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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

FILED

STATE OF WISCONSIN,

APR 19 2016

Plaintiff,

Case No. 04-CV-1709

DANE COUNTY CIRCUIT COURT

v.

ABBOTT LABORATORIES, *et al.*,

Defendants.

**ABBOTT LABORATORIES' OPPOSITION TO PLAINTIFF'S
MOTION TO TRY DEFENDANTS ABBOTT AND TAP IN ONE TRIAL**

Nearly eight years after the deadline for seeking consolidation passed, plaintiff asks the Court to consolidate two separate companies into a single jury trial, despite the two companies having different products at issue, different business practices, different facts, and different defenses. The Court should deny plaintiff's motion out of hand as untimely. Even if the Court is willing to consider the request, plaintiff's motion fails to rebut the well-reasoned presumption of separate trials the Court established in 2007. Consolidation of multiple companies in a single jury trial poses the same, grave risk of jury confusion and prejudice today as it did then. Perhaps most telling are the Court's comments in 2009 when, on the heels of the only trial to date in this case, the Court reaffirmed its view against consolidation, stating "I'm, frankly, not inclined to try more than one defendant at a time.... [a]nd I think we face a real problem with jury confusion by combining them." Plaintiff's untimely motion flies in the face of these comments. As explained below, a single jury trial of both Abbott Laboratories ("Abbott") and TAP Pharmaceutical Products Inc. ("TAP") would confuse the jury, prejudice both companies, and violate Abbott's fundamental right to a fair trial. Plaintiff's motion should be denied.

FACTS

I. PLAINTIFF'S MOTION IS EIGHT YEARS LATE

The Court ordered plaintiff to seek consolidation of any defendants it wished to try together in one trial on or before May 1, 2008. *See* Scheduling Order dated January 25, 2008, Dkt. 696, attached as Ex. 1, at ¶ 4 (“Plaintiff must move to consolidate the defendants it wishes to try together for the February 2, 2009 trial no later than February 2, 2008 ***For all remaining defendants, Plaintiff must move to consolidate the defendants it wishes to try together for each subsequent trial no later than May 1, 2008.***”) (emphasis added). Plaintiff never sought to consolidate Abbott and TAP before May 1, 2008, nor did plaintiff seek to extend the deadline.

II. THE COURT PROVISIONALLY ORDERED SEPARATE TRIALS FOR ALL DEFENDANTS AND ESTABLISHED A PRESUMPTION OF SEPARATE TRIALS

In 2007, all defendants (including Abbott) jointly moved for separate trials. Plaintiff opposed the motion. The Court presumptively ordered separate trials for all companies:

At this early juncture in the substantive litigation, it is not at all apparent, to the court at least, that any defendant could have its case fairly considered by the jury, if not in a separate trial. Defendants present a compelling argument for insurmountable jury confusion with their proof on differing corporate practices among the defendants, multiple claims against each defendant each consisting of multiple elements and each portending multiple verdict questions both on these claims and defendants' affirmative defenses. Judge Saris' words, quoted by the defense, serve as ominous harbingers in highlighting the real potential for havoc even a trial to the court with a limited number of defendants can wreak, let alone a jury trial which indisputably adds another layer of complexity, both qualitative and quantitative.

Decision and Order Denying Defs.' Joint Mot. to Sever and Provisionally Granting Defs.' Joint Mot. for Separate Trials, September 28, 2007, Dkt. 568, attached as Ex. 2, at 3.¹

¹ The “ominous harbingers” came from Judge Saris, the federal judge in Boston who presided over the federal AWP Multidistrict Litigation, after she conducted a multi-defendant *bench* trial (the “Track One” trial). *See, e.g.*, Excerpts from MDL 1456 Hearing Trs., attached as Ex. 3, 7/3/07 Tr. at 55:15-18 (“I found it confusing enough, really confusing, to sit through four defendants with dramatically different histories of marketing, with very different

The above Order “reverse[d] the presumption under §803.04 and §805.05, ... if there is one, from a single trial against all defendants to separate trials against each defendant.” *Id.* The Court offered to consider any “specific” consolidation motion – before the May 1, 2008 deadline – that explains how any proposed consolidation “protects all parties’ rights to a fair trial.” *Id.* at 4 (emphasis in original); Ex. 1 at ¶ 4.

The Pharmacia trial occurred in February 2009. At a status hearing the next month, and where the possibility of a joint trial of BMS and Johnson & Johnson was raised, the Court explained why the Pharmacia trial affirmed its view against joint trials:

*I’m, frankly, not inclined to try more than one defendant at a time. I thought that while the presentations were excellent on both sides in the Pharmacia case, Counsel was efficient, Counsel was solicitous to the jury’s naivete in the whole thing. And I don’t mean in a smarmy way. I mean you were actually educating the jury as you went along. I thought they were presented with a ton of information in a short period of time. They obviously - well, not obviously, I think they absorbed a lot of it. I don’t know that they could have taken anything more than what we did. **And I think we face a real problem with jury confusion by combining them. I don’t think there are any shortcuts here.***

March 10, 2009 Hr’g Tr., Dkt. 1193, attached as Ex. 4, at 13 (emphasis added). Notably, BMS and Johnson & Johnson are both “pure” brand companies, meaning they had no generics at issue. The Court went on: “I think every defendant needs to start with a fresh start.” *Id.* at 14.

III. ABBOTT AND TAP HAVE DIFFERENT FACTS AND DEFENSES

Abbott has both brand and generic products at issue. (TAP has no generic products at issue.) In all, Abbott has over 300 National Drug Codes (NDCs) at issue. *See* Stipulation Regarding the Identity of the Proper Def. and Target Drugs Between Pl. and Def. Abbott, filed

drugs....”); 8/27/07 Tr. at 11:3-8 (“Let me just say to plaintiffs, I know you want to put three defendants up because you want to move this case. It is too confusing. It was so confusing to me doing Track One with all the different drugs, but Amgen has five different drugs. It’s just too confusing to a jury. We’re going to do one drug.”); 8/27/07 Tr. at 29:1-3 (“I’m not sure I can try them all at once, simply because I think it’s confusing for a jury to keep track of all of them.”).

April 8, 2008, attached as Ex. 5. TAP has ten NDCs at issue, all relating to the brand drug, Prevacid®.

Abbott sold the generic products at issue through its Hospital Products Division (“HPD”), which Abbott divested in 2004. *See* Affidavit of Melissa Shields at ¶ 7, attached as Ex. 6. Unlike the products of other generic companies in the case, the generic Abbott products at issue are not generic pills. *Id.* at ¶ 11. Many are solution products (*e.g.*, sodium chloride solution) administered intravenously and often in a home health or non-hospital setting. *Id.* at ¶¶ 11, 13. Thus, any trial of Abbott will require substantial evidence about these unique generic products, including the markets in which they are sold, and the substantial cost involved in administering them safely to patients outside of a hospital.

Abbott sold its brand products through its Pharmaceutical Products Division (“PPD”). *Id.* at ¶ 9. The markets, product lines, customers, employees, and business practices of these two Abbott divisions – HPD and PPD – differed substantially throughout the relevant time period. *Id.* at ¶ 8. For instance, the two divisions separately reported price information – and different types of prices – to the pricing compendia like First Data Bank. *See* 03/21/12 Dep. of Mark Turon at 93:2-10, attached as Ex. 7.

In addition to the factual differences between Abbott’s two divisions, there are stark factual differences between Abbott and TAP that will give rise to defenses and evidentiary issues unique to each company. As one example, in 2001, TAP entered into settlement agreements with Wisconsin and the federal government regarding Lupron®, a drug not at issue in this litigation, after which TAP sent every state Medicaid program (including Wisconsin) the Average Sale Price (“ASP”) of all of its products (including Prevacid®, the only TAP drug at issue) on a quarterly basis until 2008. *See* TAP Response to Plaintiff’s Motion To Try Abbott

and TAP in One Trial, filed on April 20, 2016. TAP, of course, will use its ASP submissions to Wisconsin Medicaid as a defense to plaintiff's claims, particularly for the 2001 to 2008 time period. Abbott did not enter into any similar agreements nor was it required to submit ASP information to plaintiff.

IV. ABBOTT NEVER OWNED ALL OR EVEN A MAJORITY OF TAP

Plaintiff claims Abbott "owned" TAP. (Pl.'s Mot. to Try Defs. Abbott and TAP in One Trial ("Mot.") at 1, 4.) To be clear, Abbott owned half of TAP's stock. *See* Abbott Laboratories Form 8-K dated Mar. 19, 2008, attached as Ex. 8. Abbott Laboratories and Takeda Pharmaceutical Company Ltd., two entirely independent pharmaceutical companies, were each 50 percent shareholders of TAP. *Id.* TAP was a distinct legal entity with its own labeler code, product line, and management structure. Unlike several companies in this suit with wholly-owned subsidiaries, TAP was never wholly-owned (or even majority-owned) by Abbott. When TAP ceased operations in 2008, TAP merged into another Takeda entity and the combined entity remained a Takeda subsidiary. Furthermore, in 2008, Takeda (not Abbott) acquired the sole rights to Prevacid[®], the only TAP drug at issue, and Takeda continues to own Prevacid[®] today. Thus, two entirely separate companies are defending the respective claims against Abbott and TAP in this case.

ARGUMENT

I. PLAINTIFF'S MOTION SHOULD BE DENIED AS UNTIMELY

Plaintiff concedes its motion is several years late. Plaintiff offers no reason for the delay or for failing to seek to extend the deadline at any point in the last eight years. For this reason alone, the motion should be denied. Plaintiff asks the Court to excuse the seven-plus-year delay because the deadline fell "before a trial had taken place," and claims Abbott is not prejudiced by responding in 2016 to a motion that should have been filed in 2008. (Mot. at 5.) Plaintiff never

explains how the single-company trial of Pharmacia in 2009 informed its approach or desire to consolidate other defendants into a single trial. Even if it did, the Court squarely rejected the idea of a consolidated brand trial in the wake of the Pharmacia trial. *See* March 10, 2009 Hr'g Tr., attached as Ex. 4, at 13-14. Also, plaintiff knew since at least 2005 (when counsel for Abbott and TAP were admitted *pro hac vice*) that the same law firm represented both companies, a fact mentioned multiple times in plaintiff's motion. (*See, e.g.*, Mot. at 2, 4, 5.)

As to prejudice, plaintiff's decision not to seek consolidation before the May 2008 deadline impacted Abbott's strategy and trial preparation. When the deadline for seeking consolidation passed in 2008, Abbott reasonably concluded it would go to trial alone and has been preparing accordingly. Abbott is about to begin expert discovery based on the trial strategy it has developed with counsel over the past eight years. By the time this motion is resolved, Abbott will likely be less than a year from its trial date. If plaintiff's joinder motion is granted at this late juncture, then Abbott (and TAP) would be forced to choose between: (a) going to trial with the same shared counsel and being forced to alter trial strategy to account for this shared representation; or (b) one company starting fresh with new counsel over ten years into the case and long after fact discovery has closed, all at great expense to the company forced to change the counsel it initially hired and has relied upon during the course of this litigation. The prejudice in either scenario is substantial. Abbott should not have to bear the brunt of plaintiff's failure to seek consolidation by the Court-ordered deadline in 2008.

II. PLAINTIFF CANNOT REBUT THE PRESUMPTION OF SEPARATE TRIALS FOR ABBOTT AND TAP

This Court is authorized to order separate trials of companies named together in a single action, especially here when consolidation would prejudice a defendant. *See* Wis. Stat. 805.05(2) (authorizing courts to order separate trials "to avoid prejudice"); 803.04(4)

(authorizing courts to order separate trials “to prevent . . . prejudice”). This Court exercised its authority in 2007 to presumptively order separate trials for every defendant. Plaintiff’s motion neither rebuts the presumption of separate trials nor presents any legitimate basis to consolidate two companies for trial at this late stage of the litigation.

A. Abbott’s and TAP’s Unique Facts and Defenses Compel Separate Trials

As explained above, Abbott and TAP have unique facts and defenses. Abbott has generics and brands at issue while TAP has no generics at issue. The Abbott products at issue were sold through two separate Abbott divisions: HPD (which sold generic solutions) and PPD (which sold brands). The two divisions operated in different markets and had different product lines, personnel, business practices, customer channels, and price reporting functions, among other differences. Also, the HPD products at issue were often used in the home health setting, where specialty pharmacies expended substantial time and effort to ensure the products were administered safely to patients. In many ways, a trial of Abbott alone will be like a trial of two different companies. Adding TAP’s unique facts and defenses to the mix would overload the jury and create unnecessary confusion.

Furthermore, TAP’s agreements in 2001 and its quarterly ASP submissions to plaintiff between 2001 and 2008 are unique to TAP. Including TAP’s ASP-related evidence in Abbott’s trial will prejudice Abbott. There will likely be evidentiary disputes between TAP and plaintiff about the circumstances surrounding TAP’s ASP submissions.² Depending on how the evidentiary issues are resolved, a jury will likely wonder why Abbott did not submit ASP information like TAP did or attribute negative inferences to Abbott as a result of TAP’s ASP

² TAP paid Wisconsin \$596,000 to resolve the Lupron[®]-related claims. Further, TAP entered into a plea agreement and settlement agreement with the federal government related to the Lupron[®] investigation. That plea agreement and any allegations concerning Lupron[®] are irrelevant to plaintiff’s claims against TAP (which are limited to the one brand drug, Prevacid[®]), and certainly irrelevant to plaintiff’s claims against Abbott. However these evidentiary disputes are resolved with respect to TAP, the evidence clearly should not be part of any trial against Abbott. Separate trials would ensure that result.

submissions or its Lupron[®]-related agreements and settlements. Again, this would compromise Abbott's right to a fair trial.

B. The Exhibits To Plaintiff's Motion Do Not Warrant Consolidation

Plaintiff claims Abbott and TAP worked jointly on issues regarding "pricing and communicating with CMS" and attaches several exhibits to its motion. (Mot. at 2; Exs. 3-9.) The exhibits neither rebut the presumption of separate trials nor support consolidating Abbott and TAP into one trial. At best, they reflect some discussion, information sharing, and sourcing of IT functions between TAP and its two shareholders, neither of which owned a majority stake. Abbott and TAP had separate pricing, contracting and sales departments. Moreover, there is no overlap at all in any of the approximately 100 Abbott witnesses and 17 TAP witnesses deposed in various AWP litigation. Information sharing with shareholders is not surprising for a company of this kind, and it does not rebut the Court's presumption or warrant consolidation, especially here where the two companies have substantially different facts, defenses, and products at issue.

C. Some Overlapping Witnesses and "Common Issues" Do Not Warrant Consolidation

Plaintiff argues consolidation is appropriate because "large portions" of plaintiff's case against Abbott and TAP have overlapping State and third-party witnesses and deal with "common issues," including the State's reimbursement system, the role of First Data Bank, and how AWP was defined or understood in the industry. (Mot. at 4-5.) This is essentially the same argument pressed by plaintiff (and rejected by the Court) in 2007 when it provisionally ordered separate trials. If plaintiff's overlapping witnesses and "common issues" alone were sufficient grounds to consolidate defendants in a single jury trial, then this Court would have been consolidating multiple defendants in a single trial from the get-go. This has not happened for

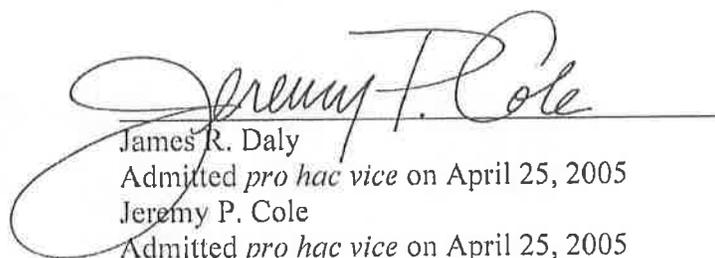
good reason. In a case of this nature, this Court has recognized that the heightened risk of confusion and prejudice, and the importance of preserving each company's fundamental right to a fair trial, substantially outweigh any efficiencies in consolidated trials or common evidence.

CONCLUSION

For the foregoing reasons, Abbott respectfully requests that plaintiff's motion to consolidate Abbott and TAP in one trial be denied.

Dated: April 20, 2016

Respectfully submitted,



James R. Daly
Admitted *pro hac vice* on April 25, 2005

Jeremy P. Cole
Admitted *pro hac vice* on April 25, 2005

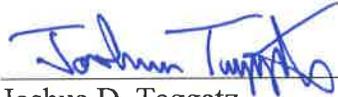
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CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of ABBOTT LABORATORIES' OPPOSITION TO PLAINTIFF'S MOTION TO TRY DEFENDANTS ABBOTT AND TAP IN ONE TRIAL and AFFIDAVIT OF JEREMY P. COLE with exhibits to be electronically served on all counsel of record by transmission to LexisNexis File & Serve this 20th day of April, 2016.



Joshua D. Taggatz