (Conn. App. 2003); *Devine v. Hutt*, 863 A.2d 1160, 1166 (Pa. Super. 2004)), and in a federal RICO lawsuit, which requires proof of common law fraud as the "predicate act" under RICO. *In re Pharm. Indus. AWP Litig.*, *supra*, 263 F.Supp.2d at 184.

As will now be discussed, Wisconsin law clearly requires this argument to be rejected.

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*Cunningham v. Huffman*, 609 N.E.2d 321 (Ill. 1993). The Wisconsin courts have not decided whether this is true under Wisconsin statutes of repose, and this Court need not decide this issue on this motion. At a minimum, the continuing-tort doctrine allows damages for that part of any continuing tort that extended into the three-year repose period of the DTPA.

§802.03(2) does not apply to a DTPA claim (or to any other claim pled by Wisconsin). And even if it did, Wisconsin's complaint would satisfy §802.03(2).

**1. §802.03(2) Is Inapplicable To a DTPA Claim**

Properly interpreted, §802.03(2) applies only to common law fraud claims. Wisconsin has asserted no such claim. Thus, ordinary notice pleading rules apply to the entire complaint.

No Wisconsin appellate decision has held that §802.03(2) applies to DTPA claims, and at least one Wisconsin Circuit Court, in a closely reasoned decision, refused to apply §802.03(2) to a consumer protection claim brought under §100.18 by Wisconsin on behalf of consumers.

*Wisconsin v. Publishers Clearing House*, Case No. 99 CV 27 (Columbia Cty. Cir. Ct. June 30, 2000), at 9-13.

Legislative history supports this position. In 1978, Wis. Stat. §802.02 (1)(a), the section authorizing notice pleading, was amended to read that a claim may set forth a "short and plain statement of the claim, identifying the . . . *series of transactions, occurrences, or events out of which the claim arises . . .*" The emphasized portion of this section was inserted by order of the Supreme Court. Wis. Sup. Ct. Order, 82 Wis.2d ix, x (1978). This modification was accompanied by a Judicial Council Committee Note that the Supreme Court approved for publication, making clear that the modification, and that notice pleading rules in general, were intended to apply to consumer protection statutes. It reads:

[Subsection (1)] is amended to allow a pleading setting forth a claim for relief under the Rules of Civil Procedure to contain a short and plain statement of any series of transactions, occurrences, or events under which a claim for relief arose. This modification will allow a pleader *in a consumer protection or anti-trust case*, for example, to plead a pattern of business transactions, occurrences or events leading to a claim of 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 involving either a substantial span of time or multiple and continuous transactions and events.

*Id.* at x-xi (emphasis added).

Further weakening the case for considering DTPA to be “fraud” claims subject to §802.03(2) is the fact Wisconsin courts treat DPTA claims as wholly distinct from common law fraud claims. In *Kailin v. Armstrong*, 252 Wis. 2d. 676, 643 N.W.2d 132 (Ct. App. 2002), the court, speaking of the DTPA, held that:

The elements of this cause of action differ from those of 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 “advertisement, announcement, statement, or representation” be made “to the public.” There is no indication in these sub-sections 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.

252 Wis.2d at 707-08 (footnote omitted).

Thoughtful decisions from other jurisdictions have also refused to heighten pleading requirements under consumer protection laws similar to the DTPA. A particularly thorough discussion is *State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111 (Del. Ch. 2001), which cited with approval *Wisconsin v. Publishers Clearing House*, *supra*. The court held that:

- (1) Cases applying heightened pleading requirements to consumer protection statutes do so without any meaningful analysis.
- (2) Consumer protection statutes are not sufficiently analogous to common law fraud causes of action to justify setting aside a state’s notice pleading requirements.
- (3) The remedial goals of consumer protection acts are inconsistent with a particularized pleading requirement.

- (4) Claims under consumer protection acts do not require proof of moral turpitude.
- (5) The better reasoned decisions in other states do not append a heightened pleading standard to their state's consumer protection laws.

787 A.2d at 115-118. Other jurisdictions agree. See *Petitt v. Celebrity Cruises, Inc.*, 153 F. Supp.2d 240, 265 (S.D.N.Y.2001) and cases cited therein; *Omega Eng'g, Inc. v. Eastman Kodak Co.*, 908 F. Supp. 1084 (D. Conn. 1995); *Freeman v. Time, Inc.*, 68 F.3d 285 (9th Cir. 1995).

Similarly, courts in federal jurisdictions have rejected applying Fed. R. Civ. P. 9(b) (which reads the same as §802.03(2)) to claims under federal consumer protection statutes such as the Federal Trade Commission Act or Lanham Act. See, e.g., *FTC v. Communidyne, Inc.*, No. 93 C 6045, 1993 WL 558754 (N.D. Ill. Dec. 3, 1993), which relied on *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989). Wisconsin courts interpret the DTPA consistently with §5(a) of the FTC Act. *Tim Torres Enterprises, Inc. v. Linscott*, 142 Wis.2d 56, 66, 416 N.W.2d 670 (Ct. App. 1987). In *John P. Villano Inc. v. CBS, Inc.*, 176 F.R.D. 130, 131 (S.D.N.Y. 1997), the court wrote:

[N]othing in the language or history of Rule 9(b) suggest that it is intended to apply, willy-nilly, to every statutory tort that includes an element of false statement. No matter how parsed, a claim of false advertising under the Lanham Act ... is not identical to a claim of fraud. Fraud requires, not just the making of a statement known to be false, but also, *inter alia*, a specific intent to harm the victim and defraud him of his money or property . . . Consequently, a claim of false advertising under § 1125 (and parallel provisions of New York State law) falls outside the ambit of Rule 9(b) and may not be the subject of any heightened pleading requirement. [Citations omitted.]

In sum, Wisconsin must only satisfy the notice pleading requirements when pleading a cause of action under Wisconsin's consumer protection statute. Notice pleading dispenses with

the requirement that every transaction of every defendant be spelled out in detail, as defendants demand. §802.02 authorizes the plaintiff to simply plead “a short and plain statement of the claim, identifying the...series of transactions or occurrences out of which the claim arises...”

In *K-S Pharmacies v. Abbott Labs.*, No. 94 CV 2384, 1996 WL 33323859 (Dane Cty. Cir. Ct. May 17, 1996), this Court interpreted what notice pleading requires in the context of a complex multidefendant antitrust case. This Court insisted that the complaint provide enough detail so that “the court can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for recovery against each defendant.” *Id.* at 5. This standard does not “require that extensive details be included.” Rather, the Court required only “a single occurrence linking each defendant to the alleged scheme.” *Id.* at 6. Only when the *K-S Pharmacies* plaintiffs failed to follow the road map this Court set out for them did the Court dismiss the action. Here, Wisconsin has set forth in detail what it is complaining about and has provided examples as to each defendant.

## **2. In Any Event, The Complaint Satisfies §802.03(2)**

Even if §802.03(2) applied to the DTPA, Wisconsin’s complaint would satisfy it. Defendants cite the “who, what, when, where, and how” test for particularity. DJM 9, *citing Friends of Kenwood v. Green*, 239 Wis.2d 78, 87, 619 N.W.2d 271 (Ct. App. 2000). They then argue that the complaint fails this test in three respects. All three assertions are unpersuasive.

**The “group pleading” argument.** Defendants’ “group pleading” argument derives from *Friends of Kenwood, supra*, a common-law fraud case, alleging that synagogue trustees had lied to congregation members in connection with the sale of the temple facilities. The Court of Appeals affirmed a lower court dismissal under §802.03(2) on the grounds that the complaint

failed to say which trustees had engaged in the fraudulent conduct. The court held that “[t]he complaint must inform each defendant of the nature of his alleged participation in the fraud and specify who was involved in what activity.” 239 Wis.2d at 89.

As opposed to *Friends of Kenwood*, there can be no confusion here among the defendants about who is charged with what. The complaint makes clear that each defendant misleadingly represented the published prices of *all* of its drugs, *all* of the time. See, for example, ¶¶34, 37 and 40. Contrary to defendants’ argument, there is nothing *per se* wrong with attributing conduct to “all defendants” in a fraud pleading. Rather, it depends on the context. Sometimes, as in *Friends of Kenwood*, the kind of conduct being alleged involves varying kinds of statements and conduct, and therefore fairness makes it necessary to associate particular defendants with particular statements. The present case involves no such variation. The fundamental misrepresentation it alleges concerns a uniform practice – publishing AWP’s and other data in public journals, using uniform names (“average wholesale price,” “wholesale acquisition cost”), and always publishing prices that are far above what these names convey. No purpose of §802.03(2) is served by requiring Wisconsin to repeat dozens of times, as to each defendant, this allegation.

**The “identify each drug” argument.** Defendants claim that they are confused about what the “subject” drugs are. This argument cannot be taken seriously. The complaint says in no uncertain terms that the Defendants’ scheme intentionally masked the true price of *all* their drugs. Defendants know the true prices of their drugs to providers. If the allegation is true, defendants can admit it; if false, defendants can deny it.

Defendants appear to demand that Wisconsin identify every drug price it alleges was

inflated. DJM 12-13. This demand would require Wisconsin to attach to its complaint the annually published medical compendiums listing the price of each of Defendants' drugs, an action that would serve no purpose other than to jeopardize Wisconsin's remaining forests. Alternatively, defendants appear to argue that Wisconsin must state precisely what the true selling price of the drugs was in each such year. DJM 15-16. This argument makes even less sense. The thrust of the complaint is that defendants have successfully hidden their true prices. While Wisconsin now has significant evidence that this is so, the universe of drug prices that defendants kept and still keep secret is still wholly within defendants' possession.

**The "what did we do wrong?" argument.** Defendants complain that the complaint does not adequately inform them about what they did wrong. This argument rings hollow from the start. In 2000, Congress ordered the Justice Department to investigate the pricing practices of the entire pharmaceutical industry. This investigation, and follow-up state investigations, led to some 16 states (and the number is growing) to sue all or some of these defendants for the same conduct covered by the complaint in this case. Private class actions, now consolidated in federal court in Boston, have followed. Some of the cases have progressed significantly. For example, Texas has settled its claims with Dey and Warrick for many millions of dollars and is now pursuing other defendants. Thus, litigation over the same scheme Wisconsin has detailed in its complaint is going on all around the country. In such a context, it is disingenuous for defendants to argue to this Court that they are confused about the charges against them.

Moreover, the "what did we do wrong" argument simply wraps substantive arguments in the guise of pleading arguments under §801.03(2). Thus, defendants argue that they cannot discern whether they are accused of fraud because Wisconsin has "long known" that AWP's were

discounted (DJM 16-17); or because there is nothing false or fraudulent about calling their published prices “average wholesale prices” or “wholesale acquisition costs” when they are not. (DJM 15); or because with respect to some drugs Wisconsin did not base its reimbursement on the published AWP (DJM 14). Wisconsin has answered these substantive arguments above.

In sum, the complaint alleges more particularity than Wisconsin law requires, not less.

### **III. COUNT III STATES A VALID CLAIM FOR VIOLATION OF THE WISCONSIN TRUST AND MONOPOLIES ACT**

Count III is based on §5 of the Trusts and Monopolies Act, Wis. Stat. §133.05:

The secret payment or allowance of rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise, or the secret extension to certain purchasers of special services or privileges not extended to all purchasers purchasing upon like terms and conditions, such payment, allowance or extension injuring or tending to injure a competitor or destroying or tending to destroy competition, is an unfair trade practice and is prohibited.

The complaint alleges the elements of this claim as set forth in the statute. It alleges secret rebates, refunds, or unearned discounts. It alleges that defendants have hidden their real drug prices by providing free drugs and phony grants to providers as a means of discounting the overall price of their drugs. ¶51. It further alleges, in connection with defendants’ practice of inflating their “wholesale acquisition costs,” that the WACs were “secretly discounted to purchasers other than the Medicaid and Medicare programs through an elaborate charge back system.” ¶44. (See above, p. 9, for the complaint’s description of that system.) And it alleges that these actions “destroy[] or tend[] to destroy competition”:

56. Defendants’ unlawful scheme has completely corrupted the market for prescription drugs. Instead of competing on prices and medicinal value alone, the defendants have deliberately sought to create a powerful financial incentive for providers to prescribe drugs based on the spread between the true price of a drug and its published AWP or WAC. Creating incentives for providers to

prescribe drugs based on such a spread is inconsistent with Wisconsin's public policy. Large price spreads on higher priced drugs encourage providers to prescribe more expensive drugs instead of their lower priced substitutes thereby increasing the cost of healthcare, and competition on the basis of such spreads has the potential to influence (consciously or unconsciously) providers to prescribe less efficacious drugs over ones with greater medicinal value.

85. All of the defendants have discounted secretly from defendants' published prices with the intent and effect of injuring competition and creating artificially inflated markets and market prices for their products. Additionally, the defendants have paid PBMs secret discounts, rebates, and other economic benefits with the intent and effect of artificially inflating the private payer market for their products. As a result of this unlawful conduct, the market for the drugs manufactured by defendants has been artificially distorted, and the prices Wisconsin, its citizens, and private payers have paid for defendants' drugs increased beyond that which would have existed absent defendants' unlawful discounts and rebates.

Defendants nonetheless offer three invalid arguments to dismiss this claim.

**The "No Injury To Competition" Argument.** Defendants assert that "no facts are alleged that even attempt to show how these alleged price discounts operate to restrain *price* competition for drug sales." DJM 33 (emphasis added), *citing Roux Laboratories, Inc. v. Beauty Franchises, Inc.*, 60 Wis.2d 427, 429, 210 N.W.2d 441 (1973). But the statute speaks of injury to "competition," not "price competition." Nothing in *Roux Laboratories* or any other case restricts the statute's reach to "price competition." In any event, the actions alleged in the complaint *do* implicate price competition. The complaint alleges that instead of competing with each other on the basis of price and drug efficacy, defendants are in effect competing on the basis of getting Wisconsin and its citizens and private payers to subsidize the providers who make the purchasing decisions as to defendants' products. This artificial subsidization of demand is the exact opposite of "price competition," and hurts consumers rather than helps them.

The defendants try to turn this allegation on its head. According to them, "The State

theorizes that each Defendant vigorously discounts its prices to physicians and PBMs in order to *compete against the other Defendants*, not to reduce competition.” DJM 33. This perverted form of “competition” – keeping up with competitors by misleading the State into subsidizing your customers – is not what the Trusts and Monopolies Act is intended to protect.

**The “secret unearned discounts” argument.** Defendants claim that “the statute applies only where discounts are provided to one purchaser and are kept secret from other purchasers.” DJM 33, citing *Jauquet Lumber Co. v. Kolbe & Kolbe Millwork Co.*, 164 Wis.2d 689, 699, 476 N.W.2d 305 (Ct. App. 1991). It is unclear what defendants mean by this deliberately ambiguous description, which nowhere appears in the statute or in *Jauquet Lumber*. If they mean that the statute only forbids discounts that are extended to one purchaser but not to another, *Jauquet Lumber* expressly rejected that assertion. It ruled that in the statute, “the ‘not extended’ phrase modifies only the ‘special services and privileges’ clause preceding it and not ‘discounts.’” Therefore, we conclude that this statute is violated when a discount, both secret and unearned, tends to injure or injures competition.” 164 Wis.2d at 700-01. Thus, so long as defendants gave a secret and unearned discount to *anyone*, and that secret discount tended to injure competition, the statute is violated. As discussed above, Wisconsin alleges just that.

Defendants also claim that Wisconsin alleges no “unearned” discounts. DJM 34. Again, *Jauquet Lumber* defeats this argument. It held:

Because our statute was designed to accomplish the same goals as the federal antitrust laws, we conclude that an “earned” discount under sec. 133.05, Stats., is similar in nature to the federal concept of a functional discount. See *Independent Milk Producers Co-op v. Stoffel*, 102 Wis.2d 1, 6-7, 298 N.W.2d 102, 104 (Ct.App.1980). “A functional discount is a discount given to a purchaser based on its role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier.” *Texaco Inc. v.*

*Hasbrouck*, 496 U.S. 543, 110 S.Ct. 2535, 2542 n. 11 (1990) (citation omitted).

The secret discounts alleged in the complaint have no relation to a “functional discount” as thus described. They are alleged to be discounts given as part of a scheme to get Wisconsin unwittingly to subsidize providers.

**The “no authority of the Attorney General” argument.** §16 of the Trusts and Monopolies Act, Wis. Stat. §133.16, provides:

Any circuit court may prevent or restrain, by injunction or otherwise, any violation of this chapter. The department of justice, any district attorney or any person by complaint may institute actions or proceedings to prevent or restrain a violation of this chapter, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing be enjoined or prohibited . . . . In an action commenced by the department of justice, the court may award the department of justice the reasonable and necessary costs of investigation and an amount reasonably necessary to remedy the harmful effects of the violation. The department of justice shall deposit in the state treasury for deposit in the general fund all moneys that the court awards to the department or the state under this section. The costs of investigation and the expenses of suit, including attorney fees, shall be credited to the appropriation account under s. 20.455(1)(gh). Copies of all pleadings filed under this section shall be served on the department of justice.

This section plainly authorizes the Attorney General to seek all damages Wisconsin has suffered from a violation of the Act, and defendants do not argue otherwise. However, defendants argue that the Attorney General has no power under the Act to seek relief on behalf of Wisconsin citizens or private payers. DJM 26. It is true that this Act, unlike the DTPA, does not explicitly grant that power to the Attorney General. It is also true that the Attorney General has no power on his own to bring such actions. However, the Governor does have such power, and Wisconsin statutes and case law explicitly empower the Governor to request the Attorney General to bring such an action. That is what has happened here.

Wis. Stat. §14.11(1) provides, in relevant part:

The governor, whenever in the governor's opinion the rights, interests or property of the state have been or are liable to be injuriously affected, may require the attorney general to institute and prosecute any proper action or proceeding for the redress or prevention thereof ....

Wis. Stat. §165.25(1) lists, among the Attorney General's powers (emphasis added):

(1) Represent state. ... [The attorney general shall] appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party; and, *if requested by the governor* or either house of the legislature, *appear for and represent the state*, any state department, agency, official, employee or agent, whether required to appear as a party or witness in any civil or criminal matter, *and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested....*

In *State ex rel. Reynolds v. Smith*, 19 Wis.2d 577, 120 N.W.2d 664 (1963)<sup>11</sup>, the Supreme Court construed these two provisions together and held that (1) §14.11(1) enables the Governor to bring claims on behalf of its citizens, and (2) under §165.25(1), “the governor is authorized under [sec. 14.11(1)] to direct the attorney general to commence a *parens-patriae* type of action to enforce the constitutional rights of its citizens . . . .” 19 Wis.2d at 585. While the claims in this case on behalf of Wisconsin citizens and private payers are statutory rather than constitutional, the statute does not distinguish between those two categories of claims. All that is needed is that Wisconsin citizens “may be interested” in the matter, which they are here.

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<sup>11</sup> *State ex rel. Reynolds v. Smith* cites to former §14.12 and §14.53(1). Subsequent to the publication of this case, §14.12 was renumbered §14.11(1) (by L.1969, c. 276, §16) and §14.53(1) was renumbered §165.25(1) (L.1969, c. 276, §§45 to 47).

#### **IV. WISCONSIN ALLEGES A VALID CLAIM FOR MEDICAL ASSISTANCE MISREPRESENTATION**

The defendants' scheme violates not only Wisconsin's general consumer protection statute but also the prohibition designed to assure straightforward dealing by persons benefitted by Wisconsin's Medicaid program. Wis. Stat. §49.49(4m)(a)(2) 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." Count IV pleads these elements. It alleges false statements by defendants about average wholesale prices and wholesale acquisition costs. Those statements were clearly "material" in determining benefits, since Wisconsin uses AWP's as the basis for determining the amount of Medicaid benefits, and defendants so knew.

Defendants raise no argument specific to this Count alone, but merely rehash arguments which Wisconsin has answered above in connection with earlier counts: the "fraud with particularity" argument (DJM 35; see above, pp. 37-44); the argument that Wisconsin does not allege what was "false" about their published AWP's (DJM 35; see above, pp. 23-24); the argument, based on their documentary appendix, that Wisconsin knew all along what they were doing, and hence none of their misrepresentations about their AWP's could have been "material" (DJM 36; see above, pp. 25-27); and the argument that the Attorney General lacks the power to assert the claim on behalf of Wisconsin citizens or private payers (DJM 26; see above, pp.47-48).

#### **V. WISCONSIN STATES A CLAIM FOR UNJUST ENRICHMENT**

To state a claim for unjust enrichment, Wisconsin must allege (1) a benefit conferred upon the defendant by the plaintiff; (2) defendant's appreciation or knowledge of the benefit; and (3) defendant's acceptance or retention under circumstances that makes its retention inequitable.

*S & M Rotogravure Serv., Inc. v. Baer*, 77 Wis.2d 454, 460, 252 N.W.2d 913 (Wis. 1977).

Count V alleges that each defendant (1) knew that Wisconsin, its Medicare Part B participants, and private payers were being overcharged by pharmacy providers and physicians as a direct result of defendants' misleading pricing information; (2) obtained increased sales, market share and profits at the expense of Wisconsin, its citizens and private payers; and (3) knew that it was not entitled to the profits and increased market share it thereby realized. ¶¶95-97.

Defendants offer a fleeting attack on Count V. First, they question the Attorney General's authority to seek relief under this Count for anyone other than Wisconsin itself. DJM 36. The answer is the same discussed under Count III at pp. 47-48 above. Second, they allege that Wisconsin fails to allege any of the elements of unjust enrichment, "even in cursory fashion." DJM 36. As discussed above, Wisconsin alleges precisely these elements in ¶¶95-97 and in the detailed allegations incorporated by reference into Count V. Third, defendants argue that Wisconsin fails to allege that it "directly" conferred a benefit on them, because Wisconsin pays providers, not defendants, under its programs. Defendants cite no authority for the assertion that the "benefit" in question must be conferred through a direct payment from plaintiff to defendant. Any such rigid rule would be contrary to the flexibility that is the hallmark of equitable doctrines. *Schlosser v. Allis-Chalmers Corp.*, 65 Wis.2d 153, 174-75, 222 N.W.2d 156 (1974).

**CONCLUSION**

Wisconsin respectfully requests that this Court deny defendants' Joint Motion to Dismiss.

Dated this 10<sup>th</sup> day of March, 2005.

Respectfully submitted,

  
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