

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SIDNEY HILLMAN HEALTH CENTER OF)
ROCHESTER and TEAMSTERS HEALTH)
SERVICES AND INSURANCE PLAN)
LOCAL 404, on behalf of themselves and all)
others similarly situated,)

Plaintiffs,)

v.)

ABBOTT LABORATORIES and)
ABBVIE INC.,)

Defendants.)

No. 13 C 5865

Judge Sara L. Ellis

ORDER

The Court grants Defendants’ motion to dismiss the second amended class action complaint [125]. The Court dismisses the RICO claims with prejudice and the state law claims without prejudice subject to refile in state court. This case is terminated. See Statement for further details.

STATEMENT

Plaintiffs Sidney Hillman Health Center of Rochester and Teamsters Health Services and Insurance Plan Local 404 (collectively, the “Funds”) are multi-employer benefit plans and health services funds that provide health benefits, including prescription drug coverage, to their members. The Funds seek to represent a nationwide class of such third-party purchasers or third-party payors (“TPPs”) who from 1998 to 2012 reimbursed and paid all or some of the purchase price for Depakote, a drug developed and initially marketed by Abbott Laboratories and later by AbbVie, Inc. (collectively, “Abbott”), for indications not approved by the Food and Drug Administration (the “FDA”).¹ The Funds also seek to represent subclasses of TPPs in New York and Massachusetts. The Funds bring claims for violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962(c), conspiracy to violate RICO, 18 U.S.C. § 1962(d), violation of the New York deceptive business practices act, N.Y. Gen. Bus. Law. § 349, and unjust enrichment under New York and Massachusetts law. The Court

¹ In 2012, Abbott Laboratories split into two separate companies, Abbott Laboratories, focused on the development and sale of medical products, and AbbVie, Inc., focused on the development and sale of pharmaceuticals. AbbVie, Inc. currently sells and markets Depakote in the United States, while Abbott Laboratories does so outside the United States. The Court will not differentiate between the two in this Order.

dismissed the Funds' initial complaint on statute of limitations grounds, Doc. 67, but the Seventh Circuit reversed that decision and remanded the case for further proceedings, *Sidney Hillman Health Ctr. of Rochester v. Abbott Labs., Inc.*, 782 F.3d 922 (7th Cir. 2015). The Funds then filed an amended class action complaint ("amended complaint"), which the Court also dismissed without prejudice. Doc. 117. In dismissing the amended complaint, the Court found that the Funds did not adequately allege proximate cause under RICO. *Id.* at 13–15. Having dismissed the RICO claims, the Court declined to address the state law claims, deferring consideration of Abbott's arguments on those claims until the Funds adequately alleged a basis for the Court's subject matter jurisdiction.

Specifically, in finding the Funds did not adequately allege the proximate cause required for a prescription drug TPP RICO case, the Court considered whether Abbott "directly made misrepresentations to the TPP," finding that without such direct representations, "intervening factors—such as a physician's independent medical judgment or a patient's decisionmaking—interrupt the chain of causation." Doc. 117 at 12. Because the Funds did not allege that Abbott made any direct misrepresentations to them, omitting any mention about the prescription reimbursement process or how they came to pay for Depakote and instead focusing on the alleged representations Abbott and its co-conspirators made to doctors, patients, and caregivers, the Court found the chain of causation too attenuated to establish the required proximate cause. *Id.* at 13.

The Funds responded by filing a second amended class action complaint ("second amended complaint"), asserting the same claims raised in the amended complaint. Indeed, the Funds' second amended complaint basically copies the amended complaint, with the sole addition of five paragraphs, Doc. 119 ¶¶ 217–21.² But instead of including allegations to cure the identified defects in the chain of causation, these additional paragraphs allege the following: physicians write prescriptions without specifying an indication for the medication, meaning that even the FDA must use incomplete data in estimating the percentage of prescriptions written for particular indications. Abbott knew this to be the case, and also knew that TPPs paid a substantial portion of the cost of all prescription drugs. Because drugs are commonly added to a TPP's formulary whenever the FDA approves the drug for any indication, and most TPPs do not inquire into the indication for which drugs are prescribed, this meant Abbott had not reason to direct false statements to TPPs whose drug coverage was not indication-dependent. Instead, Abbott directed its marketing of off-label Depakote prescriptions to doctors.

Based on the Funds' apparent failure to cure the defects identified by the Court in its June 29, 2016 Opinion and Order, Abbott filed a motion to dismiss the second amended complaint. Abbott highlighted that the Funds' new allegations acknowledged that they did not meet the Court's proximate causation test, as the Funds alleged that "Abbott knew there was no reason to direct false statements at TPPs whose drug coverage is not indication-dependent in order to induce coverage or a listing on a formulary." Doc. 119 ¶ 220. In Abbott's view, the Funds merely amended their complaint to further any future arguments they might make at the appellate

² The Court presumes familiarity with its June 29, 2016 Opinion and Order, Doc. 117. Because the second amended complaint mirrors the amended complaint in all but these five additional paragraphs, the Court does not repeat the factual allegations here but refers the reader to the background section in its June 29, 2016 Opinion and Order, Doc. 117 at 2–6.

level. In response, the Funds reinforced Abbott's point, acknowledging that their new allegations "explain why [the Court's standard] is nearly impossible to meet" and suggesting that the Court erred in its proximate cause analysis. Doc. 126 at 2–3. Giving short shrift to Abbott's motion, the Funds merely incorporated their arguments from prior briefing and stated that "[i]f, despite the new allegations and Plaintiffs' arguments (here and in earlier rounds of briefing on Defendants' dismissal motions), the Court still finds it appropriate to dismiss the case (presumably with prejudice), then this will be another issue to be resolved in the appellate arena." *Id.* at 3. Essentially, then, the Funds concede that under the Court's proximate cause analysis, their second amended complaint fails.

The Court sees no need to reengage in an extensive analysis of the proximate cause requirements, particularly where the Funds have not presented the Court with any reason to deviate from its prior analysis. The Court's conclusions were recently reaffirmed in another TPP case pending in this district recently, although in that case the court found the plaintiff satisfied the requirements by providing details regarding misrepresentations the defendants made to the TPP plaintiff and about the TPP's formulary procedures, in addition to "provid[ing] a better explanation . . . for why the complaint lacks certain details and for why certain seemingly extraneous details are actually relevant." *See In re Testosterone Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings*, No. 14 C 1748, 14 C 8857, 2016 WL 4091620, at *2–5 (N.D. Ill. Aug. 2, 2016). Here, the Funds fall far short, instead alleging that Abbott had no reason to make representations to TPPs because, based on the fact that TPPs cover most prescriptions regardless of the indication for which they are prescribed, Abbott should have known that the Funds would pay for off-label Depakote. Without a more direct tie between Abbott and the Funds, the Court finds that the Funds have again failed to allege proximate cause so as to allow them to proceed on their RICO claim. *See* Doc. 117 at 12–15. This also means that the Funds' RICO conspiracy claim fails. *See United Food & Commercial Workers Unions & Emp'rs Midwest Health Benefits Fund v. Walgreen Co.*, 719 F.3d 849, 856–57 (7th Cir. 2013). The Court dismisses the RICO claims with prejudice, allowing the Funds the opportunity to challenge the seemingly "impossible" proximate cause standard on appeal. And because the Court dismisses the claims over which it has original jurisdiction and the Funds have not pleaded an independent basis for jurisdiction over the state law claims, the Court declines to exercise supplemental jurisdiction over the state law claims and dismisses them without prejudice.

Date: February 6, 2017

/s/ Sara L. Ellis