

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN RE LORAZEPAM & CLORAZEPATE  
ANTITRUST LITIGATION

MDL Docket No. 1290 (TFH)  
Misc. No. 99ms276 (TFH)

**FILED**

OCT 04 2002

NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

This Order applies to:

BLUE CROSS BLUE SHIELD  
OF MINNESOTA,

BLUE CROSS BLUE SHIELD  
OF MASSACHUSETTS,

FEDERATED MUTUAL INSURANCE  
COMPANY,

Plaintiffs,

v.

MYLAN LABORATORIES, INC. et al.,  
Defendants.

Civ. No. 02-1299 (TFH)

**ORDER**

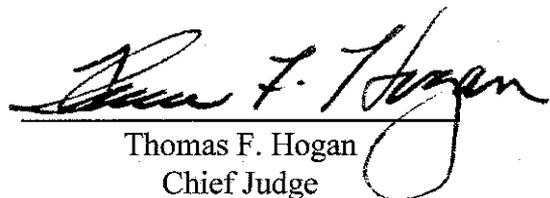
For the reasons stated in the accompanying Memorandum Opinion, it is hereby

**ORDERED** that Defendants' Motion To Strike Portions of Second Amended Complaint

[filed under former case number 01-2646, # 25] is **DENIED**.

**SO ORDERED.**

October 3<sup>rd</sup>, 2002

  
Thomas F. Hogan  
Chief Judge

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MEMORANDUM OPINION

**I. INTRODUCTION**

Pending before the Court is Defendants' Motion To Strike Portions of Second Amended Complaint [filed under former case number 01-2646, # 25]. Specifically, Defendants move to strike the second sentence from paragraph 79, paragraphs 89 through 92, and 100 through 104 of Plaintiffs' Second Amended Complaint. For the following reasons, the Court denies the Defendants' Motion.

**II. DISCUSSION**

The Defendants move to strike the above-noted portions of Plaintiffs' Second Amended Complaint, claiming that such portions constitute "a number of potentially prejudicial allegations that are not materially relevant to the issues in this action and, therefore, are immaterial and

impertinent." Def.s' Mot. at 2-3. For example, paragraph 79 of the Second Amended Complaint alleges that "some patients may have stopped taking Lorazepam and Clorazepate tablets altogether, or been forced to reduce the quantity they take, because they cannot afford them." Defendants claim that this bears no relevance to the overall suit at hand, and are included only to inflame the reader and unfairly prejudice Mylan. *Id.* at 4. Paragraphs 89-92 of the same complaint allege insider trading by individuals that the Defendants state "are not parties to this action," and "[t]hus the allegations are not material to the Plaintiffs' claims." *Id.* Finally, paragraphs 100-104 of the complaint deal with alleged "inflammatory newspaper articles and media sound bites that have no relevance to this action" and "will only confuse the issues in this case and cause undue prejudice to Mylan." *Id.* at 6-7.

Plaintiffs rejoin by claiming that "each of the allegations is necessary to demonstrate the nature and scope of Defendants' scheme to drive up the prices for Lorazepam and Clorazepate, which anti-competitive scheme resulted in direct injury to Plaintiffs." Pl.s' Opp. at 2. Further, Plaintiffs argue that in order to state an antitrust claim under pertinent state laws, the Plaintiffs must establish the type of injury that the antitrust injuries are designed to address. *See id.* at 4-5.

### III. LEGAL STANDARD

Motions to strike under Fed. R. Civ. P. 12(f) are drastic actions and are viewed with disfavor. Resolution Trust Corp. v. Gardner, 798 F. Supp. 790, 797 (D.D.C. 1992) (citing Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Pty., 647 F.2d 200, 201 (D.C. Cir. 1981)).

This Court has broad discretion when dealing with motions to strike portions of a pleading. Makuch v. Federal Bureau of Investigation, No. CIV.A.99-1094, 2000 WL 915767, at \*1 (D.D.C. Jan. 7, 2000). In exercising this discretion, the Court remains mindful of the

following considerations:

Motions to strike portions of a pleading are generally disfavored. Such motions are disfavored because, so long as the complaint states a claim and is otherwise legally sufficient, the efforts of the parties and the attention of court are better spent on the substantive merits of the action rather than the contents of the pleadings. They are also disfavored "because striking a portion of a pleading is a drastic remedy and because it often is sought by the movant simply as a dilatory tactic...." 5A Wright & Miller § 1380. All averments sought to be stricken are taken as admitted for purposes of a motion to strike.

Id. (citations omitted).

The Court is aware that Fed. R. Civ. P. 12(f) does not by its terms *require* that matters be prejudicial to be stricken. Id. at 2. The rule is phrased in the disjunctive, allowing the court to strike "from any pleading ... any redundant, immaterial, impertinent, *or* scandalous matter." Id. (citing Fed. R. Civ. P. 12(f) (emphasis added)). However, "the courts view motions to strike portions of a complaint with such disfavor that many courts will grant such a motion only if the portions sought to be stricken as immaterial are also prejudicial or scandalous." Id.

#### IV. ANALYSIS

With this review of pertinent law, the Court now turns to the Defendants' Motion to Strike. Similar to the Makuch court's determination, this Court cannot say that the allegations contained in paragraphs 79, 89–92, and 100–104 of Plaintiffs' Second Amended Complaint are "immaterial or impertinent" as Defendants believe. Nor does the Court find the allegations to be "prejudicial or scandalous." Indeed, the Defendants themselves identify the allegations as only "potentially prejudicial."<sup>1</sup> Def.'s Mot. at 3. Further, while by no means having reached a

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<sup>1</sup> The Court finds persuasive guidance from the Second Circuit Court of Appeals:

In deciding whether to strike a Rule 12(f) motion on the ground that the matter is impertinent and immaterial, it is settled that the motion will be denied, unless it can be shown that no evidence in support of the allegation would be admissible. The Federal Rules of Civil Procedure have long departed from the era when lawyers were

decision on the merits of this case, the Court finds that the paragraphs in question may very well be relevant to Plaintiffs' ability to establish that an antitrust violation has occurred under pertinent state laws.

After analyzing carefully the paragraphs in question and the merits of each parties' competing arguments, the Court here exercises its discretion and declines to strike the portions in question of the Second Amended Complaint.

#### V. CONCLUSION

For the reasons stated above, the Court will deny Defendants' Motion To Strike Portions of Second Amended Complaint [filed under former case number 01-2646, # 25]. An appropriate Order will accompany this Opinion.

October 3, 2002

  
Thomas F. Hogan  
Chief Judge

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bedeviled by intricate pleading rules and when lawsuits were won or lost on the pleadings alone. Thus the courts should not tamper with the pleadings unless there is a strong reason for so doing.

Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976) (citations omitted).

If at some later point this case approaches a jury trial on the merits, the Court may revisit this issue of undue prejudice via a motion in limine under Fed. R. Evid. 403. Indeed, if this Court feels that the pleadings in question "are prejudicial, it can direct that they be not read to the jury. The pleadings are not evidence." Sinaiko Bros. Coal & Oil Co. v. Ethyl Gasoline Corp., 2 F.R.D. 305, 306 (S.D.N.Y. 1942).