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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

ABBOTT LABORATORIES, et al.,

Defendants.

FILED

APR 19 2016

Case No. 04-CV-1709

DANE COUNTY CIRCUIT COURT

**TAP PHARMACEUTICAL PRODUCTS INC.'S OPPOSITION TO
PLAINTIFF'S MOTION TO TRY DEFENDANTS ABBOTT AND TAP IN ONE TRIAL**

Plaintiff's untimely motion to combine Abbott Laboratories ("Abbott") and TAP Pharmaceutical Products Inc. ("TAP") in one trial should be denied for several reasons. First, TAP's unique facts warrant a separate trial. From 2001 to 2008, TAP delivered to plaintiff Average Sale Price ("ASP") information for all of TAP's products, including the only TAP product at issue in this case – Prevacid[®]. The ASP was the average transaction or market price for TAP's products, the very information that plaintiff claims it lacked in this lawsuit. No other company (including Abbott) made ASP submissions to plaintiff for as long as TAP did and for all of its products. Beyond the ASP submissions, Abbott and TAP have fundamentally different facts and defenses. For example, TAP's only product at issue (Prevacid[®]) is a branded pill, while Abbott has several generic solutions at issue. Given the marked differences between the brand and generic markets (and further differences between solutions and pills), any evidence related to Abbott's generics or solutions would unfairly prejudice TAP. Indeed, in AWP litigation that has spanned dozens of states and encompassed over fifty pharmaceutical companies, no court to TAP's knowledge has ordered a jury trial involving multiple companies where one company sold only brands and the other company sold generics.

Second, plaintiff's motion comes nearly *eight years* after the Court's deadline for seeking consolidation. Plaintiff offers no explanation for the delay and considering the motion at this late stage would prejudice TAP as it prepares for expert discovery and trial.

Third, plaintiff's motion fails to rebut the presumption this Court established in 2007 and affirmed in 2009, namely, that all companies should receive a separate trial. The Court's concerns expressed in 2009 – *e.g.*, “I think we face a real problem with jury confusion by combining [multiple companies]” – are particularly instructive, as they came shortly after the Pharmacia trial, the only trial to date in this case. Nothing has happened between now and then to change the calculus or eliminate the severe risk of jury confusion and prejudice that a joint trial of two companies would create.

For these and other reasons, explained in more detail below, plaintiff's motion should be denied.

FACTS

I. TAP AND ABBOTT ARE SEPARATE COMPANIES WITH DIFFERENT PRODUCTS, FACTS AND DEFENSES

A. TAP's Average Sale Price Submissions to Plaintiff Are Unique To TAP

It is undisputed that from 2001 to 2008, TAP sent plaintiff ASP information for all of TAP's products, including the Prevacid[®] formulations at issue here. *See* July 28, 2009 Affidavit of Glenn Weiglein at ¶¶ 7-8, attached as Ex. 1. TAP agreed to provide the ASP information in connection with a settlement agreement it entered into with plaintiff in 2001 that resolved and released any Medicaid-related claims involving the marketing, pricing or sale of Lupron[®], a physician-administered drug sold by TAP and not at issue in this case. *Id.* at 5-7; *see also* Dec. 3, 2001 State Settlement Agreement and Release, attached as Ex. 2. TAP paid plaintiff and the other states a total of \$25.5 million to resolve the Lupron[®]-related claims and agreed to submit

ASP information for all of its products for a seven-year period to the Medicaid program of every state, including Wisconsin, the federal Centers for Medicare and Medicaid, and First Data Bank (the independent price publisher with whom plaintiff contracts for price information).¹ One of the obvious purposes of the ASP submissions was to eliminate any post-2001, AWP-related claims for any TAP product. When asked about TAP's ASP submissions, plaintiff's § 804.05 witness testified that she did not believe TAP concealed its prices from plaintiff. Ex. 3, Dep. of Carrie Gray, dated August 5, 2008, at 89:11-12. This admission is not surprising given that the National Association of Medicaid Fraud Control Units ("NAMFCU") wrote plaintiff in 2001 and described TAP's ASP submissions as an "extraordinary opportunity" for plaintiff to receive "true market prices" for TAP's products, including Prevacid®. Ex. 4, December 10, 2001 Letter from NAMFCU.²

In 2009, mindful of the Court's preference for when summary judgment motions get filed, TAP sought leave to file a motion for summary judgment based on the ASP submissions, even though TAP had not yet been set for trial. Plaintiff opposed TAP's motion for leave, stating: "As TAP acknowledged, the Court has stated that defendants must wait until their scheduled trial time approaches to move for summary judgment." Ex. 5, Pl.'s Opp. to TAP's Mot. for Leave To File Mot. for Summ. J., dated Aug. 6, 2009, at 1. The Court denied TAP leave and, consistent with the scheduling orders in place at the time, instructed TAP to wait until its trial date approaches to move for summary judgment.

¹ In addition to paying money to the states, TAP also entered into various agreements with the federal government related to the Lupron® investigation. While irrelevant to plaintiff's claims about TAP's drug, Prevacid®, TAP anticipates disputes with plaintiff about the admissibility of these various agreements and related dollar amounts paid by TAP. This is yet another reason why TAP should have a separate trial.

² The December 10, 2001 letter from NAMFCU is addressed to Kentucky. Although plaintiff here has not yet produced a copy of the letter sent from NAMFCU to plaintiff, plaintiff's counsel stated at Ms. Gray's deposition that "we don't doubt that we received the letter." See Ex. 3, Gray Dep. at 165:20-166:11.

B. Abbott Did Not Own a Majority or Controlling Interest in TAP

Plaintiff asserts as a basis for consolidation that “Abbott owned TAP.” Pl.’s Mot. to Try Defs. Abbott and TAP in One Trial (“Mot.”) at 1. Abbott and Takeda Pharmaceutical Company Ltd., two entirely independent pharmaceutical companies, each owned fifty percent of TAP’s stock. Neither company owned a majority or controlling interest in TAP at any time from its inception until it ceased operations in 2008. TAP was a distinct legal entity with its own labeler code, headquarters, management, personnel, and product line. TAP had its own pricing, contracting and sales departments. At least 17 TAP employees have been deposed in AWP litigation and not one of them has doubled as an Abbott witness.

C. TAP Has No Generics or Solutions At Issue While Abbott Has Several

Unlike Abbott, TAP has only one product at issue – Prevacid®, a branded self-administered pill. *See* Ex. 6, Stipulation Regarding the Identity of the Proper Defendant and Target Drugs Between Plaintiff and Defendant TAP, filed March 25, 2008. Prevacid® is a proton-pump inhibitor designed to decrease the amount of acid in the stomach. *See* July 28, 2009 Affidavit of Glenn Weiglein at ¶ 4, attached as Ex. 1. Indicated uses for Prevacid® include the treatment of stomach and intestinal ulcers, heartburn, and symptoms of gastroesophageal reflux disease (GERD). *See* Prevacid® Package Insert, attached as Ex. 7. Unlike TAP, Abbott has several generic products at issue, many of which are also solutions administered by a physician or other medical provider in a hospital or home health care setting. *See* Ex. 8, Stipulation Regarding the Identity of the Proper Defendant and Target Drugs Between Plaintiff and Defendant Abbott, filed April 8, 2008. As the Court knows from its experience in this case, brand and generic drugs differ substantially in terms of price, competition, regulatory approval, research and development, and how they were reimbursed by Wisconsin Medicaid. Likewise, solutions and pills differ substantially both in how they are sold and marketed and the costs to

pharmacies to dispense these products. Moreover, Abbott sold its generic solutions and brand products through separate divisions, each with its own employees, contracts, and marketing practices, which will add a layer of complexity to a trial of Abbott alone. Substantial evidence at trial will be devoted to these topics.

D. Abbott Is Not Defending the Prevacid[®] Claims Against TAP

When TAP ended operations in 2008, TAP was merged into another Takeda entity and the combined entity is a wholly-owned subsidiary of Takeda. At the same time, Prevacid[®] became a wholly-owned asset of Takeda and remains one today. Thus, Abbott is not defending the claims against TAP in this case.

II. THIS COURT HAS ALREADY ADDRESSED THE CONSOLIDATION ISSUE RAISED BY PLAINTIFF

To avoid repetition, TAP incorporates by reference Abbott's Response to Plaintiff's Motion To Try Abbott and TAP in One Trial, filed on April 20, 2016. TAP quickly summarizes certain key facts below.

- In its Scheduling Order dated January 25, 2008, the Court set May 1, 2008 as the deadline for the State to seek consolidation. *See* Ex. 9, Dkt. 696, 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).
- In September 2007, the Court provisionally granted defendants' joint motion for separate trials and established the presumption that all defendants should receive separate trials. *See* Ex. 10, Decision and Order Denying Defs.' Joint Mot. to Sever and Provisionally Granting Defs.' Joint Mot. for Separate Trials, dated September 28, 2007, Dkt. 568, at 3 (“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.***”)(emphasis added).

- In March 2009, shortly after the Pharmacia trial in February 2009, the Court rejected plaintiff's idea of possibly trying two **brand** companies in a joint trial: *"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 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 I think every defendant needs to start with a fresh start." March 10, 2009 Hr'g Tr., Dkt 1193, attached as Ex. 11, at 13-14 (emphasis added).

ARGUMENT

I. TAP'S UNIQUE FACTS AND DEFENSES WARRANT SEPARATE TRIALS

As explained above, TAP has no generic products or solutions at issue while Abbott has several. Given the differences between brand and generic drugs, and between solutions and pills, this fact alone should defeat plaintiff's motion. Plaintiff cannot point to one jury trial in any AWP lawsuit to date where a court has combined multiple companies in one trial, where one company sold only brand products and the other company sold generics. This is not a coincidence. The risk of jury confusion and prejudice would be insurmountably high, not to mention the probability of an appellate court finding reversible error. In 2009, the Court rejected the idea of trying two entirely **brand** companies together because of the "real problem with jury confusion." A joint trial that mixes brands and generics and solutions and pills from different companies, as plaintiff proposes here, would be far worse.

Tellingly, in 2007, plaintiff recognized the important differences between brands and generics and even suggested grouping defendants for trial along brand and generic lines. *See* Pl.'s Opp. to Defs.' Joint Mot. to Sever, or in the Alternative, for Separate Trials, filed on Aug. 24, 2007, at 20-21, attached as Ex. 12 ("[W]itnesses and evidence are likely to be similar for companies engaged in the same general type of business."). Yet now plaintiff apparently has

reversed course, proposing that TAP (which has only brand products at issue) be combined with Abbott (which has brands and generics at issue). Plaintiff's request to combine TAP and Abbott is far less compelling than a proposed combination of two "pure" brands, which this Court rejected in 2009.

Additional differences between Abbott and TAP support separate trials. TAP's quarterly ASP submissions to plaintiff are unique among all defendants. No company other than TAP submitted ASP information for all of the company's products at issue for a seven-year period. It will be difficult for a jury to keep straight evidence relating solely to TAP, if the jury also receives evidence in the same trial about Abbott's generic solution products, the different Abbott divisions that sold them, the brands and generic solutions the markets where they were sold, the methods and costs associated with administering the solutions to patients, and how plaintiff reimbursed pharmacies for these generic products, including whether the dispensing fee for such products was reasonable. The Court should avoid any such problem and deny plaintiff's motion.

II. PLAINTIFF'S MOTION SHOULD BE DENIED AS UNTIMELY

Plaintiff acknowledges its motion is several years late and does not even try to justify the delay. TAP conducted itself in accordance with the Court's preferred timing for motions, and it would be unfair to let plaintiff sidestep a Court-ordered deadline that passed several years ago. Moreover, TAP would be severely prejudiced if plaintiff's motion were granted at this stage of the case. The three remaining companies will soon begin expert discovery and the next trial date is likely to be in early 2017. TAP's expert and trial strategies are premised on going to trial alone. Entertaining plaintiff's motion at this late stage will disrupt TAP's approach to expert discovery and trial. Furthermore, TAP has maintained shared counsel in this case on the understanding TAP will go to trial alone. If the Court were to grant plaintiff's motion at this juncture, TAP (like Abbott) would have to choose between going to trial with the same shared

counsel as its co-defendant; or incur substantial, additional expense by starting over with new counsel twelve years after the case was filed and on the eve of expert discovery. Either option prejudices TAP. TAP should not have to pay the price of plaintiff's unjustified delay.³

TAP incorporates by reference the additional arguments in Abbott's response to plaintiff's motion that apply with equal force to TAP.

³ Plaintiff mentions repeatedly in its motion that Abbott and TAP are represented by the same law firm. (*See, e.g.*, Mot. at 2, 4, and 5.) This is not a new development in the case. Indeed, plaintiff has known this fact since 2005 (when Abbott and TAP appeared in the case represented by the same law firm).

CONCLUSION

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

Dated: April 20, 2016

Respectfully submitted,



Daniel E. Reidy

Admitted *pro hac vice* on April 25, 2005

Lee Ann Russo

Admitted *pro hac vice* on May 25, 2007

James R. Daly

Admitted *pro hac vice* on May 25, 2007

Jeremy P. Cole

Admitted *pro hac vice* on May 25, 2007

JONES DAY

77 West Wacker Drive, Suite 3500

Chicago, Illinois 60601-1692

Phone: 312-782-3939

Lynn M. Stathas

WI State Bar ID NO. 1003695

REINHART BOERNER VAN DEUREN S.C.

22 East Mifflin Street, Suite 600

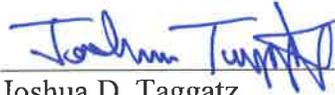
Madison, Wisconsin 53703

Phone: 608-229-2205

Attorneys for TAP Pharmaceutical Products Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of TAP PHARMACEUTICAL PRODUCTS INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO TRY DEFENDANTS ABBOTT AND TAP IN ONE TRIAL and AFFIDAVIT OF LEE ANN RUSSO 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