

**IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA**

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CIVIL**

IN RE	:	
	:	
REGLAN®/METOCLOPRAMIDE	:	JANUARY TERM, 2010
LITIGATION	:	NO. 01997
	:	

**REPORT AND RECOMMENDED DECISION
OF DISCOVERY MASTER REGARDING REQUEST FOR STAY**

I. ISSUE PRESENTED

Whether the United States Supreme Court’s granting of writs of certiorari on December 10, 2010 in the matters of *Demahy v. Actavis, Inc.*, 593 F.3d 428 (5th Cir. 2010) *cert. granted* No. 09-1501 and *Mensing v. Wyeth, Inc.*, 588 F.3d 603 (8th Cir. 2009) *cert. granted* Nos. 09-993 and 09-1039 warrants and justifies a stay of the parties’ discovery obligations and/or the entirety of the litigation pending the Supreme Court’s ruling on whether plaintiff’s state law tort claims against generic manufacturers are preempted by federal law.

II. PROCEDURAL HISTORY

In the matter of *Mensing v. Wyeth, Inc., et al.*, 562 F.Supp.2d 1056 (D.Minn. 2008), the district court granted the motion to dismiss of defendant Actavis Elizabeth, LLC (“Actavis”) and the motion to dismiss or for summary judgment of defendant Pliva, Inc. (“Pliva”). In so doing, the district court determined that plaintiff’s state law claims against generic manufacturers of metoclopramide for failure to adequately warn of the risk of tardive dyskinesia were preempted by the Drug Price Competition and Patent Term Restoration Act of 1984 (“Hatch-Waxman Act”, 21 U.S.A. § 355(j)), which amended the Food Drug & Cosmetic Act (“FDCA”).

Upon appeal, the United States Court of Appeals for the Eighth Circuit reversed and determined that the FDCA did not preempt plaintiff's claims against generic manufacturers under Minnesota law. As part of its conclusion, the court articulated that it declined to assume that Congress intended to shield the manufacturers of the majority of the prescription drugs consumed in this country from tort liability, and leave injured parties with no legal recourse. (*Mensing*, 588 F.3d at 612).

Similarly, the United States Court of Appeals for the Fifth Circuit in *Demahy v. Actavis, Inc.*, 593 F.3d 428 (5th Cir. 2010) also found that the FDCA did not preempt plaintiff's claims against generic manufacturers under Louisiana law. The court found that "there is no evidence sufficient for us to say that it was the "clear and manifest purpose" of Congress to preempt state law, or to allow the FDA to do the same." (*Id.* at 449).

On December 10, 2010, the United States Supreme Court granted certiorari on defendants' appeals from the Fifth and Eighth Circuit decisions, argument for which is scheduled for March 30, 2011. It is noteworthy that the Supreme Court granted certiorari¹ despite the absence of conflict among the circuits (including the Fourth Circuit, which also found against preemption in *Foster v. American Home Products Corp.*, 29 F.3d 165 (4th Cir. 1994)), and despite the recommendation of the Solicitor General that certiorari be denied.

At the December 14, 2010 Discovery Master Conference, counsel for defendant Teva Pharmaceuticals USA, Inc. ("Teva") requested a stay of discovery in view of the foregoing. On January 3, 2011, Teva submitted to the Discovery Master a letter brief in support of its request.²

¹ The consent of four justices is required for certiorari, which is granted for approximately 100 of the 10,000 petitions filed each term.

² Joining in Teva's letter brief are defendants Ivax Pharmaceuticals, Inc., UDL Laboratories, Inc., PLIVA, Inc., Barr Pharmaceuticals, LLC, Barr Laboratories, Inc., Duramed Pharmaceuticals, Inc., Qualitest Pharmaceuticals, Inc., Generics Bidco I, LLC, Vintage Pharmaceuticals, LLC, Watson Laboratories, Inc., and Rugby Laboratories, Inc. Ranbaxy Pharmaceuticals, Inc., Ipca Pharmaceuticals, Inc., ANIP Acquisition Company, and Northstar Rx LLC.

By letter brief dated January 3, 2011, defendant Actavis Elizabeth, LLC (“Actavis”) requested a stay of all proceedings.³ The brand defendants (Alaven Pharmaceutical LLC, Schwarz Pharma, Inc., Wyeth LLC, and Wyeth Pharmaceuticals Inc.) do not oppose the requested stay, but seek a “carve out” provision that would allow the brand defendants to continue to pursue motions for summary judgment.

Subsequently, the Plaintiffs’ Liaison Counsel and Defense Liaison Counsel have jointly submitted to the Discovery Master a proposal, as more fully described below.

III. LEGAL STANDARD

The standard for deciding a request for a stay is discretionary. As the Pennsylvania Commonwealth Court has stated, “a trial court possesses broad discretion to grant or deny a stay.” (*In re Penn-Delco School Dist.*, 903 A.2d 600 (Pa. Cmwlth. 2006)). Moreover, the existence of a potentially conflicting action in another jurisdiction does not serve as a bar to an action in a Pennsylvania court. (*See Singer v. Dong Sup Cha*, 550 A.2d 791 (Pa. Super. 1988)). Likewise, “the trial court has the inherent power to stay the proceedings in one case during the pendency of another case which may resolve or moot the case which has been stayed.” (*Gwynedd Properties, Inc. v. Board of Sup’rs of Lower Gwynedd*, 635 A.2d 714 (Pa. Cmwlth. 1993)). As such, this Court has full discretion in entertaining the instant request for stay.

IV. ANALYSIS

The primary argument for a stay is that a ruling by the Supreme Court favorable to the generic manufacturers would effectively terminate plaintiffs’ state law product liability claims against those defendants. As such, trials held in advance of the Supreme Court’s decision would be a potential waste of time and resources of both the litigants and the Court. Since argument is

³ Joining in Actavis’ letter brief are defendants Beach Products, Inc., Bedford Laboratories, Hospira, Inc., Mutual Pharmaceutical Company, Inc., Pharmaceutical Associates, Inc., Roxane Laboratories, Inc., Silarx Pharmaceuticals, Inc., United Research Laboratories, Inc., and Vista Pharm, Inc.

scheduled before the Supreme Court for March 30, 2011, it is anticipated that a ruling will be rendered prior to June 30, 2011, which is the end of the court's term.⁴

Initially, defendants requested an absolute stay to the proceedings. At the briefing stage before the Discovery Master, a faction of the generic defendants led by Actavis sought a complete stay, while another faction led by Teva sought a stay of the trials and expert discovery, but a continuation of fact discovery. Plaintiffs opposed any stay whatsoever. Following the intervention of the Discovery Master, the parties engaged in extensive discussions brokered by the Master, and ultimately reached an agreement on a proposed resolution.

In their joint submission, the parties propose that identification of trial cases pursuant to the trial selection protocol, as well as full case specific discovery of the selected cases and back-ups would proceed without delay. The parties would also proceed with service of Plaintiff and Defendant Fact Sheets, the production of documents, and the taking of company depositions. However, expert discovery, pre-trial motions (i.e. dispositive and *in limine*), exhibit/witness lists, jury instructions, and the trials would be stayed pending the Supreme Court's decision.

The parties also agree that the brand defendants will still argue their "Foster" motions before the Court at the February 16, 2011 status conference, with the plaintiffs preserving their right to argue to the Court that the hearing and decision of such motions are not ripe pending the Supreme Court's decision.

The parties propose that the trial in *Hassett v. Dafoe*, August Term 2008, No. 01551 be rescheduled from a May 16, 2011 trial ready date to September 2011. The two June 2011 trials would be rescheduled for October 2011, the two July 2011 trials would be rescheduled for November 2011, and the two September 2011 trials would be rescheduled for January 2012.

⁴ The Supreme Court decides all cases by the end of its term, except on very rare occasions, where the matter is reargued during the next term.

There would be no trials in December 2011, which corresponds with the Court's contemplated break allowing the parties to engage in settlement discussions.

The parties underscore in their joint submission the intent to try these matters without delay, as per the Court's imperative, but also to proceed in a manner that will result in an efficient use of judicial resources and promote the likelihood of broad settlements. Moreover, each of the selected cases in the first wave, but for the *Hassett* matter, will be tried within two years of original filing.

V. RECOMMENDED DECISION

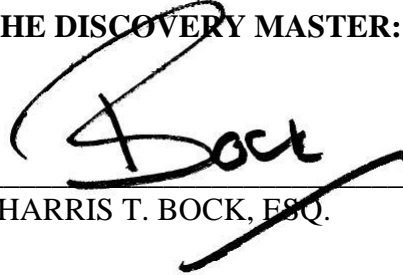
The Discovery Master is mindful of two competing interests in making the instant recommendation. A hallmark of our judicial system is for a plaintiff to have his or her day in court. The exceptional administration of the Philadelphia Court of Common Pleas Civil Division, particularly in the Complex Litigation Program, allows plaintiffs to prosecute their cases with an expeditiousness that rivals the federal courts. A complete stay of proceedings will thwart the goal of permitting plaintiffs a timely trial, which is especially critical for plaintiffs with advanced and/or terminal medical conditions.

The foregoing notwithstanding, trials in mass tort litigation demand investments of time, money, and other resources from the litigants, attorneys, and the Court. Judicial economy cannot be ignored, particularly in view of prevailing and extenuating circumstances that may have a direct impact on the survival of a plaintiff's cause of action. It makes little sense to commit to an endeavor that will result in duplicative and wasteful expenditures of resources. In the view of the Discovery Master, such would occur if trials went to verdict, only to have the Supreme Court eliminate or significantly modify a cause of action that had been integral to the trial – thus necessitating a re-trial.

Upon careful review of the parties' joint submission, the Discovery Master respectfully recommends that the Court approve a limited stay, as memorialized by the Discovery Master in the proposed Case Management Order attached hereto as Exhibit "A".

While the Discovery Master did not initially concur with the parties' joint proposal, the difference has since been resolved. Furthermore, the Discovery Master submits that the foregoing will not detrimentally impact the plaintiffs' rights or result in an undue burden on the defendants.

BY THE DISCOVERY MASTER:



A handwritten signature in black ink, appearing to read "H. Bock", is written over a horizontal line. The signature is stylized and cursive.

HARRIS T. BOCK, ESQ.

Dated: January 21, 2011

EXHIBIT “A”

IN RE : COURT OF COMMON PLEAS
: PHILADELPHIA COUNTY, PA
REGLAN®/METOCLOPRAMIDE :
LITIGATION : JANUARY TERM, 2010
: NO. 01997
This Document Relates to All Cases :

CASE MANAGEMENT ORDER NO.

AND NOW, this ____ day of _____, 2011, upon consideration of the requests by Defendants for a stay of discovery and a stay of all proceedings, the response of Plaintiffs, argument of counsel, the joint proposal of the parties, and the Recommendation of the Discovery Master, it is hereby **ORDERED and DECREED:**

1. All requests for a complete stay of the proceedings are DENIED.
2. All requests for a complete stay of discovery are DENIED.
3. The parties will proceed with the following:
 - a. Service of Plaintiff and Defendant Fact Sheets;
 - b. Defendants will complete their document productions;
 - c. Plaintiffs may proceed to notice and take company depositions; and
 - d. Argument of “Foster” motions on February 16, 2011.
4. The following shall be stayed pending the United States Supreme Court’s decision in the matters of *Demahy v. Actavis, Inc.*, 593 F.3d 428 (5th Cir. 2010) *cert. granted* No. 09-1501 and *Mensing v. Wyeth, Inc.*, 588 F.3d 603 (8th Cir. 2009) *cert. granted* Nos. 09-993 and 09-1039, and further order of this Court:
 - a. Designation of expert witnesses; and
 - b. Pre-trial filings (e.g. dispositive motions, motions *in limine*, exhibit and witness lists, deposition designations, and jury charges).

5. The trial schedule set forth in Case Management Order No. 13 shall be modified as follows:
 - a. June 2011 trials shall be rescheduled for October 2011;
 - b. July 2011 trials shall be rescheduled for November 2011; and
 - c. September 2011 trials shall be rescheduled for January 2012.
6. All deadlines in the Scheduling Order for *Hassett v. Dafoe*, August Term 2008, No. 01551 (Case Management Order No. 7) are hereby modified as follows:
 - a. All fact depositions shall be completed by August 12, 2011;
 - b. Plaintiff's expert reports shall be served by July 20, 2011;
 - c. Defendants' expert reports shall be served by August 5, 2011;
 - d. All pre-trial motions shall be filed and served by August 12, 2011;
 - e. All responses to dispositive and *Frye* motions shall be filed and served by August 26, 2011;
 - f. All replies to dispositive and *Frye* motions shall be filed and served by September 2, 2011;
 - g. A Settlement Conference is scheduled on or about September 9, 2011;
 - h. A Pretrial Conference is scheduled on or about September 14, 2011;
 - i. Settlement/Pretrial Conference Memoranda from all parties will be submitted fifteen (15) days prior to the Settlement/Pretrial Conference; and
 - j. The case will be trial ready by September 19, 2011.

SO ORDERED:

THE HONORABLE SANDRA MAZER MOSS