UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Southern Division

IN RE: TERAZOSIN HYDROCHLORIDE ANTITRUST LITIGATION	MASTER FILE NO. 99-MDL-1317 MDL DOCKET NO. 1317
THIS DOCUMENT RELATES TO: *Walgreen* (No. 99-1938) *CVS Meridian* (No. 99-3512)	Hon. Patricia A. Seitz Mag. Judge Ted E. Bandstra

INDIVIDUAL PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S ORDER DENYING THEIR MOTION TO INVALIDATE THE JUDGMENT-SHARING AGREEMENT

The *Walgreen* and *CVS Meridian* Plaintiffs, pursuant to Fed. R. Civ. P. 72(a) and this Court's Mag. Judge Rule 4(a)(1), respectfully object to Magistrate Judge Bandstra's June 25, 2002 Order denying Plaintiffs' motion to invalidate the judgment-sharing agreement between Defendants Abbott Laboratories ("Abbott") and Geneva Pharmaceuticals, Inc. ("Geneva") on the ground that the agreement contravenes the public policy favoring settlement. For the Court's convenience, a copy of the June 25, 2002 Order is attached as Exhibit 1. Plaintiffs' objections to the Magistrate Judge's Order are set forth below.

INTRODUCTORY STATEMENT

The legal issue raised by Plaintiffs' motion is relatively simple to state. Under a typical judgment-sharing agreement, a plaintiff that wishes to settle with one defendant separately will be required to reduce its claim against the remaining defendants by "the amount for which the

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settling defendant would have been responsible under the agreement absent the settlement."[1] The issue raised by Plaintiffs' motion is whether it is permissible for antitrust defendants to enter into a judgment-sharing agreement which requires the plaintiffs to reduce their claim against the remaining defendants by an amount that is substantially ***more than*** "the amount for which the settling defendant would have been responsible under the agreement absent the settlement." Stated differently, is it permissible for antitrust defendants to enter into a judgment-sharing agreement which prohibits them from settling separately unless the settling plaintiff agrees to waive damages for which the ***nonsettling*** defendant is responsible under the agreement?

This is a purely legal issue and, as Magistrate Judge Bandstra noted in his Order, appears to be an issue of first impression in the federal courts. Plaintiffs respectfully contend that Magistrate Judge Bandstra decided this legal issue incorrectly.

ARGUMENT

I. THE LEGITIMATE PURPOSE OF A CLAIM-REDUCTION PROVISION IS TO MAINTAIN THE AGREED-UPON ALLOCATION OF RESPONSIBILITY AMONG THE DEFENDANTS.

Plaintiffs do not object to all judgment-sharing agreements among defendants in antitrust cases. If the Abbott-Geneva agreement were a typical judgment-sharing agreement, as Defendants implied when they opposed our efforts to obtain discovery of the agreement, this motion would not have been filed. Our objection to the Abbott-Geneva agreement is based on a very specific and very unusual feature of the agreement—a feature that is not present in any other judgment-sharing agreement the lawyers on the plaintiffs' side of this case have ever seen.

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[1] Defendants Abbott Laboratories' and Geneva Pharmaceuticals, Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery of Judgment-Sharing Agreement (Doc. 650) at 7.

In a typical judgment-sharing agreement, the judgment-allocation portion of the agreement and the claim-reduction portion of the agreement match. For example, if the agreement specifies that defendant A is to pay 20% of a judgment (i.e., it allocates 20% to defendant A), the agreement will go on to provide that, in order to settle separately from its co-defendants, defendant A must obtain from any settling plaintiff a commitment that the settling plaintiff will reduce its claim against the non-settling defendants by the 20% that defendant A has agreed to pay. The purpose of such a provision is to ensure that a partial settlement with defendant A does not shift any portion of A's agreed-upon share of the judgment to its co-defendants.[2]

There is no dispute that the judgment-sharing agreement between Abbott and Geneva is quite different; in this agreement, the judgment-allocation portion of the agreement and the claim-reduction portion of the agreement do not match. To continue the example given in the preceding paragraph, this agreement is similar to one in which defendant A is allocated 20% of a judgment, but, in order to settle with defendant A separately, the plaintiffs are required to reduce their claim against the nonsettling defendants by 40%. The issue before the Court is whether such an agreement is enforceable.

Abbott and Geneva have agreed that Geneva will pay no more than $58 million of any judgment entered against them in this litigation. Hence, in order to protect Abbott from having

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[2] For example, if the plaintiff has a total damage claim of $1 million and settles with defendant A for $100,000, the plaintiff will be required to reduce its claim against the remaining defendants by 20% of the plaintiff's total claim, or $200,000. Absent such a provision, the plaintiff's claim would be reduced only by $100,000, leaving the non-settling defendants with potential responsibility for 90% of the plaintiff's claim rather than the 80% specified in the judgment-sharing agreement. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 212 n.14 (1994) (giving a similar example). This discrepancy will occur whenever the plaintiff settles with a defendant for less than that defendant's agreed-upon share of the plaintiff's total claim.

to pay any portion of Geneva's agreed-upon $58 million share, plaintiffs who settle with Geneva separately would be required to reduce their claim against Abbott by no more than the $58 million that Geneva has agreed to pay. Such a reduction would ensure that Abbott will not under any circumstances be required to pay a larger share of a judgment than the share that Abbott has voluntarily agreed to pay.

Unlike a typical judgment-sharing agreement, however, the Abbott-Geneva agreement does not tie the required claim-reduction to the share of a judgment that Geneva has agreed to pay. The Abbott-Geneva agreement provides that, in order to settle with Geneva, Plaintiffs are required to reduce their claim against Abbott by 40%—a number that is, potentially, not twice but roughly ***ten times*** larger than the $58 million that Geneva has agreed to pay. The agreement therefore requires Plaintiffs to reduce their claim against Abbott by an amount that is substantially more than the amount that Geneva has agreed to pay. Stated differently, the agreement provides that, in order to settle with Geneva, Plaintiffs are required to waive a portion of their claim that Abbott has agreed to pay. There is no legitimate justification for forcing a plaintiff that settles with ***Geneva*** to waive a portion of its claim that ***Abbott*** has agreed to pay. Forcing a plaintiff to do so simply penalizes—and thereby prevents—partial settlements.

Abbott and Geneva have themselves acknowledged that the purpose of a claim-reduction provision is "[t]o ensure that any individual settlement will not undermine the agreed-upon apportionment of responsibility in the [judgment-sharing agreement]," and that this objective is fully met when a settling plaintiff reduces its claim by "the amount for which the settling defendant would have been responsible under the Agreement absent the settlement." Defendants Abbott Laboratories' and Geneva Pharmaceuticals, Inc.'s Memorandum in Opposition to Plaintiffs' Motion to Compel

Discovery of Judgment-Sharing Agreement (Doc. 650) at 7. As Abbott and Geneva explained to the Court in that memorandum:

> To ensure that any individual settlement will not undermine the agreed-upon apportionment of responsibility in a JSA, JSAs typically provide that 'any Defendant entering into a settlement with the plaintiffs of any or all of the claims against it will remain liable . . . [in accordance with the formula specified in the JSA] . . . unless its settlement agreement expressly provides "that the Claimant or Claimants with whom it has settled . . . shall exclude from the dollar amount collectable from the non-Settling Parties ***the amount for which [the settling defendant would have been responsible under the Agreement absent the settlement***]."' *Brand Name*, 1995 WL 221853, at *2.

Id. (emphasis supplied; bracketed material in original) (quoting *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 221853 (N.D. Ill. 1995)).

The judgment-sharing agreement between Abbott and Geneva fails Defendants' own test, because it requires a settling Plaintiff to reduce its claim against Abbott by several hundred million dollars ***more than*** "the amount for which [Geneva] would have been responsible under the Agreement absent the settlement." The amount for which Geneva would have been responsible under the Agreement absent a settlement is capped at $58 million, but the amount by which the Sherman Act Plaintiffs are required to reduce their claim if they wish to settle with Geneva could be as much as $600 million.[3] Hence, in order to settle with Geneva, Plaintiffs are required to waive up to $542 million of their claim against Abbott, despite the fact that, under Defendants' judgment-sharing agreement, ***Abbott*** rather than ***Geneva*** has agreed to pay that $542 million. Such a condition obviously cannot be justified by the need to ensure that individual settlements do not undermine the

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[3] This figure is based on a total single-damage figure of $500 million, or $1.5 billion trebled; 40% of $1.5 billion is $600 million. Plaintiffs' experts have calculated damages in connection with the Sherman Act section 1 claim that are in excess of $500 million.

agreed-upon allocation of responsibility between Abbott and Geneva, and Defendants have never suggested any other justification. In fact, there is no legitimate justification for imposing such a condition on a partial settlement.

II. DEFENDANTS THEMSELVES RECOGNIZE THAT 40% OF A JUDGMENT IS LIKELY TO BE FAR MORE THAN $58 MILLION.

Magistrate Judge Bandstra noted that, if the jury ultimately awards Plaintiffs something like the (approximately) $500 million that our experts have calculated as the damages resulting from Defendants' section 1 violations, waiving 40% of the resulting $1.5 billion judgment would be a "significant impairment" of Plaintiffs' litigation position and therefore a disincentive to settling separately with Geneva. Order at 3. He went on to point out that Defendants estimate Plaintiffs' damages at a far lower number, and denied Plaintiffs' motion primarily on that ground. *Id.* In fact, while it is obviously true that Defendants dispute Plaintiffs' damage claim in the litigation, the agreement they have reached is based on the recognition that Defendants' exposure in this case is in the billions of dollars and not in the tens of millions.

Abbott and Geneva have ostensibly predicated their agreement on a 60%/40% split. Under a typical judgment-sharing agreement between two defendants based on a 60/40 split, Abbott would agree to pay 60% of any judgment entered in this case and Geneva would agree to pay 40%. According to the papers Defendants filed in opposition to Plaintiffs' motion, Abbott asked Geneva to sign such an agreement, and Geneva refused. The reason is obvious. Geneva believes on the basis of prior experience that it can settle this case for something close to $58 million and, given its ability to settle the case at that level, would be foolish to agree to pay as much as $600 million of a $1.5 billion judgment. If Abbott and Geneva were confident that 40% of a judgment in this case will

come to no more than $58 million, Geneva would have been willing to sign the judgment-sharing agreement that Abbott proposed. The fact that Geneva was not willing to sign that agreement and insisted on a $58 million cap shows that Defendants' litigation position is not a reliable indicator of their actual views.

At the risk of being trite, actions speak louder than words. Abbott and Geneva *say* that Plaintiffs' damages are (relatively) minimal, but what they *do* proves just the opposite. They negotiated an agreement which uses one definition of "Geneva's share" for purposes of judgment-allocation ($58 million), and a different definition of "Geneva's share" for purposes of claim-reduction (40%). The only reason they did so was because Geneva was unwilling to sign an agreement which requires it to pay 40% of a judgment in this case. Defendants nevertheless want Plaintiffs to pretend that Geneva has agreed to a 40% share for purposes of the claim-reduction portion of the agreement. We respectfully contend that Defendants should not be permitted to have it both ways. Either Geneva should agree to pay 40% of the judgment, in which case these Plaintiffs will not object to a 40% claim-reduction provision, or Geneva can continue to enjoy the benefit of a $58 million cap, in which case the claim-reduction provision should likewise be limited to $58 million. Defendants' mix-and-match approach prejudices Plaintiffs and should not be allowed.

As it stands, the agreement forces Plaintiffs to waive damages that Abbott has agreed to pay as a condition of settling with Geneva. This is not conjecture or speculation. The Sherman Act Plaintiffs have a total section 1 damage claim that, if accepted by the jury, would result in a judgment in excess of $1.5 billion. In order to settle with Geneva, Plaintiffs would be required to waive approximately $542 million of that potential judgment—dollars that Abbott rather than Geneva has agreed to pay. Geneva cannot settle with Plaintiffs unless Plaintiffs agree to release

Abbott from this half a billion dollars of potential liability. The agreement thereby unreasonably penalizes any plaintiff that settles separately with Geneva.

There is authority for striking down judgment-sharing agreements that prohibit or unreasonably penalize partial settlements. *See In re Dupont Plaza Hotel Fire Litigation*, 1989 WL 996278 (D.P.R. 1989); Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION (THIRD) § 23.23 at 181 (1995) (judgment-sharing agreements may "expressly prohibit or indirectly discourage individual settlements," and "the court may refuse to approve or enforce such agreements where they would violate public policy or prejudice other parties in these or other ways"). Individual Sherman Act Plaintiffs respectfully contend that the Court should follow these authorities and decline to enforce the agreement between Abbott and Geneva on public-policy grounds.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served by facsimile and United States mail this July 3, 2002 on all attorneys identified on the attached service list.

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EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 99-1317-MDL-SEITZ/BANDSTRA

IN RE: TERAZOSIN HYDROCHLORIDE
ANTITRUST LITIGATION.
_____/

THIS DOCUMENT RELATES TO:

ALL CASES
_____/

ORDER DENYING PLAINTIFFS' MOTION TO INVALIDATE JOINT-SHARING AGREEMENT

THIS CAUSE came before the Court on Plaintiffs' Motion to Invalidate Joint-Sharing Agreement filed on April 9, 2002. On May 13, 2002, this motion was referred to the undersigned for appropriate resolution pursuant to 28 U.S.C. § 636(b) and Rule 1 of the *Magistrate Rules of the Southern District of Florida*. Accordingly, the undersigned conducted a hearing on this motion on May 31, 2002. Following full review of the pleadings, applicable law, and oral argument of counsel, it is hereby

ORDERED AND ADJUDGED that Plaintiffs' Motion to Invalidate Joint-Sharing Agreement is **DENIED** for reasons stated below.

ANALYSIS

The Sherman Act Class Plaintiffs ("plaintiffs") move to invalidate the joint-sharing agreement ("agreement") between Defendants Abbot Laboratories ("Abbott") and Geneva Pharmaceuticals, Inc. ("Geneva"), entered into on or about November 30, 2001, on the ground that the agreement "prohibits a settlement with Geneva alone and is therefore void as against public policy." Motion pg. 1. Plaintiffs particularly

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complain about the "claim-reduction" portion of the agreement, contained in Section 3.2(c)(i)-(iii), which essentially provides that in order for Geneva to separately settle with plaintiffs, Geneva must include in its settlement agreement a provision whereby plaintiffs agree to reduce their claim against Abbott by 40%, without regard to the dollar amount of the settlement between plaintiffs and Geneva. Abbott contends that this provision, coupled with Geneva's maximum financial responsibilities of $58 million in the judgment-allocation clause contained in the agreement, imposes a severe financial penalty on plaintiffs, as large as $542 million, so that the judgment-sharing agreement absolutely prohibits any independent settlement between plaintiffs and Geneva and should be declared null and void as violative of public favoring settlement in civil cases.

Reviewing the judgment-sharing agreement, defendants' position on this motion, and applicable law, the Court finds that the agreement does not necessarily prohibit a partial settlement with Geneva or Abbott--or otherwise bar a settlement with either defendant so that it does not violate public policy. Initially, the Court notes the parties' concession that very few courts have rendered relevant decisions on the validity of judgment-sharing agreements in antitrust litigation. The two district court decisions which discuss such agreements at all, as cited by the parties, provide little guidance here. Most recently, an Illinois District Court, in In Re: Brand Name Prescription Drugs Antitrust Litigation ("BNPD"), 1995 WL 21853 (N.D. Ill. 1995), noted that joint-sharing agreements provides a means of discouraging coerced settlements by commonly providing:

> ... that if any signatory defendant settles, it must require the plaintiff to reduce any ultimate judgment against the other signatories by the settling defendant's percentage share of liability under the agreement.

Id. at *3 (citing Hearings before the United States House of Representatives Committee on the Judiciary, Subcommittee on Monopolies and Commercial Law, on Antitrust Damage Allocation, 97th Cong., 1st & 2nd Sessions, at 135 (1982) (prepared statement of Robert P. Taylor).

In another recent decision, In Re: San Juan DuPont Plaza Hotel Fire Litigation ("DuPont Plaza"), 1989 WL 996278 (D. Puerto Rico 1989), the district court struck down a judgment-sharing agreement between defendants in multiparty litigation after finding that the agreement "flatly prohibit[ed] individual settlements" in violation of public policy.

On close review, this Court finds that neither BNPD nor DuPont Plaza leads to a result here. Rather, the Court finds that the validity of the joint-sharing agreement between Geneva and Abbott largely depends on the parties' widely divergent estimates concerning defendants' liability and potential damages resulting therefrom. Plaintiffs' estimate damages, as high as $1.5 billion which, under the agreement, would result in a significant impairment to settlement with Geneva under the terms of the agreement. Defendants estimate damages far lower and, if accurate, would present no impairment whatsoever to an individual settlement one or both defendants.

Finding no basis to accurately access the parties' estimate of liability and damages, the Court can only examine the judgment-sharing agreement itself. Doing so, this Court finds the agreement does not necessarily prohibit or unduly restrict a

partial or global settlement between plaintiffs and these defendants. Therefore, the Court **DENIES** Plaintiffs' Motion to Invalidate the Judgment-Sharing Agreement at this time.

DONE AND ORDERED in Chambers at Miami, Florida this 25th day of June, 2002.

TED E. BANDSTRA
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Honorable Patricia A. Seitz

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Civ. No. 99-MDL-1317-SEITZ/BANDSTRA

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In re TERAZOSIN HYDROCHLORIDE ANTITRUST LITIGATION

Civ. No. 99-MDL-1317-SEITZ/ BANDSTRA

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