

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

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In re: :

Clozapine Antitrust :
Litigation :

MDL 874 (HDL)

-----X

This document relates to all :
State Actions :

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MAY 02 1991

Judge Harry D. Leinenwebe
U. S. District Court

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ANTITRUST BUREAU

STATES' JOINT PRETRIAL CONFERENCE MEMORANDUM

Counsel for the States are
listed after the signature block

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

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In re: :
Clozapine Antitrust :
Litigation : MDL 874 (HDL)
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This document relates to all : STATES' JOINT PRETRIAL
State Actions : CONFERENCE MEMORANDUM

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Plaintiff States of Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin and the District of Columbia (the "States")¹ submit this memorandum pursuant to the Court's Order dated April 16, 1991 ("Order No. I"), in preparation for the status conference currently scheduled for May 3, 1991 at 1:30 p.m.²

PRELIMINARY STATEMENT

Plaintiff States, by their Attorneys General, brought these

¹ This list includes the States that filed so-called "Tag-Along Actions" under MDL Rule 12: Alabama, Arizona, Delaware, District of Columbia, Idaho, Kansas, Missouri, Oklahoma, South Carolina, and South Dakota.

² No one among the States received a copy of the Order until April 25, 1991. Thus, the States were unable to submit this memorandum by April 26, 1991, the date specified in Order No. I.

antitrust actions to remedy injuries caused by defendants Sandoz Pharmaceuticals Corporation ("Sandoz") and Caremark, Inc. ("Caremark"). Sandoz is the manufacturer of a antipsychotic drug, clozapine, which has been available for years in Europe but only recently in the United States. Sandoz, which sells clozapine in the United States under the trademark Clozaril, holds the exclusive right to market clozapine until September 1994. Until very recently, Sandoz refused (and usually still refuses) to sell Clozaril unless the purchaser also bought (or buys) through Sandoz's sole distributor, Caremark, expensive non-drug services that are readily available elsewhere at much lower costs. The price charged by Caremark for the combined drug and service package was (and in many cases still is) fixed by Sandoz.

Recently Sandoz began to expand its system of distributing Clozaril. At this point the effect of this expansion is unclear, because the distribution system continues to change. The States have been unable to analyze fully the competitive impact of these changes but remain concerned that the changed system will continue to be a de facto tie of the drug to the services provided by Caremark.

By their Complaints, the States allege that Sandoz's and Caremark's marketing of Clozaril violates sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and their respective state antitrust and/or consumer protection laws, because that marketing constitutes an illegal tying arrangement, price fixing, monopolization, and a contract, combination, or conspiracy in

unreasonable restraint of trade. The States seek injunctive relief and treble damages on behalf of themselves and natural persons and others that the States represent as parens patriae.

As provided in ¶ 3(c) of Order No. 1, this memorandum provides a preliminary report on the State Actions, focusing on the status of pleadings, discovery, and settlement discussions between the States and Sandoz and Caremark. In addition, to assist in focusing the discussion at the May 3, 1991 hearing, the States propose Order No. 2, attached as Exhibit A to this memorandum.

PRELIMINARY REPORT

A. Pleadings

As to the pleadings in the State Actions, the complaints are substantially the same. Counsel for Sandoz and Caremark consented to service of each of the complaints.

Caremark filed motions to dismiss each of the complaints under Fed. R. Civ. P. 12(b)(6). Caremark asserted that: (1) the States lacked standing; and (2) no cognizable violation was alleged. Caremark's motions were opposed by the States. The motions were fully briefed and the parties were awaiting Judge Keenan's response when the States' Actions were transferred by order of the MDL Panel.

Sandoz answered the complaints. Sandoz's Answers, inter alia, assert: (1) the absence of two products for the tying claim; (2) that the restraints "are justified by considerations of health and safety"; (3) that the restraints are "imposed by" and "approved by" the Food and Drug Administration. The main defense asserted to the

price-fixing claim is that the pricing of the combined drug and service package was "the independent decision" of Caremark.³ The States consider other defenses asserted by Sandoz, such as the Court lacking subject matter jurisdiction, to be frivolous within the meaning of Fed. R. Civ. P. 16(c)(1).

B. Discovery

As to discovery, the States and the defendants in January agreed to stay discovery until a status conference could be held in the Southern District of New York. On February 19, 1991, the conference was held in front of the Honorable John F. Keenan, Jr., the judge to whom the State Actions were then assigned. At that conference, Sandoz requested a stay of all discovery pending the decision of the MDL Panel. Judge Keenan granted the request to stay depositions and denied the request to stay other forms of discovery.

On February 25, 1991, the States served the States' Joint First Discovery Requests (the "States' Requests"), which included document requests, interrogatories, and requests for admissions focused primarily on their tying claims. In response to that request, Caremark produced to the States only those documents that Caremark had previously provided to the Federal Trade Commission (the "FTC").⁴ Counsel has not advised the States when, or if,

³ The States note that, contrary to Sandoz's position, Caremark asserted in its motion to dismiss that the pricing relationship between Sandoz and Caremark is one of "agency."

⁴ The Federal Trade Commission is investigating Sandoz's marketing of Clozaril. As part of that investigation, the FTC has served subpoenas and taken oral testimony. The States'

Caremark will produce additional documents, which the States believe are required. In mid-April 1991, Caremark's counsel confirmed that Caremark would respond to the interrogatories and requests to admit "in the very near future." As of this date, the States have not received that response.

In response to the States' Requests, Sandoz renewed its request for a stay pending the decision of the MDL Panel. In a conference call on March 28, 1991, the States' interpretation is that Judge Keenan orally denied Sandoz's renewed request for a stay and ordered Sandoz to respond in full to the States' Requests by April 19, 1991. Sandoz interpreted this Order to apply only to those documents that Sandoz had previously provided to the FTC. The States reject that interpretation. Nonetheless, in an effort to move the case forward, James Spencer, Assistant Attorney of Minnesota, called Sandoz's counsel on April 16, 1991, to secure at least copies of the FTC Documents. Counsel refused to provide copies of the FTC Documents based on this Court's stay of all discovery proceedings at a hearing on April 12, 1991. The States received no prior notice of this hearing and were not represented at the hearing. Counsel further indicated that Sandoz would not be responding in any way to the States' Requests by April 19, 1991. As of this date, Sandoz has not responded to the States' Requests.

C. Settlement Discussions

The States have always been willing to discuss settlement at

understanding is that the FTC is not now in litigation with Sandoz or Caremark.

any time. To that end, the States made a detailed settlement proposal to Sandoz, including a draft settlement agreement, on March 27, 1991. To date, Sandoz has not responded to that proposal. Counsel for Sandoz has indicated that Sandoz is still reviewing the proposal.

The States do not oppose any action this Court may entertain to encourage settlement, including appointment of a master under Rule 16(c)(6), so long as Sandoz is actually willing to engage in good faith negotiations. Accordingly, if Sandoz has now completed its review of the States' settlement proposal and is prepared to negotiate, the States will participate in any reasonable process that might lead to settlement.

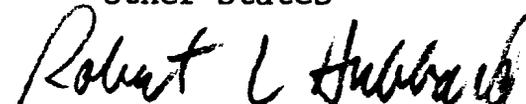
The States have also discussed settlement with Caremark. Caremark's role in the restraints is so intertwined with Sandoz's control over distribution that meaningful settlement discussions between Caremark and the States are problematic and have not yet occurred.

Dated: New York, New York
April 30, 1991

Respectfully submitted,

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EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

In re: Clozapine Antitrust Litigation)	MDL No. 874
This Document Relates to: All Cases)	<u>Order No. 2</u>

A pretrial conference in this matter was held on May 3, 1991, the views of counsel having been considered and good cause appearing,

IT IS HEREBY ORDERED that:

1. Unless modified for good cause shown, the following discovery schedule is hereby established:
 - a. Defendants shall respond in full to the States' Joint Firsts Discovery Requests dated February 25, 1991, by no later than May 19, 1991.
 - b. All discovery, except depositions of the parties' experts and that relating to the amount of damage suffered by any person other than the individual plaintiffs in the Newell and Dauer actions, shall be completed by no later than September 30, 1991.
 - c. Depositions of the parties' experts shall commence on October 1, 1991 and shall be completed by no later than November 15, 1991.
 - d. Subject to the terms of subparagraph b. of this paragraph, discovery relating to the amount of

damage suffered by any person is hereby stayed pending the further order of the court.

2. All discovery disputes shall be resolved by prior consultation among the parties effected, followed by conference call consultation with the Court. No discovery motions shall be filed unless authorized by the Court during such conference call. The Court expects the parties to bring only meritorious discovery disputes to its attention. Further, the parties are encouraged to exchange relevant information and materials in aid of the proceedings outlined in this Pretrial Order.

3. Pursuant to Fed. R. Civ. P. 5(d), discovery requests and responses will not be filed with the court except to the extent that they are offered in connection with a motion, pleading or some other matter filed with the court.

4. The Court shall maintain a master docket and case file entitled "In re: Clozapine Antitrust Litigation" under Case No. MDL-874. All orders, pleadings, motions and other documents shall be filed and docketed only in the master case file and shall be deemed filed and docketed in each individual case to the extent applicable.

5. Orders, pleadings, motions and other documents shall bear the same caption as this Order. If generally applicable to all consolidated actions, such papers shall so state by indicating that they relate to "All Cases." If applicable to all the cases identified on Attachments A or B of this order, such papers shall so state by indicating that they relate to "All

State Actions" or "All Private Actions" as the case may be. If applicable only to a particular case or cases, such papers shall include in the caption the same caption as this order and the plaintiff in the individual case(s) and the corresponding case number(s). The filing party shall provide the clerk with the original and one copy of all documents filed.

6. Assistant Attorney General Robert Hubbard of the State of New York is hereby appointed Administrative Liaison Counsel for the State plaintiffs in these proceedings identified in Attachment A. Howard Sedran, Esquire and Perry Goldberg, Esquire are hereby appointed Co-Administrative Liaison Counsel for the private plaintiffs in these proceedings identified in Attachment B. The clerk shall provide one copy of any order or other communication of the Court to each defendant and to each Administrative Liaison Counsel. Each Administrative Liaison Counsel shall further distribute such orders or other communications to the other counsel and parties for whom he has been appointed. The above appointments shall not, without further order of the court, authorize or obligate Administrative Liaison Counsel to assume or undertake any other duties and responsibilities beyond those stated herein.

7. All papers, other than those covered by the terms of paragraph 6, above, shall be served and filed in accordance with the provisions of Fed. R. Civ. P. 5.

8. Discovery.

a. Discovery shall be conducted in accordance with the schedule set forth in paragraph 1, above.

b. All discovery requests and responses are subject to the requirements of Fed. R. Civ. P. 26(b)(1) and (g). Discovery shall not, without prior approval of the court, be taken of putative class members; and any request for such discovery shall indicate why the discovery is needed and the specific information or documents sought.

c. In order to expedite the flow of discovery information and material, the parties shall consult on the establishment of a confidentiality order to be entered by the court, subject to its concurrence, upon the stipulation of all parties. In the event that the parties are unable to agree on the form of such order within fifteen (15) days from the date of this Order, then the parties shall promptly file their respective positions with the court for resolution without any hearing thereon.

d. Counsel shall develop and use a system for identifying by a unique number or symbol each document produced or referred to during the course of this litigation. All copies of the same document should ordinarily be assigned the same identification number.

e. Counsel shall, to the extent possible, coordinate and consolidate their discovery requests to eliminate duplicative requests from the same party or person.

f. The parties shall consult on the establishment of a discovery procedures order to be entered by the court, subject to its concurrence, on the stipulation of all parties. In the event that the parties are unable to agree on the form of such order within fifteen (15) days from the date of this Order, then the parties shall promptly file their respective positions with the court for resolution without any hearing thereon.

9. Subject to the further order of the court, the parties are directed to be ready for trial on all issues other than the amount of damage suffered by January 6, 1992. Counsel are cautioned that the court may require a listing in advance of trial of the factual contentions each party expects to prove at the trial, identifying the witnesses and documents to be presented in support of each such contention, and may preclude the presentation of any contention, witness, or document not so identified.

10. The next pretrial conference is scheduled for July ____, 1991.

11. The provisions of this order shall apply to all later instituted actions which may, by whatever means and for whatever purposes, be consolidated in this Court.

IT IS SO ORDERED this ____ day of May, 1991.

Harry D. Leinenweber, Judge
United States District Court

ATTACHMENT A

<u>Plaintiff Name</u>	<u>Docket Number</u>
State of Minnesota	90-C-8055 (SDNY)
State of California	90-C-8060 (SDNY)
State of Colorado	90-C-8079 (SDNY)
State of Connecticut	90-C-8062 (SDNY)
State of Florida	90-C-8063 (SDNY)
State of Iowa	90-C-8064 (SDNY)
State of Maine	90-C-8065 (SDNY)
State of Maryland	90-C-8067 (SDNY)
Commonwealth of Massachusetts	90-C-8069 (SDNY)
State of New Hampshire	90-C-8071 (SDNY)
State of New Jersey	90-C-8073 (SDNY)
State of New York	90-C-8074 (SDNY)
State of North Carolina	90-C-8092 (SDNY)
State of Ohio	90-C-8075 (SDNY)
State of Oregon	90-C-8076 (SDNY)
Commonwealth of Pennsylvania	90-C-8077 (SDNY)
State of Tennessee	90-C-8080 (SDNY)
State of Texas	90-C-8081 (SDNY)
State of Utah	90-C-8082 (SDNY)
Commonwealth of Virginia	90-C-8084 (SDNY)
State of Washington	90-C-8086 (SDNY)
State of West Virginia	90-C-8087 (SDNY)
State of Wisconsin	90-C-8089 (SDNY)

Tag-Along Actions

<u>Plaintiff Name</u>	<u>Docket Number</u>
State of Alabama	91-C-1813 (SDNY)
State of Arizona	91-C-921 (SDNY)
State of Delaware	91-C-1219 (SDNY)
District of Columbia	91-C-1220 (SDNY)
State of Idaho	91-C-1043 (SDNY)
State of Kansas	91-C-1165 (SDNY)
State of Missouri	91-C-1392 (SDNY)
State of Oklahoma	91-C-1673 (SDNY)
State of South Carolina	91-C-1814 (SDNY)
State of South Dakota	91-C-244 (SDNY)

ATTACHMENT B

Plaintiff Name

Docket Number

Victor Dauer

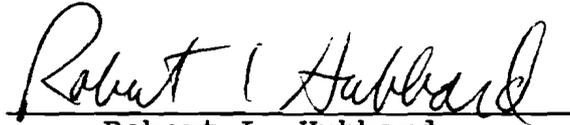
90-C-6412 (NDIL)

Richard Newell

90-C-7724 (SDNY)

CERTIFICATE OF SERVICE

This is to certify that, on April 30, 1991, the undersigned served copies of the attached STATES' JOINT PRETRIAL CONFERENCE MEMORANDUM dated April 30, 1991, by mailing same in sealed envelopes, with first-class postage prepaid thereon, in an official depository of the U.S. Postal Service within the State of New York, addressed to the last known addresses of counsel for all parties on attached Service List.


Robert L. Hubbard

Dated: New York, New York
April 30, 1991

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