



STATE OF WISCONSIN

CIRCUIT COURT
Branch 9

DANE COUNTY

STATE OF WISCONSIN,)	
)	
Plaintiff,)	Case No. 04-CV-1709
)	Unclassified – Civil: 30703
v.)	
)	
ABBOTT LABORATORIES, et al.,)	
)	
Defendants.)	

**STATE OF WISCONSIN’S MOTION TO
TRY DEFENDANTS ABBOTT AND TAP IN ONE TRIAL**

The State moves to try defendants Abbott Laboratories (“Abbott”) and TAP Pharmaceutical Products Inc. (“TAP”) in one trial. Given that there is only one drug (Prevacid) at issue for TAP, and that Abbott owned TAP, trying these defendants in one trial would be fair to all parties, thus satisfying the Court’s requirement for consolidating defendants for trial. Further, because trials of Abbott and TAP will include common issues, evidence, and legal arguments, judicial economy would be served by trying these two defendants in one trial.

FACTUAL BACKGROUND

TAP, which stands for Takeda-Abbott Products, was a joint venture formed in 1977 between Abbott Laboratories and the Japanese pharmaceutical company Takeda Pharmaceutical Company and was created to sell a handful of drugs in the United States.¹ On April 30, 2008,

¹ “TAP Pharmaceuticals was a joint venture of Abbott Laboratories and Takeda North America.” Ex. 1, Weiglein Dep., July 22, 2008, at 21:1-5; *See also* Ex. 2, Abbott Laboratories, Form 10-K, for the fiscal year ended December 31, 2008, retrieved from <http://www.sec.gov/Archives/edgar>, Part I, Item 1. Business, Narrative Description of Business, at 3.

Abbott and Takeda “concluded their TAP Pharmaceutical Products Inc. (‘TAP’) joint venture.”² Abbott was therefore the co-owner of TAP during almost all of the 14-plus-year damage period.

There is only one TAP drug at issue in this case, Prevacid.

Abbott and TAP worked jointly on issues regarding pricing and communicating with CMS. For example, Abbott and TAP jointly developed their government pricing and Medicaid assessment policies. *See* Ex. 3 (Abbott/TAP Government Pricing and Medicaid Assessment Project, Executive Summary, Jan. 17, 2003) & Ex 4 (email, subject: “Follow-up Rebate Meeting with Abbott,” from Kevin M Dolan/FINANCE/TAP to Hamanaka_Suburo@takeda.co.jp, 5/22/2003). Further, Abbott and TAP work jointly in processing TAP’s WAC contract pricing. *See* Ex. 5 (email string, subject: “Updating Floating WAC Contracts,” between Christopher C Yokey@ABBOTT and Nancee L Erickson/CONTRACTS/TAP@TAP@ABTLAB, 6/12/2003). Abbott maintained a database for and reviewed the AWP and WACs of TAP’s drugs. *See* Ex. 6 (email, subject: “AWP,” from Jeff S Letizia/ CONTRACTS/TAP to Susan E Hertel@ABBOTT, 12/19/2003); Ex. 7 (email, subject: “Updated TAP WAC price list,” Heather D Frankenberger/ CONTRACTS/TAP to Gary L Kennedy Jr/LAKE/CORP/ABBOTT, 01/08/2004); Ex. 8 (email string, subject: “WAC file,” between Linda Yates/CONTRACTS/TAP, Johnson Soares@ ABBOTT, and Heather D Frankenberger@TAP, 9/26/2002). Finally, Abbott sent data to CMS for TAP drugs. *See* Ex. 9 (TAP_AWP_E0368481, “Quarterly Medicaid Filings (AMP, Best Price) Data (AMP, Best Price, basic rebate, additional rebate) is entered into GVR.... If the report is accurate, notify Abbott. Abbott sends data to CMS.”).

From the beginning of this lawsuit, Abbott and TAP have been represented by the same counsel, Jeremy Cole, Lee Ann Russo, James R. Daly, and J. Ryan Mitchell of the law firm Jones Day; and Allen C Schlinsog, Jr., Mark Cameli, and Lynn Stathas of Reinhart Boerner Van

² *See id* (Abbott 10-K).

Deuren S.C.³ The joint representation of the two defendants remained the same even after the TAP joint venture concluded in 2008.⁴

ARGUMENT

“[M]ultiple trials involving similar or identical issues” are “contrary to the purpose of sec. 803.04,” which provides for joinder of claims. *Kluth v. Gen. Cas. Co. of Wisconsin*, 178 Wis. 2d 808, 819, 505 N.W.2d 442, 446 (Ct. App. 1993). Despite finding that the claims against the multiple defendants in this case were properly joined,⁵ the Court nevertheless issued a “provisional and limited” order on defendants’ motion for separate trials, directing that a “single trial against all defendants will not occur.” (Ex. 13, Sever Motion Decision at 3.) The Court said it “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 held, however, that it would “revisit the issue of joining some defendants in a single trial upon motion by any party” that demonstrated that such a trial would “protect[] all parties’ rights to a fair trial.” (*Id.* at 3-4) (emphasis in original.) Trying Abbott and TAP together satisfies this standard.

First, there is nothing inherently unfair about trying separate defendants together in one trial. As the defendants pointed out in their original motion, Judge Saris tried multiple pharmaceutical companies in one AWP trial—four unrelated companies and their five

³ See Ex. 10, Def. Abbott Labs.’ Answer and Affirm. Defs. to the State of Wis.’s Second Amended Complaint, August 11, 2006, at 44, and Ex. 11, Def. TAP Pharmaceutical Products, Inc.’s Answer and Affirm. Defs. to the State of Wis.’s Second Amended Complaint, August 11, 2006, at 45.

⁴ See Ex. 12, Abbott Laboratories Docketing Statement, Feb. 25, 2010, at 1 & TAP Pharmaceutical Products, Inc. Docketing Statement, Feb. 25, 2010, at 1.

⁵ Ex. 13, Decision and Order Denying Defs’ Joint Motion to Sever and Provisionally Granting Defs’ Joint Motion for Separate Trials (“Sever Motion Decision”), Sept. 28, 2007, at 1-2.) The Court found joinder appropriate even under the assumption that the State “only seeks relief against each defendant for its independent and separate contribution to the overall damage to the pharmaceutical marketplace.” (*Id.* at 2.)

subsidiaries.⁶ *See In re Pharm. Indus. Average Wholesale Price Litig.*, 491 F. Supp. 2d 20, 54, 59, 70 (D. Mass. 2007) *aff'd*, 582 F.3d 156 (1st Cir. 2009). There is even less of a concern about fairness in trying two defendants together when one defendant owned the other for almost all of the 14-plus-year damages period, as Abbott owned TAP (*see* Exs. 1-2), and when the defendants worked jointly on issues relevant to the case. (*See* Exs. 3-9.)

Second, the Court based its rejection of “a single trial against all defendants” on a concern about “jury confusion.” (*Id.*) But no such concern arises here. Given that there is only one drug at issue for TAP—Prevacid—it is within a reasonable jury’s ability to differentiate between the Prevacid (TAP) evidence and the non-Prevacid (Abbott) evidence.

Finally, in provisionally granting each defendant a separate trial, the Court found that no courtroom could hold the “176 lawyers [that] have appeared in this action,” or even “one lawyer for each of the 37 parties.” (Ex. 13, Sever Motion Decision at 3.) The “too many lawyers” concern is not present with the current request as the same counsel represent both Abbott and TAP and have done so throughout this litigation.

Consistent with the purposes of Wis. Stat. § 803.04(1), trying Abbott and TAP in a single trial would “further the interests of justice, the convenience of the parties and witnesses, the speedy resolution of the action, and the parties’ and court’s interests in cost-effective litigation.” (Ex. 13, Sever Motion Decision at 3.) This is especially true given that large portions of the cases against Abbott and TAP deal with common issues, such as the State’s reimbursement system, the role of First DataBank, and the definitions of AWP in the industry, to name just a few. Given these common issues, there will be overlapping exhibits and witnesses, *e.g.*, many of

⁶ The defendants tried together were AstraZeneca; Bristol-Myers Squibb Co.; Oncology Therapeutics Network Corp.; Apothecon, Inc.; Johnson & Johnson; Centocor, Inc.; Ortho Biotech Products, L.P.; Schering-Plough Corporation; and Warrick Pharmaceuticals Corporation. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 491 F. Supp. 2d at 54, 59, 70.

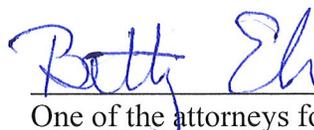
the State's witnesses (including former state employees and third party witnesses) will be the same regardless of the defendant. It would be inefficient for two separate juries to be educated on and consider the common issues when one jury could do so in a trial that would be fair to all parties. Moreover, as history has proven, many of the pre-trial proceedings, including motions *in limine*, will be identical, especially given that the *same counsel* represent both Abbott and TAP. It would be inefficient for the Court to go through the process twice with the same counsel.

The State acknowledges that the Court set a May 2008 deadline to move to consolidate defendants for trial. The State requests relief from this deadline. The deadline fell before a trial had taken place and before the State litigated six separate but very similar pre-trial proceedings. The State and the Court have gained experience and knowledge during the past eight years that did not exist when the Court established the May 2008 deadline. As discussed above, issues, evidence, and legal arguments common to all defendants exist that make it reasonable to try Abbott and TAP's single drug Prevacid in one trial. Neither Abbott nor TAP is prejudiced by the State moving to consolidate them for trial now versus in May 2008.

CONCLUSION

For the foregoing reasons, the State moves to try defendants Abbott and TAP in one trial.

Dated this 30th day of March, 2016.



One of the attorneys for the Plaintiff

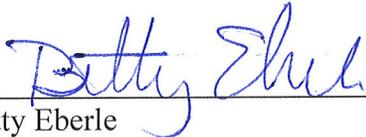
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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the State of Wisconsin's Motion to Try Abbott and TAP in One Trial, the Affidavit of Betty Eberle and exhibits electronically on all counsel of record by transmission to LexisNexis File & Serve this 30th day of March, 2016.



Betty Eberle