

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ABBVIE INC. et al.,

Defendants.

CIVIL ACTION

Case No. 14-cv-5151

[PROPOSED] ORDER

The matter is before the Court on the motion filed by Defendants AbbVie Inc., Abbott Laboratories, and Unimed Pharmaceuticals, LLC (“the AbbVie Defendants”). The Court hereby ORDERS as follows:

1. The supersedeas bond in the amount of \$484,449,943 issued by Liberty Mutual Insurance Company is hereby approved; and
2. Pursuant to Federal Rule of Civil Procedure 62(d), this Court’s Judgment, dated July 18, 2018 (Dkt. No. 448), is stayed pending the final resolution of appellate proceedings.

While the stay is in effect, no execution may issue on the Judgment, nor may any proceedings be taken to enforce it.

Dated: _____

The Honorable Harvey Bartle, III
United States District Judge

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ABBVIE INC. et al.,

Defendants.

CIVIL ACTION

Case No. 14-cv-5151

**ABBVIE DEFENDANTS' MOTION FOR APPROVAL OF A SUPERSEDEAS BOND
AND STAY OF JUDGMENT UNDER RULE 62(d)**

Defendants AbbVie Inc., Abbott Laboratories, and Unimed Pharmaceuticals, LLC (“the AbbVie Defendants”) respectfully move for approval of a supersedeas bond in the amount of \$484,449,943 issued by Liberty Mutual Insurance Company and for a stay of the Judgment against the AbbVie Defendants under Federal Rule of Civil Procedure 62(d). Pursuant to Local Rule 7.1, this Motion is based on the Memorandum in Support of the AbbVie Defendants’ Motion.

Dated: August 9, 2018

Respectfully submitted,

/s/ Stuart N. Senator

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

FEDERAL TRADE COMMISSION,

Plaintiff,

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ABBVIE INC. et al.,

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CIVIL ACTION

Case No. 14-cv-5151

**MEMORANDUM IN SUPPORT OF ABBVIE DEFENDANTS' MOTION FOR
APPROVAL OF A SUPERSEDEAS BOND AND
STAY OF JUDGMENT UNDER RULE 62(d)**

On July 18, 2018, the Court issued a Judgment (Dkt. No. 448) in favor of Plaintiff Federal Trade Commission (“FTC”) and against Defendants AbbVie Inc., Abbott Laboratories, and Unimed Pharmaceuticals, LLC (“the AbbVie Defendants”) in the amount of \$462,181,397 (an amount that includes \$42,864,196 in prejudgment interest). Both the AbbVie Defendants and FTC have filed notices of appeal from this Court’s Judgment.¹ Pursuant to Federal Rule of Civil Procedure 62(d), and as contemplated by the Court’s Order of July 18, 2018, the AbbVie Defendants now move for approval of a supersedeas bond and entry of a stay of the Judgment pending final resolution of appellate proceedings.

The AbbVie Defendants and the FTC have extensively conferred about the bond and the proposed stay, and they have reached agreement on the amount of the bond, the identity of the surety, the form of the bond, and virtually all aspects of the requested stay. All parties thus agree that a stay of the Judgment should issue. There is only one remaining dispute between the parties about the scope of that stay: whether Paragraph 4 of the Judgment, which requires the Defendants to provide information to the FTC “relevant to facilitate distribution of the money paid under this Judgment” and allows the parties to “seek relief from the court” with respect to any dispute, should be excluded from the scope of the stay. Because that paragraph is directly related to the portions of the Judgment requiring the AbbVie Defendants to pay money to the FTC, and because reversal or vacatur of the Judgment by the court of appeals would render moot any transfer of information to facilitate distribution of that money to third parties, the AbbVie Defendants respectfully submit that the stay should encompass Paragraph 4.

¹ The filing of a notice of appeal does not divest a district court of jurisdiction to approve a supersedeas bond and to stay its judgment. *See, e.g., Venen v. Sweet*, 758 F.2d 117, 120 n.2 (3d Cir. 1985). Rule 62(d) specifically contemplates granting such a motion once an appeal has been taken. *See* Fed. R. Civ. P. 62(d); *see also* Fed. R. App. P. 8(a).

ARGUMENT

Rule 62(d) “entitles a party appealing a money judgment to an automatic stay upon posting a supersedeas bond.” *FTC v. NHS Sys., Inc.*, 2009 WL 4729893, at *1 (E.D. Pa. Dec. 10, 2009) (quoting *Hebert v. Exxon Corp.*, 953 F.2d 936, 938 (5th Cir. 1992)); *see also, e.g.*, *Supinski v. United Parcel Serv., Inc.*, 2012 WL 2905458, at *6 (M.D. Pa. July 16, 2012); *FTC v. Neovi, Inc.*, 2009 WL 10672945, at *1-4 (S.D. Cal. May 18, 2009) (applying Rule 62(d) in case in which FTC was awarded disgorgement). A supersedeas bond “should generally be sufficient in amount to satisfy the judgment, plus interest and costs.” *Evergreen Cmty. Power LLC v. Riggs Distler & Co.*, 2012 WL 2974891, at *1 (E.D. Pa. July 19, 2012) (Bartle, J.). Under Rule 62(d), “[t]he stay takes effect when the court approves the bond.” Fed. R. Civ. P. 62(d).

A. This Court Should Approve The AbbVie Defendants’ Bond Pursuant To Rule 62(d) And Order That The Judgment Be Stayed

The AbbVie Defendants have obtained an adequate bond under Rule 62(d), and they respectfully request that this Court approve the bond and order that the Judgment be stayed pending final resolution of appellate proceedings. A copy of the executed bond, which is dated August 6, 2018, is attached hereto as Exhibit A. The AbbVie Defendants stand ready to deposit the original of the bond with the Clerk’s Office upon this Court’s approval of the bond.

The bond is proper under Rule 62(d) as to amount, the identity of the issuing surety, and form. *First*, the amount of the bond is “sufficient,” *Evergreen*, 2012 WL 2974891, at *1, and the FTC has informed the AbbVie Defendants that it has no objection to the bond amount. The total amount covered by the bond is \$484,449,943. The bond is thus large enough to satisfy the full amount of the judgment against the AbbVie Defendants (including prejudgment interest), as well as (a) the AbbVie Defendants’ allocated share of the FTC’s estimated costs and (b) estimated post-judgment interest at the statutory rate for two years. *See id.* The AbbVie Defendants note

that they increased the amount of the bond, at the FTC's request, to cover two years of post-judgment interest (rather than one year, as courts in this district have found acceptable in the past, *see, e.g., North River Ins. Co. v. Greater New York Mut. Ins. Co.*, 895 F. Supp. 83, 85 (E.D. Pa. 1995)).

Second, there is no question about the financial solvency of the surety, to which the FTC has informed the AbbVie Defendants it does not object. The supersedeas bond was issued by Liberty Mutual Insurance Company, which is on the United States Treasury's list of approved sureties. *See* List of Certified Companies, U.S. Department of the Treasury, <https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/CertifiedCompanies.pdf>; *see also* *Cashman Equip. Corp. v. United States Fire Ins. Co.*, 2008 WL 5000355 (E.D. Pa. Nov. 21, 2008).

Third, the form of the bond guarantees payment of the Judgment to the FTC at the conclusion of appellate proceedings if the Court's Judgment is affirmed (or, if the Judgment is modified on appeal, payment of the Judgment as so modified). The FTC has informed the AbbVie Defendants that it has no objection to the form of the bond, which reflects all of the changes that the FTC requested during the parties' discussions in advance of the filing of this motion.

For all of those reasons, the AbbVie Defendants respectfully request that the Court approve the bond under Rule 62(d) and order a stay of the Judgment pending final resolution of appellate proceedings.

B. Paragraph 4 Of The Judgment Should Not Be Carved Out Of The Stay

While there is no dispute between the parties about the adequacy of the bond, the parties have one dispute relevant to this motion: the FTC has informed the AbbVie Defendants that it

believes that Paragraph 4 of the Judgment should be carved out of the scope of the stay, and the AbbVie Defendants disagree. Paragraph 4 provides that “[n]o later than 30 days after receiving a written request by the [FTC], the defendants, at their own cost and expense, shall provide to the [FTC] information and data in their possession, custody, or control relevant to facilitate distribution of the money paid under this Judgment, including but not limited to the name, last known contact information, and prescription and purchasing data of AndroGel customers and consumers.” Judgment at 3. Paragraph 4 further provides that “[i]f defendants object to any written request, or defendants refuse to produce requested information, the parties may seek relief from the court.” *Id.*²

This Court should include Paragraph 4 of the Judgment within the scope of the stay. Rule 62(d) does not expressly contemplate staying certain portions of the Judgment while allowing other portions to remain unstayed; it states merely that “[t]he stay takes effect when the court approves the bond.” Fed. R. Civ. P. 62(d). The AbbVie Defendants understood the Court to be indicating at the recent status conference that upon approval of a supersedeas bond Paragraph 4 of the Judgment would be stayed along with other provisions. And, in any event, Paragraph 4 is directly linked to the AbbVie Defendants’ obligation to pay money, which the supersedeas bond secures, because that paragraph requires provision of information that will

² The FTC has also informed the AbbVie Defendants that it would like to exclude from the scope of the stay Paragraph 5 of the Judgment, which states that “[t]he defendants shall notify the [FTC] at least 30 days prior to a change that may affect their respective compliance obligations arising out of this Judgment, including any proposed dissolution, acquisition, merger, or consolidation.” Judgment at 3. To the extent that Rule 62(d) permits exclusion of portions of the Judgment from a stay pending appeal, the AbbVie Defendants have no objection to excluding Paragraph 5 of the Judgment from the scope of the stay. Unlike Paragraph 4, Paragraph 5 relates to the AbbVie Defendants’ ultimate ability to satisfy the Judgment if it is upheld on appeal, and complying with Paragraph 5 while the appeal is pending would not impose any burden on the AbbVie Defendants or on the Court.

“facilitate distribution of the money paid under this Judgment.” Judgment at 3. If the Judgment is reversed or vacated on appeal, then no money need ever be paid, and any provision to the FTC during the pendency of the appeal of information that will facilitate distribution of the money to third parties will have been entirely superfluous.

Denying the AbbVie Defendants a stay of Paragraph 4 thus imposes on them a burden and an expense that may turn out, at the conclusion of appellate proceedings, to have been unnecessary. It also risks placing unnecessary burdens on the time and resources of the Court, since Paragraph 4 states that any disputes over provision of the information—which may well, as discussed at the recent status conference with the Court, include sensitive patient data—should be brought before the Court for resolution.

If the Judgment were ultimately upheld, the FTC would obtain the information it seeks from the AbbVie Defendants with reasonable expedition. Presumably the FTC would have formulated its information requests to serve them promptly upon expiration of the stay. And if disputes that need to be presented to the Court arise, presumably such disputes can be resolved without significant delay.

The text and structure of the Judgment reinforce the conclusion that the FTC should wait until after the final resolution of appellate proceedings to obtain information from the AbbVie Defendants under Paragraph 4. The Judgment provides that—regardless of any stay—the FTC shall not disburse any money “until this action has been finally resolved, including any appeals.” Judgment at 2. Accordingly, the FTC can have no immediate need for information that will aid in disbursement. In addition, the Judgment gives the FTC 60 days (once an applicable stay is lifted) to “develop a plan of administration” for the money “to identify valid claims and to distribute equitably redress to consumers or other purchasers,” and contemplates an additional

period of time for the defendants “to comment” and for the court to approve any such plan. Judgment at 2 (Paragraph 3). It is unclear how information in Defendants’ possession “relevant to facilitate distribution” of the money, including the names of “customers and consumers,” Judgment at 3, also would be relevant to development of such a plan by the FTC—but to the extent that it is relevant, Paragraph 4 allows the parties and the Court a sufficient opportunity to consider that information.

CONCLUSION

For all of the foregoing reasons, the AbbVie Defendants respectfully request that the Court approve the bond and order that the Judgment be stayed pursuant to Rule 62(d) pending final resolution of appellate proceedings.

Dated: August 9, 2018

Respectfully submitted,

/s/ Stuart N. Senator

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CERTIFICATE OF SERVICE

I certify that, on August 9, 2018, the foregoing document was filed with the United States District Court for the Eastern District of Pennsylvania using the ECF system. The document is available for viewing and downloading.

/s/ Stuart N. Senator