



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TEAMSTERS LOCAL 237 WELFARE FUND;
LOCAL 237 TEAMSTERS RETIREES' BENEFIT
FUND; LOCAL 237 TEAMSTERS-PLAINVIEW-
OLD BETHPAGE CENTRAL SCHOOL DISTRICT
HEALTH AND WELFARE TRUST FUND; LOCAL
237 TEAMSTERS-NORTH BABYLON SCHOOL
DISTRICT HEALTH AND WELFARE TRUST
FUND; LOCAL 237 TEAMSTERS-BRENTWOOD
SCHOOL DISTRICT HEALTH AND WELFARE
TRUST FUND; AND LOCAL 237 TEAMSTERS-
SUFFOLK REGIONAL OFF-TRACK BETTING
CORPORATION HEALTH AND WELFARE TRUST
FUND, on behalf of themselves and all others similarly
situated,

Plaintiffs-Below, Appellants,

v.

ASTRAZENECA PHARMACEUTICALS LP; AND
ZENECA, INC.,

Defendants-Below, Appellees.

No. 415, 2015

APPEAL FROM
THE OPINION AND
ORDER DATED
JULY 8, 2015 OF
THE SUPERIOR
COURT OF THE
STATE OF
DELAWARE IN
C.A. No. N04C-11-
191-VLM

APPELLANTS' SUR-SUR-REPLY BRIEF

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A. *Avandia* rejects the notion that TPPs' claims to recover prescription drug overcharges are too attenuated.

In re Avandia Mktg. Sales Practices & Prods. Liab. Litig., No. 14-1948, 2015 U.S. App. LEXIS 18633 (3d Cir. Oct. 26, 2015) ("*Avandia*"), was before the Third Circuit on interlocutory appeal to answer the following certified question: "Does the independent judgment of doctors and decision-making of the physicians who wrote the prescriptions for Avandia render the causal chain too attenuated to state a claim?" *Id.* at *11. The Third Circuit found it did not. *Id.* at *31-32. In almost mirror-image language the Superior Court held the opposite: "any purported chain of causation that runs" through "the decisions of individual doctors to prescribe a drug to their patients . . . is simply too attenuated." AOB Ex. A at 21. Despite Defendants' best efforts, that holding cannot be reconciled with *Avandia*. In fact, GSK in *Avandia* and Pfizer in *Neurontin*, had the same arguments Defendants advance here rejected.¹

Defendants' attempt to shift the focus of the causation question to the *Avandia* plaintiffs' placement of Avandia on their formularies fails. Sur-Reply at

¹ Compare *Avandia*, at *31 ("GSK argues that the presence of intermediaries, doctors and patients, destroys proximate causation."); *In re Neurontin Mktg. and Sales Practices Litig.*, 712 F.3d 21, 34 (1st Cir. 2013) ("Pfizer's primary argument is that, as a matter of law, there is no proximate causation in this case because there are too many steps in the causal chain connecting its misrepresentations to the injury to Kaiser, particularly because that injury rests on the actions of independent actors -- the prescribing doctors."), with AAB at 6, 11, 14-15 ("Any attempt to state a claim based on the conduct of their members or the medical prescribing decisions of their members' physicians is too attenuated.").

2-3. Placement of a drug on TPPs' formularies is the precursor for TPPs to fund their members' purchase of the drug. *Avandia*, at *3. TPPs suffer no damages just by having a fraudulently marketed drug placed on their formularies. They are damaged by overpaying for the drug when their members fill their prescription—a prescription that must be written by a doctor.² That is what was at issue in *Avandia*. *See id.* at *8-9.

Avandia also rejected the notion that TPPs can never suffer an injury from prescription drug overcharges because they account for fraud in their business models. *See Avandia*, at *20-21 (“the argument lacks a limiting principle”).

Defendants criticize the Third Circuit's analysis. Sur-Reply at 6 n.4. However, Defendants take no issue with *Avandia*'s finding that premium pass-on is a fact question that should not be decided on a motion to dismiss. *See Avandia*, at *20.³

² Defendants' attempts (Sur-Reply at 3-4) to minimize *Neurontin* and *Desiano* ignore the relevant points Plaintiffs rely on. *See, e.g., Neurontin*, 712 F.3d at 38-39 (“Pfizer has always known that, because of the structure of the American health care system, physicians would not be the ones paying for the drugs they prescribed. . . . Pfizer fraudulently marketed to physicians with the intent that those physicians would write prescriptions paid for by Kaiser. The fraudulent scheme worked as intended, inducing a huge increase in Neurontin prescriptions.”); *Desiano v. Warner-Lambert Co.*, 326 F.3d 339, 349 (2d Cir. 2003) (“Plaintiffs allege an injury directly to themselves; an injury, moreover, that is unaffected by whether any given patient who ingested Rezulin became ill. Plaintiffs' claim is that the Defendants' wrongful action was their misrepresentation of Rezulin's safety, and that this fraud directly caused economic loss to them as purchasers.”).

³ *Avandia* also articulated why TPPs' claims to recover increased medical expenditures resulting from their members' smoking-related illnesses (similar to *State of São Paulo of Federative Rep. of Braz. v. Am. Tobacco Co.*, 919 A.2d 1116

B. Defendants misstate Plaintiffs' theory of damages.

Defendants posit that Plaintiffs “solely assert the indirect-causation, ‘cheaper alternative drug’ theory . . . that was not at issue in *Avandia*.” Sur-Reply at 4. They are wrong on both points. In *Avandia*, the plaintiff advanced two theories. *Avandia*, at *9 (explaining plaintiffs’ “excess price” and “quantity effect” theories). Both theories were prominent in the Third Circuit’s analysis. *See id.* at *28, *30-31. Plaintiffs also plead both theories: “Had Defendants not engaged in false, misleading and deceptive conduct described above, Plaintiffs and the Class members would not have purchased Nexium or would have done so at a price that was substantially reduced.” A213; *see also* A214, A217, A218.

Defendants again make much of the fact the Plaintiffs kept Nexium on their formularies even after commencing this action. Sur-Reply at 5-6. Plaintiffs addressed this point on Reply (at 9). However, even if the Court finds Defendants’ argument persuasive, any mitigation stemming from Plaintiffs covering Nexium only affects the “quantity effect” theory, not Plaintiffs’ claims pursuant to the “excess price” theory—namely, that Defendants’ fraudulent marketing allowed them to sell Nexium at a premium it was not worth.

In their Opening Brief, Plaintiffs focused, as the Superior Court did, on the

(Del. 2007), *see* AAB at 6, 16-18) are inapposite to claims to recover prescription drug overcharges. *Avandia*, at *32. Defendants do not attempt to address *Avandia* on this point.

choice of law questions raised here. Defendants responded by devoting the first half of their answering brief to a separate issue: whether TPPs can ever hold drug manufacturers civilly liable for marketing frauds that result in prescription drug overcharges that TPPs pay for. Defendants, seeking *carte blanche* immunity, ask this Court to rule that they cannot. But *Avandia*—despite Defendants’ attempt to minimize and criticize its holding and rationale—instructs otherwise.

Dated: November 19, 2015

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