

Given *Kluth*, Abbott and TAP must establish substantial prejudice to overcome the presumption against multiple trials. Despite this, the defendants support their claim of prejudice with only conclusory, general assertions—nothing on which the Court could base a finding of prejudice.

I. Undisputed Corporate Relationship between the Abbott and TAP.

The defendants do not dispute what Abbott told the Securities & Exchange Commission: that TAP was a “joint venture” between Abbott and the Japanese firm Takeda. (*See* Ex. 2 to Pltf’s Motion.) They only offer the clarification that the arrangement was a 50-50 joint venture. Further, Abbott admits, as it must given the record evidence, that Abbott and TAP engaged in confidential¹ “information sharing” and “discussions” about the companies’ pricing policies. (Abbott Resp. at 8.) Although Abbott asserts that the defendants had separate “pricing” departments, it does not supply the Court with any record evidence or affidavit to support the contention. At the same time Abbott admits that one department communicated TAP’s and Abbott’s prices to CMS. (*Id.*)

II. No Prejudice from a Combined Trial.

The only ground Abbott and TAP give for alleged prejudice from a joint trial is possible jury confusion. But as the State explained in its motion, TAP is an ideal defendant to try with Abbott because, in addition to their shared history, there is only one drug at issue for TAP—Prevacid. The defendants fail to explain why a reasonable jury would be unable to keep Prevacid evidence separate from non-Prevacid evidence. Further, the defendants do not dispute that a “large portion” of the evidence is common to both defendants. (Pltf’s Motion at 4.)

¹ Abbott and TAP have maintained that the documents reflecting these discussions and the information sharing about their pricing policies remain confidential. *See* Ex. 3-9 to Pltf’s Motion, filed under seal.

A. Context is not prejudicial.

TAP argues that a joint trial will allow evidence about AWP for generic drugs and solutions, and that this will cause jury confusion. The assumption underlying this “confusion” argument is that evidence about AWP for generic and solutions would be inadmissible in a TAP-only trial because Prevacid is a brand pill. But TAP is not entitled to a *context-free* trial.

For example, TAP will likely tell the jury (as other brand defendants have argued) that the State had all the information that it needed about AWP—namely, that AWP are a 20% or 25% markup from the WAC. Although that may be the relationship for some drugs in the market, the AWP for other drugs are marked up with other ratios—*e.g.*, 30% (Remicade), 20.5% (some BMS drugs), and 18.75% (some Abbott drugs)—and AWP for generic drugs have no relationship to their WACs whatsoever. All of this “context” is relevant to what the State knew (or didn’t know) about AWP, which is the basis of the defendants’ defense. These facts will come into the TAP trial whether or not Abbott is in the trial.

TAP also attempts to artificially ratchet up the complexity of the issues by citing irrelevant issues, such as “regulatory approval” and “research and development,” and how they differ between brands and generics. (TAP Resp. at 4.) TAP does not even try to explain the relevance of these issues, which played no part in the Pharmacia trial.

The alleged “brand versus generic” ground for jury confusion cannot even get a foothold for Abbott since TAP’s Prevacid is a brand-name pill and there are many brand-name pills at issue for Abbott.²

² The brand name pills at issue for Abbott include Advicor, Biaxin, Cylert, and Depakote, Desoxyn, Dilaudid, Ery-Tab, Flomax, Gengraf, Hytrin, Ibu, Isoptin Sr, Kaletra, K-Tab, Mavik, Meridia, Micardis, Mobic, Niaspan, Norvir, Omnicef, PCE, Peganone, Prosom, Rythmol, Synthroid, Tarka, Tranxene, Tricor, Vicodin ES, and Vicoprofen.

Finally, Abbott's reference to Judge Saris' comments about trying more than one defendant at a time is inapposite. The legal standard for "deceptiveness" under the Massachusetts statute at issue in that case required Judge Saris to make the determination of liability "one drug" at a time.³ (See Abbott Resp. at 3 n.2 (*quoting* Judge Saris, MDL 1456 Hearing Tr. 8/27/07, at 11:3-8.)) By contrast, a unanimous Wisconsin Supreme Court decision has already confirmed that under Wisconsin law, the deceptiveness of *hundreds* of NDCs can be properly tried to a jury in a single verdict.

B. TAP's ASP reporting, *if* relevant, would be admissible even in an Abbott-only trial.

Abbott claims that it would be prejudiced by a joint trial with TAP because TAP reported ASPs to the State (as other defendants did⁴), but Abbott chose not to do so. Abbott complains that "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 submissions." (Abbott Resp. at 7.) As an initial matter, this complaint assumes that TAP's ASP-reporting is relevant, admissible evidence, which it is not. But *if* it were, then asking Abbott why *it* did not submit ASPs would be fair game. In other words, if submitting ASPs to the State really is a "defense to the plaintiff's claims," as Abbott asserts (Abbott Resp. at 5), the State would be *entitled* to ask Abbott why it did not do it—even if TAP was not in the trial.

³ See, e.g., *In re Pharm. Indus. AWP Litig.*, 491 F. Supp. 2d 20, 106 (D. Mass. 2007), *aff'd*, 582 F.3d 156 (1st Cir. 2009) ("less than 1% of sales were made at list price and spreads reached as high as 500%. I therefore find that BMS's conduct in marketing and manipulating the spread for Taxol violated Chapter 93A.")

⁴ TAP is incorrect when it states that it alone reported ASPs to the State pursuant to a settlement agreement. (TAP Resp. at 7.) Other defendants, such as AstraZeneca and Schering Plough, did so as well.

C. The Defendants' Objection that They Would Have to Hire a New Law Firm is Unsupportable.

Abbott and TAP have shared the same counsel throughout this case, including the eight years *after* the joint venture ended. Despite this fact, Abbott and TAP assert, without explanation, that if they are tried in one trial, they will need to hire a new law firm so that counsel from two separate law firms can represent each defendant. (Abbott Resp. at 6; TAP Resp. at 7-8.) This “need” for separate counsel is unsupported and illusory. The defendants do not provide a reason why separate representation would be necessary for a combined trial and not for separate trials. It cannot be for lack of attorneys, as between the two firms that have represented both defendants throughout this litigation, Jones Day and Reinhart Boerner Van Deuren S.C., there are plenty of lawyers to take on whatever “separate” roles the defendants deem necessary.

III. Neither Defendant Has Established that the Timing of the Motion Causes Prejudice.

With no legitimate claim of prejudice from a combined trial, the defendants rely on a “timeliness” argument based on a 2008 deadline.⁵ But as the defendants themselves acknowledge, even after the initial deadline passed and the litigation continued to develop, the Court entertained a request to combine *unrelated* defendants—BMS (including its generic⁶ division Apothecon) and the five Johnson & Johnson defendants. Although that request was denied, the defendants ignore the fact that the current request comes not only after the Pharmacia trial, but also after five separate pre-trial proceedings took place (and eight rounds of expert reports were exchanged) where substantially the same defense was raised by all defendants—that

⁵ Abbott is simply wrong that the State did not seek relief from the deadline. (See Abbott Resp. at 2, 5; Pltf’s Motion at 5.)

⁶ Abbott and TAP are simply wrong that the Court denied a request to combine two “purely brand” defendants. (Abbott Resp. at 3, TAP Resp. at 7.) The case against BMS included generics drugs from BMS’s generic division Apothecon.

the State knew precisely how much AWP's were inflated for each drug and intended to pay the difference as a profit to providers. With the benefit of the knowledge gained from this experience, it is now apparent that the similarities in all of the defendants' cases mean that a "large portion" of the evidence will be common.

In any case, the only prejudice Abbott and TAP claim from the timing of the motion is an unsubstantiated claim that the defendants' "expert and trial strategies are premised on going to trial alone." (TAP Resp. at 7. *See also* Abbott Resp. at 6.) This vague assertion—with no particulars or explanation—cannot establish prejudice. First, the defendants have at least nine months to develop and refine a trial strategy. Second, if TAP's trial strategy is based on the assumption that the trial would be strictly limited to evidence that relates directly to Prevacid, the complaint is unfounded because, as discussed above, TAP is not entitled to such a trial.

Finally, there will be no downstream consequences to trying Abbott and TAP together because the only remaining defendants, the two nominally separate Watson defendants, have agreed to be tried together.

CONCLUSION

For the foregoing reasons, the Court should grant the State's request to try defendants Abbott and TAP in one trial.

Dated this 11th day of May, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing pleading electronically on all counsel of record by transmission by LexisNexis File & Serve this 11th day of May, 2016.



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