

**STATE OF NEW YORK
LITIGATION COORDINATING PANEL**

Panel Case No.0006/2007

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE**

NY County Clerk's
Number 560001 /2009
Sub. # 2

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County of Erie

Plaintiff,
- against -

Index No. 2005-2439
Justice: Hon. John M. Curran

Abbott Laboratories, Inc., Agouron Pharmaceuticals, Inc. Alcon
Laboratories, Inc., Allergan, Inc., Alparma, Inc., Amgen, Inc., Andrx
Corp., Astrazeneca Pharmaceuticals L.P., Aventis Pharmaceuticals, Inc.,
Barr Laboratories, Inc., Baxter Healthcare Corp., Baxter International, Inc.,
Bayer Corp., Ben Venue, Inc., Berlex Laboratories, Inc., Biogen Idec, Inc.,
Biovail Corp., Biovail Pharmaceuticals, Inc., Boehringer Ingelheim Corp.,
Boehringer Ingelheim Pharmaceuticals, Inc., Bristol-Meyers Squibb Company,
Dermik Laboratories, Inc., Dey Inc., Eisai, Inc., Eli Lilly and Company,
Endo Pharmaceuticals, Inc., Ethex Corp., Forest Laboratories, Inc.
Forest Pharmaceuticals, Inc. Fujisawa Healthcare, Inc., Fujisawa USA, Inc.,
Genentech, Inc. Genzyme Corp., Gilead Sciences, Inc., GlaxoSmithKline PLC,
Greenstone, Ltd., Hoffman-La Roche, Inc., Immunex Corp., Ivax Corp.,
Ivax Pharmaceuticals, Inc., Jansen Pharmaceutical Products, LP,
Johnson & Johnson, King Pharmaceuticals, Inc., Mc Neill-P.P.C., Inc.,
Medimmune, Inc., Merck & Co., Inc., Monarch Pharmaceuticals, Inc.,
Mylan Laboratories, Inc., Mylan Pharmaceuticals, Inc., Norvartis Pharmaceuticals Corp.,
Novo Nordisk Pharmaceuticals, Inc., Oncology Therapeutics Network Corp.,
Organon USA, Ortho Biotech Products LP, Ortho- Mc Neill Pharmaceuticals, Inc.,
Par Pharmaceutical, Inc., Pharmacia Corp., Pfizer, Inc., Purdue Pharma, L.P.,
Purepac Pharmaceutical Co., Reliant Pharmaceuticals, Roche Laboratories, Inc.,
Roxane Laboratories, Inc., Sandoz, Inc., Sanofi-Synthelabo, Inc.,
Schering-Plough Corp., Serono, Inc., SmithKlineBeecham Corp. d/b/a
GlaxoSmithKline, Takeda Pharmaceuticals North America, Inc.,
Tap Pharmaceutical Products, Inc., Teva Pharmaceutical Industries, Ltd.,
UCB Pharma, Inc., UDL Laboratories, Inc., Warrick Pharmaceuticals Corp.,
Watson Pharmaceuticals, Inc., Watson Pharma, Inc., and Wyeth.

Defendant.
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AND OTHER MATTERS LISTED ON THE ATTACHED APPENDIX

DECISION AND ORDER

FILED
FEB 06 2009
NEW YORK
COUNTY CLERK'S OFFICE

The defendants in the above captioned and other related matters contained in the Appendix to the Decision and Order herein, move this Panel pursuant to Section 202.69 of the Uniform Rules for the Supreme and County Courts, for an order Coordinating this and two other actions, brought by three New York State counties, pending in the courts of this state, in the County of Erie. The three actions (brought by the Counties of Erie, Oswego and Schenectady, respectively), all contain allegations that the defendants have taken part in a scheme to artificially (if not fraudulently) inflate the *Average Wholesale Price* of drugs they manufacture for sale and distribution by intermediaries (e.g.: pharmacists and other retailers) and inducing these intermediaries to sell and distribute their (each defendant's) products, by offering more of a *spread* (between the actual price and the published price) than its competitors.¹ The New York State Medicaid Program, as administered by the plaintiff counties, would then have to make higher reimbursements to the retailers and providers, based on this allegedly fraudulent scheme. The *Average Wholesale Price* or "*AWP* ", is a benchmark amount as published by private compendia, setting the average wholesale price of drugs manufactured by the industry. This amount (the "*AWP*") minus a percentage determined by the legislature, is used in determining the reimbursement amount paid by the State to these providers and retailers.²

The defendants, by Lyndon M. Tretter, Esq. of the firm of Hogan & Hartson L.L.P., argue in favor of Coordination on behalf of Bristol- Meyers Squibb Company and all defendants, that Coordination, "*...for pre- trial purposes is necessary and appropriate so that all pre-trial issues, as well as discovery, can go forward in one forum and not produce inconsistent results and a waste of judicial resources.*"³ Defendants further indicate that these matters should be Coordinated for all the reasons set forth in Uniform Rule 202.69 (b) (3).

¹ *Affirmation of Lyndon M. Tretter In Support of Defendants' Motion for Coordination*: pg. 5, paragraph no.10.

² *Ibid.* : pg.3, paragraph no.7

³ *Ibid.* : pg.7, paragraph no.17.

In opposition, the plaintiffs, by Paul Pennock of the firm of Weitz & Luxenberg, P.C., contend that the motion for Coordination by defendants is merely a delaying tactic reminiscent of the defendants removal to federal court of these actions, and their subsequent motion for inclusion in the federal Multi District Litigation that included 47 New York State Counties, the City of New York and its five boroughs or counties (MDL1456, USDC, for the District of Massachusetts). The plaintiffs later made a successful motion to remand these three county actions back to the state courts and out of the federal MDL. Plaintiffs argue: that delays of more than twenty four months or more, have been experienced because of the defendants' actions: that coordination, would unnecessarily delay the progress of these cases; that having separate proceedings would actually speed up the process; that the risk of inconsistent rulings would be minimal; and that with respect to the issues of *commonality* and *complexity*: “...the briefing by the respective parties on legal and factual issues will be, to use the defendants' term, “cookie cutter,” and are unlikely to present differing arguments to the respective courts”.⁴ The plaintiffs also point out that there is one counsel for all plaintiffs and that there exists a “...*defacto* coordination, to the extent that steps taken by the defendants need be taken only once, despite the pendency of three actions.”⁵

The Panel after hearing the respective arguments and examining the facts and circumstances, is not convinced that Coordination would unnecessarily delay the proceedings or that the risk of inconsistent rulings is “minimal”. The “de facto” coordination that has already occurred would be enhanced by not having repetitive depositions or risking inconsistent rulings.⁶ The Panel finds further, that all the factors that would militate in favor of Coordination, pursuant to Section 202.69 (b) (3) of the Uniform Rules for the Supreme and County Courts, are set forth in this application. Additionally, the availability of electronic filing in Erie County would obviate the need for traveling long distances for the mere purpose of filing papers. An actual, rather than a “*defacto*” Coordination, to use the plaintiffs' term, is appropriate in this instance.

⁴*Affirmation of Paul J. Pennock In Opposition to Defendants' Motion for Coordination*: pg.9, paragraph no. 26

⁵*Ibid.*: pg. 9, paragraph no.25

⁶*Ibid.*

The Panel grants the defendants' motion for Coordination and finds that Coordination of these related matters, including those that may hereafter be filed should take place in the Eight Judicial District, in the Supreme Court of Erie County, before a Coordinating Justice selected by the Administrative Judge of the district.

For these reasons, it is hereby

(1) **Ordered**, that any actions set forth above and in the Appendix, shall be Coordinated pursuant to Section 202.69 of the Uniform Rules of the Trial Courts, in the Supreme Court of the State of New York, County of Erie, before a Coordinating Justice of that county; and it is further

(2) **Ordered**, that actions alleging that defendants have taken part jointly or severally, in a scheme to artificially or fraudulently inflate or otherwise manipulate the "*Average Wholesale Price*" formula used by the New York State Medicaid Program in the reimbursement made to the retailers and other distributors of the defendants' drugs, that are filed in the Supreme Court of the State of New York heretofore and that remain active but are not listed in the caption above or on the attached Appendix and any such actions that are filed hereafter shall, in accordance with Subdivision F of the *Procedures of the Panel*, likewise be Coordinated pursuant to Section 202.69 in Erie County before the said Coordinating Justice, unless the Panel rules otherwise as provided in the said Subdivision F; and it is further

(3) **Ordered**, that, pursuant to Section 202.69 (c)(1), the Administrative Judge of the Eight Judicial District shall designate the Coordinating Justice; and it is further

(4) **Ordered**, that the Clerk of the Panel shall forthwith transmit a copy of this Decision and Order to all counsel for all parties herein, to the Justices to whom each of the above actions is currently assigned and the Honorable Sharon S. Townsend, Administrative Judge of the eight Judicial District; and it is further

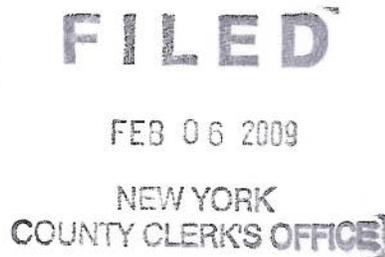
(5) **Ordered**, that with respect to any additional action that is to be Coordinated as provided in paragraph (2) hereof, upon service of a copy of the Decision and Order of the Panel with Notice of Entry, together with either the affidavit of compliance or the further decision of the Panel, upon the Clerk of the Court in which any such additional action is or hereafter shall be pending (other than the Supreme Court, Erie County) as provided in Subdivision F, the said Clerk shall forthwith transfer to the Clerk of the Supreme Court, Erie County, after payment of the appropriate fees, if any, the file in any such additional action that is to be Coordinated as provided in this Decision and Order and in Subdivision F; and it is further

(6) **Ordered**, that the Clerk of the Supreme Court of the County of Erie, shall assign an Erie County Index number, without fee, to any such action transferred to that county from another as provided above and such number shall serve as a means of identification and orderly processing of any such case while it remains in the County of Erie for the purpose of Coordination.

This constitutes the Decision and Order of the Panel. The Presiding Justice of the Panel signs this Decision and Order in her own behalf and with the authorization of, and on behalf of all members of the Panel.

Dated: New York, New York

February 6, 2009



Justices of the Panel

Hon. Helen E. Freedman
Presiding Justice, First Department

Hon. Joseph J. Maltese
Associate Justice, Second Department

Hon. E. Michael Kavanagh
Associate Justice, Third Department

Hon. Matthew Rosenbaum
Associate Justice, Fourth Department

For the Panel:

Helen E. Freedman

Hon. Helen E. Freedman
Presiding Justice

APPENDIX

LCP NUMBER : 0006/2007

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SCHENECTADY

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The County of Schenectady	/	
v. Plaintiff	/	Index Number: 2006-886
	/	Justice: Hon. Vincent J. Reilly, Jr.
Abbott Laboratories, Inc., et al.,	/	
Defendants	/	

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SUPREME COURT STATE OF NEW YORK
COUNTY OF OSWEGO

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The County of Oswego	/	
v. Plaintiff	/	Index Number: 06-697
	/	Justice: Hon. James W. Mc Carthy
Abbott Laboratories, Inc., et al.,	/	
Defendants	/	

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