IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE FLONASE ANTITRUST LITIGATION	:	CIVIL ACTION
	:	No. 08-3301
THIS DOCUMENT RELATES TO:	:	
Indirect Purchaser Actions	:	

EXPLANATION AND ORDER

Defendant GlaxoSmithKline ("GSK") moves, under Federal Rule of Civil Procedure 60(b)(2), for reconsideration of my denial of its Motion to Enforce Class Settlement. *See* ECF No. 686. The State of Louisiana moves to strike GSK's Rule 60(b) motion for lack of jurisdiction. *See* ECF No. 688. For the reasons stated below, I deny Louisiana's Motion to Strike and deny without prejudice GSK's Rule 60(b) Motion.

I. BACKGROUND

On April 2, 2015, GSK filed a Motion to Enforce Class Settlement against Louisiana after the State filed suit against GSK in Louisiana state court. GSK claimed that Louisiana was bound by a Class Settlement Agreement entered into between GSK and a class of indirect purchasers of the prescription drug Flonase ("Indirect Purchaser Class"). Under the Class Settlement Agreement, GSK argued, Louisiana released certain claims against GSK. In response, Louisiana asserted that it was not bound by the Class Settlement Agreement because it had not waived its sovereign immunity.

Since filing its Motion to Enforce Class Settlement in April 2015, GSK has been in contact with Class Counsel and the claims administrator, Rust Consulting ("Rust"), to determine whether Louisiana waived its sovereign immunity by filing any claims as part of the Flonase

settlement. Under the settlement scheme, Louisiana could have filed claims in a variety of ways, including directly as a class member or through one of several "settling health plans" ("SHPs").[1] Humana Insurance Company ("Humana") is one of the SHPs.

In the course of its communications with Rust, "GSK was told that any information it received would not include information relating to [claims submitted through SHPs] because that information was confidential, even as to GSK." Mot. for Relief at 9, ECF No. 686. GSK nevertheless continued to negotiate with Rust, Class Counsel, and Humana to determine whether Louisiana submitted any claims.

On December 1, 2015, approximately eight months after GSK filed its Motion to Enforce Class Settlement, I heard oral argument. At the hearing, counsel for Louisiana represented to the Court that the State never received any payment from the Flonase settlement. Tr. of Hr'g, Ex. A at 14, ECF No. 679. After the hearing, I ordered supplemental briefing based on various issues. On December 9, 2015, both parties filed their supplemental briefs. In its brief, GSK specifically acknowledged that although Louisiana "has stressed that it did not file a claim, . . . that does not preclude the possibility it received settlement funds indirectly through . . . a member of the related SHP settlement." Def.'s Supp. Mem. at 9 n.6, ECF No. 679.

On December 21, 2015, I denied GSK's Motion to Enforce Class Settlement on the basis that Louisiana did not unequivocally waive its sovereign immunity. *See* Mem. & Order, ECF Nos. 681-82. GSK has appealed my decision.

In January 2016, Humana finally consented to the disclosure of claims that it filed with

[1] The SHPs were excluded from the definition of the Indirect Purchaser Class. *See* Mot. for Prelim. Approval, Ex. 1, at 4, ECF No. 566. The SHPs entered into a separate agreement with GSK. Under a Plan of Allocation negotiated between the SHPs and the Indirect Purchaser Class, the SHPs could only submit claims on behalf of themselves or on behalf of entities that were members of the Indirect Purchaser Class. *See id.*, Ex. 5 ¶¶ 1(w), 4(d). On June 9, 2013, I issued final approval of both the Indirect Purchaser Settlement Agreement and the Plan of Allocation and retained exclusive jurisdiction over both. *See* Final Order & Judgment ¶¶ 10, 15, 18, ECF No. 606.

Rust. As a result, GSK alleges that it discovered that Humana had submitted claims worth $183,404.44 as an SHP on behalf of Louisiana. In light of this new evidence, GSK filed the present Rule 60(b)(2) motion. In response, Louisiana has moved to strike the Rule 60(b) motion.

II. DISCUSSION

A. Louisiana's Motion to Strike

Louisiana argues that GSK's Rule 60(b) motion should be stricken because this Court lacks jurisdiction while GSK's appeal is pending. Although the filing of a notice of appeal usually transfers jurisdiction from the district court to the appellate court, a district court has limited jurisdiction to adjudicate motions filed pursuant to Rule 60(b).

> [W]hile an appeal is pending, a district court, without permission of the appellate court, has the power both to entertain and to deny a Rule 60(b) motion. If a district court is inclined to grant the motion or intends to grant the motion, . . . it should certify its inclination or its intention to the appellate court which can then entertain a motion to remand the case. Once remanded, the district court will have power to grant the motion, but not before.

Venen v. Sweet, 758 F.2d 117, 123 (3d Cir. 1985); *see also Main Line Fed. Sav. & Loan Ass'n v. Tri-Kell, Inc.*, 721 F.2d 904, 906 (3d Cir. 1983). As discussed below, I will deny GSK's Rule 60(b) motion. Because I have jurisdiction to entertain and deny GSK's Rule 60(b) motion while GSK's appeal is pending, Louisiana's Motion to Strike is denied.

B. GSK's Rule 60(b) Motion

Pursuant to Rule 60(b)(2), GSK asks that I reconsider my denial of its Motion to Enforce Class Settlement in light of evidence that Humana submitted claims on behalf of Louisiana. GSK argues that the submission of these claims constitutes an affirmative waiver of Louisiana's sovereign immunity and Louisiana should therefore be bound by the Class Settlement Agreement.

Under Rule 60(b)(2), a "court may relieve a party . . . from a final judgment, order, or

proceeding . . . [based on] newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). This "standard requires that the new evidence (1) be material and not merely cumulative, (2) could not have been discovered before trial through the exercise of reasonable diligence and (3) would probably have changed the outcome of the trial." *Compass Tech., Inc. v. Tseng Labs, Inc.*, 71 F.3d 1125, 1130 (3d Cir. 1995). The party seeking relief "bears a heavy burden"; a Rule 60(b) motion "should be granted only where extraordinary justifying circumstances are present." *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991) (internal quotation marks omitted).

At least since April 2015, GSK has been aware that "any information it received [from Rust] would not include information relating to the SHP agreement" because of confidentiality issues. Mot. for Relief at 9, ECF No. 686. GSK understood that "[w]ithout encompassing the SHP agreement, information limited to the Indirect Purchaser Class would provide an incomplete list of those entities participating as class members." *Id*. Despite Louisiana's counsel's statements at oral argument that the State did not receive funds from the settlement, GSK remained aware that an SHP claim may have been filed on behalf of Louisiana. GSK's supplemental brief specifically acknowledged that Louisiana's representation did "not preclude the possibility it received settlement funds indirectly through . . . a member of the related SHP settlement." Def.'s Supp. Mem. at 9 n.6, ECF No. 679.

Thus, GSK clearly knew that it was not receiving potentially significant data about SHP claims well before I denied its Motion to Enforce Class Settlement on December 21, 2015. In the eight months that its motion was pending, however, GSK did not inform the Court of its ongoing discussions with Humana, Rust, and Louisiana, or alert the Court to the obstacles it faced in obtaining the relevant data. By failing to do so, GSK did not exercise the reasonable diligence

required by Rule 60(b)(2). *See Smith Int'l Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1579 (Fed. Cir. 1985) (stating that the diligence requirement of Rule 60(b)(2) provides "finality to judicial decisions and orders by preventing belated attempts to reopen judgment on the basis of facts that the moving party" could have previously discovered).

Because GSK failed to exercise reasonable diligence, it is not entitled to relief under Rule 60(b)(2). I need not address whether the evidence of Humana's claims is material, whether it would have affected the disposition of GSK's Motion to Enforce Class Settlement, or whether GSK could use the evidence as a defense in another action.

ORDER

AND NOW, this ___31st___ day of May, 2016, it is **ORDERED** as follows:

- The State of Louisiana's Motion to Strike (ECF No. 688) is **DENIED.**
- Defendant GlaxoSmithKline LLC's ("GSK") Motion for Relief Based on Newly Discovered Evidence (ECF No. 686) is **DENIED**.

s/Anita B. Brody

ANITA B. BRODY, J.

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