

Abbott Judge Suggests \$54M Judgment In Test Strip TM Case

By Hailey Konnath

Law360 (August 23, 2024, 11:00 PM EDT) -- A New York federal magistrate judge has recommended that default judgments totaling more than \$54 million be entered against 85 companies and individuals who didn't respond to Abbott Laboratories' nearly decade-old trademark suit over gray-market diabetes test strips, according to a report and recommendation filed Thursday.



Geoffrey Potter

U.S. Magistrate Judge Lois Bloom recommended that Abbott's motion for a default judgment as well as a permanent injunction be granted against all the defendants who didn't respond to Abbott's various claims under the Lanham Act. Abbott contends that it marketed its FreeStyle brand of blood glucose test strips to be sold in other countries, but various distributors and pharmacies improperly sold them in the U.S.

According to the report, the court has already held that the sale and distribution of the strips constitutes trademark infringement as a matter of law. Abbott has also established that sale of the strips is likely to cause consumer confusion in the U.S., Judge Bloom said.

"Having established that their mark merits protection and that defendants' use of the mark is likely to cause consumer confusion, Abbott establishes as a matter of law that the sale of its international test strips in the United States is trademark infringement under the Lanham Act," Judge Bloom said.

She added that Abbott has "sufficiently pled specific liability against the individual defaulting defendants that sold its international test strips in the United States."

Judge Bloom said that Abbott's damages request should also be granted against a number of those defendants. Although Abbott is entitled to damages against all the defaulted defendants, it only requests damages against 28 of them for lost revenues, the judge said.

"Abbott has satisfied its burden to prove actual damages here," Judge Bloom said. "The instant record supports an award of damages against the defaulted defendants based on Abbott's lost revenue theory. As to the differences between the defendants, Abbott's specific allegations support its calculation of damages against each defaulted defendant."

The report and recommendation bring Chicago-based Abbott one step closer to resolving the sprawling trademark litigation campaign launched in October 2015. In April, Abbott told the court that it had

settled what remained of the litigation against six defendants that did appear in the case. A trial had been scheduled for May 6.

According to Thursday's filing, Abbott is seeking default judgment for claims including trademark infringement, false advertising, trade dress infringement and unfair competition and importation of goods bearing infringing marks. It's seeking damages for the trafficking of roughly 600,000 infringing boxes.

The court clerk has already noted entry of default against all 85 nonresponsive defendants, starting with Bay Pharmacy in May 2016 and, most recently, with five individuals in April 2024, per the report.

Judge Bloom said that a damages enhancement is indeed warranted, pointing to Abbott's damages estimates plus the damage to its goodwill. But she agreed to award double damages, not treble, as it had requested.

She also disagreed with the company's contention that it's entitled to prejudgment interest, saying that the case is "not exceptional."

"Abbott relies heavily on the notion that their cases against the defaulted defendants should be deemed exceptional because of defendants' willful infringement," Judge Bloom said. "However ... there is no allegation, nor record support, that any of these defendants engaged in 'substantial litigation misconduct.'"

None of the defaulting defendants could have engaged in litigation misconduct because they didn't litigate at all, the judge said.

In 2016, two companies and three of the people behind them were able to get out of the allegations by paying a total of \$25,000. And last year, another one of the companies, H&H Wholesale Services Inc., along with its president Howard Goldman, and his wife, Lori Goldman, was ordered to pay more than \$33 million.

In August, a New York federal judge agreed to freeze trusts tied to the Goldmans. Abbott had attempted to begin collecting the \$33 million, but the company told the court that it was facing problems with collecting the judgment. Abbott accused the Goldmans of misconduct in a purported attempt to evade the judgment, according to court documents.

Abbott's counsel declined to comment, and the defendants couldn't be immediately reached late Friday.

Abbott is represented by Geoffrey Potter of Patterson Belknap Webb & Tyler LLP.

Counsel information for the unresponsive defendants wasn't available.

The case is Abbott Laboratories 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.

--Additional reporting by Dorothy Atkins and Andrew Karpan. Editing by Jay Jackson Jr.

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