

2nd Circuit Affirms \$33M In Damages In Diabetic Test Strip Trademark Fight

NEW YORK — A panel of judges in the Second Circuit U.S. Court of Appeals on Sept. 26 upheld a New York federal judge's entry of default judgment and damages against a wholesaler and its principals accused by a manufacturer of diabetic test strips of trademark infringement for selling the strips without permission, holding that the wholesaler's intentional withholding of discovery information justified the finding (Abbott Laboratories, et al. v. H&H Wholesale Services, Inc., et al., Nos. 23-446 and 23-449, 2nd Cir., 2024 U.S. App. LEXIS 24436).

(Summary order available. Document #16-241007-449R.)

In the summary order, the Second Circuit panel affirmed the March 2023 judgment of U.S. Judge Carol Amon of the Eastern District of New York holding H&H Wholesale Services Inc. jointly and severally liable for \$33,471,224 in damages for violating the trademark of Abbott Laboratories, Abbott Diabetes Care Inc. and Abbott Diabetes Care Sales Corp. (collectively, Abbott) on Abbott's FreeStyle diabetic testing strips.

The panel held that H&H and its principals, Howard Goldman and Lori Goldman, were correctly held to be subject to case-ending sanctions for discovery violations and attempts at covering up the violations. The panel rejected Lori Goldman's argument that she should not have been subject to the entry of judgment.

The panel consisted of Judges Reena Raggi, Richard C. Wesley and Raymond J. Lohier Jr.

Sprawling Case

Abbott brought claims of trademark infringement, unfair competition and trademark dilution and associated common-law claims against hundreds of defendants in the District Court in October 2015, including the H&H defendants. Abbott says that the defendants were unlawfully selling Abbott's international FreeStyle test strips in the United States.

In September 2019, Judge Amon partially granted Abbott's motion for summary judgment as to liability, holding that H&H willfully infringed on Abbott's marks and that Howard Goldman was personally liable. In the order, the judge denied Lori Goldman's motion for summary judgment in which she argued that she was not individually liable for the infringement.

In March 2020, the judge adopted a report and recommendation from Magistrate Judge Lois Bloom to enter default judgment against the H&H defendants. Abbott sought the entry of default judgment after a court-ordered search of H&H's property in a separate trademark infringement case brought by Abbott against H&H in the District Court in 2017, accusing the company of selling international FreeStyle strips in counterfeited American packaging.

As part of the search, H&H's email server was seized, and Judge Amon wrote in a December 2022 ruling that the contents of the server showed "that the H&H defendants had engaged in a calculated pattern of discovery misconduct in this action that amounted to a fraud upon the Court." In December 2020, Judge Amon ordered a damage inquest against the H&H defendants.

In March 2023, the judge awarded \$33,471,224 plus postjudgment interest in favor of Abbott. The H&H defendants appealed, arguing that the District Court inappropriately entered damages without a jury trial.

Lori Goldman separately appealed, arguing that default judgment should not have been entered against her.

Jury Trial Waived

The panel disagreed with all of the H&H defendants' arguments. Citing Royal Am. Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011 (2d Cir. 1989), the panel said that a party can waive "its right to a jury trial if, with 'notice that the trial court [i]s planning to adjudicate the dispositive issues of fact,' it 'participate[s] in a [nonjury proceeding] without objection.'"

The panel noted that while both Abbott and H&H demanded a jury trial initially, "the H&H Defendants acquiesced to a damages inquest instead" in response to Abbott's motion for case-ending sanctions. The panel said that while the H&H defendants argued that any damages trial for the other defendants should not include the H&H defendants, "the H&H Defendants did not once argue that they had the right to a jury trial on damages. Instead, they argued that the damages inquest should follow any jury trial for the remaining defendants."

The panel said the record shows that the H&H defendants' description of "their proposal to consolidate the inquest with a jury trial but to have Judge Amon decide their damages as a compromise, maintaining that their true request was to have a jury hear and decide their damages," is incorrect. In truth, the panel said, "the H&H Defendants clearly acquiesced to a nonjury proceeding for determination of the damages they owed" and thus waived their right to a trial.

Sanctions

Turning to Lori Goldman's arguments that the District Court wrongly imposed sanctions against her "because it imposed sanctions without first finding that she personally committed a fraud on the court and did so in bad faith," the panel rejected these arguments as well.

The panel said the magistrate judge pointed to "multiple instances in which Ms. Goldman misled Abbott and the court by falsely claiming that she had no role at H&H and no responsive documents to produce" in the report and recommendation.

"Indeed, the record establishes that Ms. Goldman continued to assert throughout the litigation that she had no meaningful involvement with the business activities at H&H, even though emails that she was eventually required to produce revealed that she maintained an office at H&H, attended management meetings, and handled various aspects of the business," the panel said.

It said Lori Goldman's misrepresentations led Abbott to withdraw its motion for a preliminary injunction against her. Citing Penthouse Int'l, Ltd. v. Playboy Enters., Inc., 663 F.2d 371 (2d Cir. 1981), the panel said Judge Amon correctly found that Lori Goldman acted in bad faith.

Lori Goldman argued that the discovery failures were the fault of her counsel and employees at H&H, but the panel said "Ms. Goldman is responsible for her false testimony to the District Court and at her deposition." The panel also said the record lacks evidence supporting her claim that attorneys or employees blocked the release of documents.

Citing S. New Eng. Tel. Co. v. Glob. NAPs Inc., 624 F.3d 123 (2d Cir. 2010), the panel said that "the District Court acted within its discretion in concluding that lesser sanctions would be ineffective given the record of repeated discovery abuses, misrepresentations to the court, and the prejudice to Abbott."

Counsel

Abbott is represented by Geoffrey Potter, Timothy A. Waters, Natalie G. Noble and Nicole Scully of Patterson Belknap Webb & Tyler LLP in New York.

H&H and Howard Goldman are represented by Peter Michael Levine in New York.

Lori Goldman is represented by Joshua H. Epstein and David S. Greenberg of Davis+Gilbert LLP in New York.

(Additional documents available: **H&H, et al.'s appellant brief.** Document #16-241007-450B. **Lori Goldman's appellant brief.** Document #16-241007-451B. **Abbott's appellee brief in response to H&H, et al.** Document #16-241007-452B. **Abbott's appellee brief in response to Lori Goldman.** Document #16-241007-453B. **H&H, et al.'s reply brief.** Document #16-241007-454B. **Lori Goldman's reply brief.** Document #16-241007-455B. **District Court December 2022 memorandum and order.** Document #16-241007-456R. **District Court March 2023 order for judgment.** Document #16-241007-457R. **District Court March 2023 judgment.** Document #16-241007-458R.)