

Abbott Wins Test Strip Suit After Supplier's Discovery Fraud

By **Dani Kass**

Law360 (March 26, 2020, 4:38 PM EDT) -- A New York federal judge has entered judgment against gray-market diabetes test strip supplier H&H Wholesale Services Inc. for engaging in what a magistrate judge called “a cautionary tale about how not to conduct discovery in federal court.”

U.S. District Judge Carol Bagley Amon wholly agreed with U.S. Magistrate Judge Lois Bloom that H&H committed fraud on the court while defending itself from Abbott Laboratories' trademark suit calls for case-ending sanctions. The court will next decide how much H&H owes Abbott, according to online court records.

“The court agrees with the thorough, thoughtful and well reasoned decision by Magistrate Judge Bloom and affirms its conclusions,” Judge Amon wrote.

Judge Bloom’s May report and recommendation said H&H used search terms it knew wouldn’t turn up results, specifically removed damning documents — particularly those involving its owner and President Howard Goldman, and his wife and employee, Lori Goldman — and provided numerous false excuses for these omissions.

She said the testimony from H&H’s general manager regarding the discovery woes was “clearly inconsistent if not perjured from his deposition” opposing the sanctions motion, Howard Goldman’s testimony was “evasive and self-serving at best” and H&H’s corporate representative's testimony was “clearly perjured.”

H&H filed a series of objections to the report and recommendation, all of which Judge Amon rejected.

Among those objections, H&H said it was unfair that the magistrate judge jumped to the highest sanction before considering lesser ones. Judge Amon said the judge was in line, noting that there’s not a legal requirement in the Second Circuit for sanctions to be incremental.

“Although not provided with formal and specific warnings, the H&H defendants were repeatedly made aware of the seriousness of their discovery misconduct and were given multiple opportunities to try to explain or correct it,” Judge Amon wrote. “Instead of doing so, the H&H defendants continued to mislead the court. In light of these circumstances, the H&H defendants cannot credibly claim ignorance or surprise as to the potential consequences of their fraud.”



Geoffrey Potter

The judge said any lesser sanction would have been “ineffective,” given the “the bad-faith, repeated and egregious nature” of the misconduct, cover-ups provided to the court and “continued evasion after being caught,” among other reasons.

Judge Amon also agreed that it was proper to sanction the Goldmans even though the bad faith and willfulness was found only for H&H, saying clients are liable for bad faith misconduct committed by their agents.

Among the other objections, H&H said it deserved an evidentiary hearing, which Judge Bloom had rejected. Judge Amon agreed it was unnecessary, as the sanctions were decided entirely on the record, and H&H was given the rights to defend itself in briefings and during oral argument.

Lastly, she denied H&H’s request for an permission to file an interlocutory appeal about the evidentiary hearing and the Goldman's personal liability. The district court judge found there wasn’t a “substantial ground for difference of opinion” to call for such an appeal.

The overall litigation is much bigger than H&H. Abbott had sued hundreds of distributors and pharmacies for trademark diversion, aiming to stop the U.S. sale of its FreeStyle blood glucose test strips that are intended to be used in other countries.

Although the U.S. and international strips are identical, Abbott claims the defendants capitalized on pricing differences and received undeserved reimbursement payments from insurance companies, costing it millions of dollars.

H&H has come under fire repeatedly during the litigation for its behavior.

In 2018, Judge Bloom sanctioned H&H for discovery misconduct, blocking the supplier from raising attorney-client or work-product privilege defenses for a certain set of discovery production.

Other companies that Abbott had also sued had gone after H&H and its former counsel at Kerr Russell & Weber PLC for letting Goldman listen to remote depositions of other parties, in violation of a protective order. Kerr Russell took responsibility for this conduct, paying out a confidential sum.

H&H's current attorney, Derrelle M. Janey of Gottlieb & Janey LLP, said Thursday that they’ve reviewed the ruling and are considering its implications. Janey joined the case in early 2019, after half a dozen changes in representation.

Counsel for Abbott declined to comment.

Abbott is represented by Geoffrey Potter, Timothy Waters and R. James Madigan III of Patterson Belknap Webb & Tyler LLP.

H&H and the Goldmans are represented by Derrelle M. Janey of Gottlieb & Janey LLP.

The case is Abbott Laboratories et al. v. Adelpia Supply USA et al., case number 1:15-cv-05826, in the U.S. District Court for the Eastern District of New York.

--Editing by Gemma Horowitz. All Content © 2003-2020, Portfolio Media, Inc.