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' REPLY IN SUPPORT OF THEIR OBJECTIONS TO MAGISTRATE'S ORDER DENYING THEIR MOTION TO INVALIDATE THE JUDGMENT-SHARING AGREEMENT

Abbott's and Geneva's attempt to justify their judgment-sharing agreement boils down to the following syllogism: (1) some judgment-sharing agreements between antitrust defendants are permissible; therefore, (2) all judgment-sharing between antitrust defendants are permissible. With all respect to Defendants, this legal reasoning is not airtight.

Consider the following sequence of hypothetical cases. In each case, defendants A and G are jointly and severally liable for the damages claimed by the plaintiffs.

(1) A and G enter into a judgment-sharing agreement whereby G agrees to pay 20% of any judgment and A agrees to pay 80%. A and G also agree that neither will settle with any plaintiff separately from the other; i.e., both will settle or neither will.

(2) A and G enter into a judgment-sharing agreement whereby G agrees to pay 20% of any judgment and A agrees to pay 80%. A and G also agree that, if

G settles separately, it will require the plaintiffs to reduce their claim against A by 40%.

(3) A and G enter into a judgment-sharing agreement whereby G agrees to pay $58 million of any judgment and A agrees to pay the rest. A and G also agree that, if G settles separately, it will require the plaintiffs to reduce their claim against A by 40%. The plaintiffs have claimed damages of more than $500 million, or more than $1.5 billion trebled, and have submitted expert reports in support of that damage claim.

(4) A and G enter into a judgment-sharing agreement whereby G agrees to pay 20% of any judgment and A agrees to pay 80%. A and G also agree that, if G settles separately, it will require the plaintiffs to reduce their claim against A by 20%.

Cases (1) and (4) are the easy cases. Everyone agrees that, in case (1), the judgment-sharing agreement is invalid. *See In re San Juan Dupont Plaza Hotel Fire Litigation*, 1989 WL 996278 (D.P.R. 1989). Likewise, there is no dispute that, in case (4), the agreement is valid. *See In Re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 221853 (N.D. Ill. 1995) (upholding judgment-sharing agreement which required a settling plaintiff to reduce its claim by the amount assigned to the settling defendant under the agreement).[1]

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[1] As Geneva points out, the judgment-sharing agreement in the *Brand Name* case contained an extremely mild form of the discrepancy being challenged here, because it required a plaintiff that settled with every single manufacturer in the case to release the wholesalers from the $6 million they had collectively agreed to pay under the defendants' judgment-sharing agreement. No plaintiff in that case objected to this aspect of the agreement, and it is not addressed in Judge Kocoras' opinion.

Cases (2) and (3) are the more difficult ones. In both cases, a plaintiff who wishes to settle with G is required to reduce its claim by *more than* the amount allocated to the settling defendant under the agreement. Stated differently, a plaintiff that settles with G is required to waive damages which the *nonsettling* defendant (A) has agreed to pay under the agreement.[2] In case (2), this is a mathematical certainty, because 40% of a number is always larger than 20% of the same number; in case (3), it is a probability whose magnitude is a function of the probability that the jury will award the plaintiffs the damages being claimed.[3]

What is the justification for such a provision? There is none. For all their rhetoric, Abbott and Geneva have never explained what justification or rationale there could possibly be for requiring a plaintiff that settles with one defendant to waive damages that *the other defendant* has agreed to pay. There is only a single justification for requiring a settling plaintiff to reduce its claim at all, and that is to ensure that a partial settlement does not shift to the nonsettling defendant responsibility for some of the damages allocated to the settling defendant. As a matter of logic, this justification is fully exhausted when the settling plaintiffs have agreed to reduce their claim by every dollar that the settling defendant has agreed to pay (here, $58 million). Defendants' proposed justification has no force beyond that point.

There is in fact no conceivable justification for requiring a settling plaintiff to reduce its claim by *more than* the amount allocated to the settling defendant under the judgment-sharing

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[2] This does not occur in case (4), because in that case a settling plaintiff is required to reduce its claim *only* by the amount which the settling defendant (G) has agreed to pay.

[3] In case (3) (which is essentially this case), plaintiffs that settle with G will be forced to waive damages allocated to A so long as the jury awards the plaintiffs at least $48.33 million in single damages, or $145 million after trebling. This single-damage figure is less than 10% of the damages claimed by the Sherman Act Plaintiffs.

agreement. The only possible purpose of such a provision is to penalize and thereby prevent a partial settlement. That is precisely its purpose here.

As we show briefly below, none of the points raised in Defendants' papers undermines the conclusion that Defendants' agreement is invalid.

1. Geneva writes at page 9 of its memorandum that "Geneva's share of liability under the JSA here is 40 percent . . . ." This is false. There are two shares of liability assigned to Geneva under the agreement—40% and 0%. The 40% share applies until Geneva has paid $58 million in judgment or settlement, and the 0% share applies thereafter. Arithmetic tells us that Geneva's share will be 40% only if the combined total of all judgments on the section 1 and section 1-analogue claims in all of these consolidated cases comes to $145 million or less.[4] In order for that to occur (again as a matter of arithmetic), the single damages awarded by the jury(ies) would have to be one third of $145 million ($48.33 million) or less (the number is actually smaller because the judgment will include costs and attorneys' fees). The Sherman Act Plaintiffs alone have submitted expert reports supporting a combined single damage claim of more than $500 million, or more than ten times that amount.

2. Geneva writes at page 10 of its memorandum that our proposed rule "would make JSAs a nullity . . ." Similarly, Geneva asserts at page 15 that, under our logic, "no JSA would ever pass muster." Both statements are false. Under Plaintiffs' proposed rule, antitrust defendants are free to enter into judgment-sharing agreements so long as the agreement does not penalize partial settlements by requiring a settling plaintiff to reduce its claim by *more than* the settling defendant's share of a judgment. Under a *pro rata* rule, a settling plaintiff is required to reduce its claim by an

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[4] 40% of $145 million is $58 million.

amount *equal to* the settling defendant's share (as in hypothetical case (4) above). The Abbott-Geneva agreement is obviously not based on a *pro rata* rule.

3. Geneva suggests that, in *Brand Name Prescription Drugs*, Judge Kocoras rejected a challenge to a judgment-sharing agreement similar to the challenge being made here. Geneva mem. at 13-14. This is false. While it is true that the judgment-sharing agreement in *Brand Name* contained a very mild version of the feature being discussed here,[5] no plaintiff in the case objected to that aspect of the agreement, and it is not addressed in Judge Kocoras' opinion. Judge Kocoras merely held that it is permissible for antitrust defendants to enter into a judgment-sharing agreement which requires a plaintiff that settles with one defendant to remove that defendant's allocated share of the case (our case (4) above). Since the Abbott-Geneva agreement requires a settling plaintiff to reduce its claim by *more than* Geneva's allocated share of the case, that holding does not answer the question being raised here.

4. Geneva contends that, under a standard (and admittedly lawful) 60/40 judgment sharing agreement with no dollar cap, Plaintiffs would be required to "waive" damages that Abbott might otherwise be required to pay. Geneva mem. at 16. This is true but irrelevant. Geneva's point appears to be that, since Geneva *could* have agreed to pay 40%, a 40% claim-reduction percentage is permissible, regardless of what Geneva has *actually* agreed to pay. This rule makes no sense and would permit any claim-reduction percentage whatsoever (i.e., settling with a 5% defendant could result in losing 95% of one's claim). In the hypothetical example given by

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[5] Under that agreement, each wholesaler agreed to pay $1 million and each manufacturer agreed to pay a percentage equal to its market share. A plaintiff that settled with a manufacturer was required to reduce its claim by the percentage allocated to the settling manufacturer. Thus, if a plaintiff were to settle with every single manufacturer, it would reduce its claim to 0 and thereby waive the $6 million that the wholesalers had agreed to pay.

Geneva, Geneva has agreed to pay 40% and Abbott has agreed to pay 60%, so that a 40% reduction of the plaintiff's claim is necessary to maintain this agreed-upon allocation of financial responsibility between the two defendants. In this case, by contrast, Geneva has *not* agreed to pay 40% and a 40% reduction is *not* necessary to maintain the agreed-upon division of responsibility between Abbott and Geneva. It is merely a penalty.

5. Geneva asserts that, according to its economist Dr. Rubinfeld, Plaintiffs' damages are either zero or, at most, $36 million. Geneva mem. at 18-19. Geneva is of course free to dispute Plaintiffs' damages, but this is a gross distortion of the record. Dr. Rubinfeld's opinion regarding causation is merely that, if Geneva had been 100% certain of winning the '207 patent case and technically able to enter the market in April 1998, it would have demanded more than $4.5 million per month to stay off. This opinion, whatever its merit, is irrelevant to this case. Moreover, while Geneva neglects to say so, Dr. Rubinfeld reached the figure of $36 million primarily by assuming that all contracts between the national wholesalers and its largest customers were "cost-plus" contracts within the meaning of *Hanover Shoe* and *Illinois Brick*, notwithstanding this Court's and other courts' view to the contrary.[6] Even were Dr. Rubinfeld's assumption correct, the result would not be to reduce Defendants' exposure but merely to change the identity of the plaintiffs to whom the damages are owed.

6. Geneva says it is confident that all Plaintiffs in all cases will recover a combined treble-damage judgment of less than $145 million. Geneva mem. at 19. Its actions prove otherwise. According to page 6 of Abbott Laboratories' Opposition to Plaintiffs' Motion to

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[6] Even at $36 million in single damages for the Sherman Act Plaintiffs, which is based on a legally erroneous assumption, it is virtually certain that the combined total of treble-damage judgments in all cases, including attorney's fees, would exceed $145 million.

Invalidate Judgment-Sharing Agreement (doc. 757), dated May 3, 2002, "Geneva . . . refused to enter into a judgment sharing agreement unless it included a $58 million cap on its liability." We presume from this statement that Geneva was asked to enter into such an agreement. Geneva's refusal to comply with Abbott's request was based on the recognition that "40%" and "$58 million" are likely to diverge.[7]

* * *

Abbott and Geneva can, within reason, assign to Geneva whatever share they like of their common liability in this case, but it should be the same share for all purposes. They should not be permitted to assign one share for purposes of judgment allocation and a different, significantly larger share for purposes of claim reduction. There is no legitimate rationale for doing so. For the reasons stated above and in our initial objections, the Court should rule that, as written, the judgment-sharing agreement between Abbott and Geneva is invalid as against public policy.

Respectfully submitted,

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[7] This recognition is consistent with Abbott's contention that the now-terminated settlement agreement with Geneva was a "sweetheart deal." Abbott mem. at 2.

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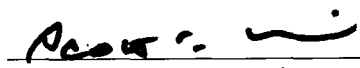
Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served by facsimile and United States mail this July 23, 2002 on all attorneys identified on the attached service list.



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