

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01659

THE STATE OF MISSISSIPPI,

Appellant,

v.

**BAYER CORPORATION
BAYER PHARMACEUTICALS CORPORATION
AND BAYER HEALTHCARE CORPORATION,**

Appellees.

BRIEF FOR APPELLANT

***ON APPEAL FROM THE HINDS CHANCERY COURT,
FIRST JUDICIAL DISTRICT***

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CERTIFICATE OF INTERESTED PERSONS

Appellant, the State of Mississippi, as a “governmental party” is not required to complete a certificate of interested persons, pursuant to Mississippi Rule of Appellate Procedure 28(a)(1).

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STATEMENT OF THE ISSUE

Whether the chancery court erred in granting Bayer's Rule 12(b)(6) motion and dismissing the State's claims against Bayer, based on the finding that a prior settlement agreement barred the State from pursuing damages on drugs that were not subject to the settlement release.

STATEMENT OF THE CASE

I. Course of Proceedings Below.

On October 20, 2005, the State of Mississippi ("State") filed its Original Complaint against Bayer Corporation, Bayer Pharmaceuticals Corporation, and Bayer Healthcare, LLC (collectively "Bayer"), as well as other defendants, in the chancery court of Hinds County. The State's lawsuit is based on Defendants' fraudulently misrepresenting the Average Wholesale Prices ("AWPs") of their drugs with full knowledge that the State used the AWP's as a basis for reimbursing Medicaid providers for providing prescription drugs to Medicaid beneficiaries.

After Bayer moved to dismiss the Complaint as regarded itself (see R.E. 4), the special masters appointed in the case granted that motion with prejudice as regarded six specific drugs (the "Qui Tam Drugs") which were the subject of a 2001 Settlement Agreement (R.E. 9) reached by Bayer and 47 states, including the State of Mississippi, but left open the prospect of a new action regarding other drugs. R.E. 5 at 1800.¹

The State filed its First Amended Complaint (R.E. 7), expressly naming particular drugs not specified in the 2001 Settlement Agreement (the "Non-Qui Tam Drugs"). Bayer again moved to dismiss the State's claims, again invoking the same Settlement Agreement and arguing that it covered the Non-Qui Tam Drugs. R.E. 8. The special masters found the Agreement did cover the Non-Qui Tam Drugs, R.E. 3 at 1556, and the chancery court entered an Order on

¹ The Record Excerpts are cited by tab number and the trial court's Bates number.

September 2, 2008 adopting their recommendation to grant Bayer's motion. R.E. 2.

Further, on September 16, 2008 the chancery court entered an order which provided all defendants, except Bayer, unique case numbers and transferred all of them, again except Bayer, to Rankin County. (See Appendix A to this brief.) The order of severance and transfer makes no mention of Bayer, for the reason that Bayer had been dismissed by the chancery court on September 2. Bayer had expressly opted out of the other Defendants' motion for severance. R.E. 12. Therefore, the severance left Bayer as the sole Defendant in the case, and the chancery court's order dismissing Bayer was a final order and thus appealable under M.R.C.P. 54.

The State timely appealed on September 30, 2008. R.E. 13.

II. Relevant Facts.

The First Amended Complaint against Bayer alleges violations of the Medicaid Fraud Control Act, Miss. Code Ann. § 43-13-207; unfair or deceptive trade practices in or affecting commerce, in violation of Miss. Code Ann. § 75-24-5; and common law fraud. R.E. 7 at 1082-85. The lawsuit contends that Bayer, and many other pharmaceutical companies, reaped hundreds of millions of dollars in unjust profits by building market share in select drugs using an inflated AWP. Evidence will show that the official AWPs listed have little relation to the actual prices that drug companies charge private doctors, hospitals and medical providers for Mississippi Medicaid patients.

When Bayer moved to dismiss the original Complaint, claiming the 2001 Settlement Agreement not only covered the Qui Tam Drugs specified in the Agreement, but all Bayer drugs, the court-appointed special masters entered Report & Recommendation ("R&R") No. 2, which provided in relevant part that:

In any event, absent any specific allegation of wrongdoing as to Non-*Qui Tam* Drugs, we find no basis for the State's claims relating to the pre-settlement period to proceed at this point. *See Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 495 (Miss. 2004). If at a later date the State has evidence the comprehensive investigation previously made against Bayer that resulted in the settlement should have included other drugs for the time prior to 2001, the State may bring a new action at that time.

R.E. 5 at 1797 (emphasis added).

On September 5, 2006, the special masters entered R&R No. 16, which provided in relevant part that the State

shall file its amended complaint to comply with Rules 8, 9, and 11, and, at a minimum, shall plead as to each Defendant the specific

drug(s) in issue, and if ascertainable, the allegedly fraudulent AWP(s) for each such drug, and the basis for alleging each such AWP was fraudulent.

R.E. 6 at 1806.

On October 5, 2006 the State filed its First Amended Complaint fully complying with the pleading standards set forth in M.R.C.P. 9(b), as well as the special masters' R&R Nos. 2 and 16. R.E. 7. Specifically, with regards to Bayer, the State went back and combed through its research of the Non-Qui Tam Drugs and reasserted claims against specific Bayer products with fraudulent AWP's.

In particular, the Amended Complaint explicitly sets forth the National Drug Code ("NDC") of thirty-one drugs for which Bayer reported inflated AWP's. R.E. 7 at 1103-04. Furthermore, the Amended Complaint states that the true AWP at which Bayer sold its drugs in the marketplace was at least seventeen (17) percent lower than the reported AWP which the State of Mississippi's Division of Medicaid used to reimburse providers. R.E. 7 at 1057-58. The Amended Complaint also provides the "basis for alleging each such AWP was fraudulent," in its assertion that Bayer

caused false Average Wholesale Prices for each of the listed pharmaceuticals to enter the stream of commerce knowing that they would be used by Mississippi as the principal means of estimating the acquisition cost of pharmaceuticals dispensed to beneficiaries of the Medicaid program, causing Mississippi to overpay [Bayer's] customers in violation of state law as alleged below.

R.E. 7 at 1057-58.

On February 21, 2008, Aventis Pharmaceuticals Inc., "on behalf of all Defendants in this case," filed a Motion for Judgment on the Pleadings arguing,

among other things, that the State's Amended Complaint failed to plead fraud with particularity. R.E. 10 at 1437, 1439.

On March 19, 2008 the special masters entered R&R No. 33 in response to Defendants' Joint Motion for Judgment on the Pleadings, and found in pertinent part as follows:

In Report and Recommendation No. 16 . . . we pointed out that the original Complaint had identified the time during which the alleged fraud had occurred (1991 through the present), the place (throughout the State where providers were reimbursed by Medicaid based upon alleged false filing), the contents of the false misrepresentations (allegedly inflated AWP's,) the person engaged in the fraud (the defendants), and what was obtained as a result (marketing of the spread resulting in allegedly greater sales). What the State did not do in its original Complaint was identify as to each defendant the specific drug to which each defendant was alleged to have submitted a false AWP. In addition, the State's original Complaint failed to set forth the allegedly fraudulent AWP for each drug and the basis for alleging that each such AWP was fraudulent.

. . .

. . . It is clear, however, in our view, that the Defendants have been given adequate specific notice of the fraud alleged against them in the Amended Complaint. They now have been told the specific drug for which the Attorney General contends they submitted a false AWP, the time period during which the State alleges this occurred, the place where it occurred, the methodology of it occurring, and what was obtained as a result. Accordingly, we do not believe that additional specificity is required.

R.E. 11 at 2248 (emphasis added). Conspicuously, the special masters concluded by noting additional specificity was not required. The specificity of the allegations pled in the State's Amended Complaint is equal in degree against Bayer and the other Defendants. R.E. 7 at 1057-59.

Drugs, "it is logical to assume that those concerns would have been addressed" in the Settlement. *Id.*

The specific provision regarding the release of claims states that Bayer is release[d] from liability for the "Covered Conduct." R.E. 9 at 1572-74. According to the Preamble of the Agreement, "Covered Conduct" is defined as

conduct during the period January 1993 through August 1999 involving the marketing and sale of Koate-HP Antihemophilic Factor (Human), Kogenate Antihemophilic Factor (Recombinant), Konyne-80 Factor IX Complex (Human), Gamimune N, 5% Immune Globulin Intravenous (Human, 5%), Gamimune N, 10% Immune Globulin Intravenous (Human, 10%), and Thrombate III Antithrombin III (Human)(collectively referred to hereafter as the Qui Tam Drugs).

R.E. 9 at 1572-74.

The Agreement reserved the right for the State to bring an action against Bayer for Non-Qui Tam Drugs, as follows:

Notwithstanding any other terms of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including BAYER) are any and all of the following: . . . Any civil or administrative liability that BAYER has or may have under any state statute, regulation or rule not released in Paragraph III(2) above.

R.E. 9 at 1579.

The Agreement also mandates Bayer's cooperation with the State's investigations. Specifically, the Agreement states:

Bayer covenants to cooperate fully and truthfully with the STATE in any ongoing investigation or investigation commenced within five years of the Effective Date of this Agreement of individuals and entities not specifically released by this Agreement . . . relating to the Covered Conduct.

R.E. 9 at 1584.

The Release's Preamble contains very specific language regarding the "Qui Tam Drugs," as they are the subject of the Covered Conduct. The Dismissal provision references only claims relating to "Covered Conduct." R.E. 9 at 1579. It does not provide for the dismissal of any Bayer drugs other than those six drugs cited in the definition of "Covered Conduct." R.E. 9 at 1572.

Bayer had previously paid \$48,608.09 to the State in consideration for releasing Bayer from liability for the "Covered Conduct." R.E. 9 at 1576-77. During the time period at issue in the case, the State reimbursed approximately \$37.7 million for Bayer drugs, *not including* the six Qui Tam Drugs. R.E. 14 at 1561.

SUMMARY OF THE ARGUMENT

The special masters and the chancery court wrongly imposed a heightened pleading standard on the State by forcing the State to bring forth evidence to show why the Non-Qui Tam Drugs had not previously been identified in the Department of Justice's investigation. Bayer argued, and the chancery court agreed, that the instant action is barred by the prior Settlement Agreement based on the assumption that drugs other than those specifically cited in the Settlement Agreement were released. However, on a motion to dismiss, the trial court's lone concern should be the sufficiency of the complaint; therefore, Bayer's defenses are not a factor in that evaluation. The State did not have to anticipate Bayer's affirmative defenses in order to survive a motion to dismiss.

Alternatively, in considering matters outside the pleadings, the chancery court should have converted Bayer's motion to dismiss to a motion for summary judgment. Such a conversion requires proper notice, which was never provided. The failure of proper notice requires rejection of the chancery court's order of dismissal.

Finally, the chancery court committed reversible error in assuming that the Department of Justice's investigation and False Claims Act case included Non-Qui Tam Drugs. The chancery court went beyond the text of the Settlement Agreement to assign meaning and intent, in contravention of Mississippi law. Bayer has used the Agreement for purposes of amnesty in many other AWP cases. However, courts across the country have repeatedly refused to adopt Bayer's position that the Agreement encompasses drugs other than those which it

specifically names. Reading the Agreement within its four corners, as the trial court was legally obliged to do, this Court will see that the Agreement is concerned with the "Covered Conduct," which cannot be read to the inclusion of the Non-Qui Tam Drugs. Additionally, the State's claims squarely fall into the Reservation Provision of the Settlement Agreement because the drugs at issue are not considered part of the conduct released by the Agreement.

For these reasons, the chancery court erred in granting the Motion to Dismiss, and this Court should reverse that decision and allow the State to present its case on the merits.

ARGUMENT

Motions to dismiss are reviewed *de novo* by this Court. *Ralph Walker, Inc. v. Gallagher*, 926 So. 2d 890, 893 (Miss. 2006).

Under a *de novo* standard of review, we will affirm only if the moving party can show beyond doubt that the plaintiff failed “to state a claim upon which relief can be granted.” Miss. R. Civ. P. 12(b)(6). In order for us to affirm a grant, or reverse a denial, of a Rule 12(b)(6) motion to dismiss, it must be such that no set of facts would entitle the opposing party to relief.

Id. The facts are to be construed in the favor of the non-movant. *Richardson v. Sara Lee Corp.*, 847 So. 2d 821, 823 (Miss. 2003). Motions to dismiss under Rule 12(b)(6) are “not favored.” *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990). “When considering a 12(b)(6) motion, the court’s inquiry essentially is limited to the content of the complaint.” *Id.*

- I. The Trial Court Erred in Holding the State to a Heightened Pleading Standard Based on a Previous Settlement Agreement Which Should Not Have Been Considered at the Motion to Dismiss Stage.**
- A. The State’s Amended Complaint sets forth facts which would entitle the State to relief against Bayer.**

The special masters set forth the general pleading requirements for this case in R&R No. 16, which provided, in pertinent part, that the State

shall file its amended complaint to comply with Rules 8, 9, and 11, and, at a minimum, shall plead as to each Defendant the specific drug(s) in issue, and if ascertainable, the allegedly fraudulent AWP(s) for each such drug, and the basis for alleging each such AWP was fraudulent.

R.E. 6 at 1806. The State amended its Complaint in compliance with the pleading standards set forth in M.R.C.P. 9(b), as well as with the special masters’ R&R Nos. 2 and 16. The Amended Complaint explicitly sets forth each “specific drug

in issue.” R.E. 7 at 1103-04. Furthermore, the Amended Complaint specifically states that the true AWP at which Bayer sold its drugs in the marketplace was seventeen (17) percent lower than the price at which it was reimbursed by the State of Mississippi’s Division of Medicaid. R.E. 7 at 1057-58. The Amended Complaint also provides the “basis for alleging each such AWP was fraudulent,” in its assertion that Bayer

caused false Average Wholesale Prices for each of the listed pharmaceuticals to enter the stream of commerce knowing that they would be used by Mississippi as the principal means of estimating the acquisition cost of pharmaceuticals dispensed to beneficiaries of the Medicaid program, causing Mississippi to overpay [Bayer’s] customers in violation of state law as alleged below.

R.E. 7 at 1058.

All Defendants, including Bayer, filed a joint motion to dismiss the State’s Amended Complaint based on inadequate pleading under M.R.C.P. 9(b). However, the State has met the “notice pleading” requirement of Mississippi. M.R.C.P. 8; *see also Bedford Health Props., LLC v. Estate of Williams*, 946 So. 2d 335, 350 (Miss. 2006). Under M.R.C.P. 8, “no magic words are required. . . . [I]t is only necessary that the pleadings provide sufficient notice to the defendant of the claims and grounds upon which relief is sought.” *Estate of Stevens v. Wetzel*, 762 So. 2d 293, 295 (Miss. 2000).

In contradiction to Bayer’s position that the State’s Amended Complaint lacked specificity, the chancery court issued an Order adopting special masters’ R&R 33 which found the State’s Amended Complaint contained the requisite specificity under M.R.C.P. 9(b). The special masters expressly noted, “in our

view, the Defendants have been given adequate specific notice of the fraud alleged against them in the Amended Complaint.” R.E. 11 at 2248. The special masters concluded by stating “we do not believe that additional specificity is required.” *Id.* The degree of specificity in the allegations against Bayer is equivalent to those against the other defendants in the State’s Amended Complaint. Rule 9(b) requires the State plead the “circumstances of the alleged fraud such as the time, place and contents of any false representations or conduct.” *Howard v. Estate of Harper*, 947 So. 2d 854, 861 (Miss. 2006) (citation omitted). Rule 9(b)’s deliberate use of “such as” is a clear indication that “time, place, and contents” are examples of “circumstances” and not requirements. *See, e.g., Bosarge v. State*, 786 So. 2d 426, 437 (Miss. Ct. App. 2001) (list of factors showing reliability of evidence “such as” A, B, C, etc., “by no means exclusive”).

Despite finding the State met the pleading requirements of M.R.C.P. 9(b) in R&R 33 with respect to all Defendants, the special masters and chancery court created a heightened pleading standard as regards Bayer. Such a rigorous pleading requirement contravenes Mississippi law. On this basis alone, the Court has sufficient grounds to reverse the decision of the chancery court.

B. The Chancery Court should not have considered the Settlement Agreement in ruling on Bayer’s Motion to Dismiss.

Despite its affirmation that the State’s Amended Complaint complied with Mississippi’s pleading requirements, the chancery court (in adopting R&R 35) went beyond its limited purview at the motion to dismiss stage and considered the applicability of a Settlement Agreement in deciding Bayer’s Motion to Dismiss.

Assuming arguendo that the 2001 Settlement Agreement does encompass Non-Qui Tam Drugs, which it does not, it remains Mississippi law that “when a court is considering a motion to dismiss, the allegations in the complaint must be taken as true.” *Lang vs. Bay St. Louis/Waveland Sch. Dist.*, 764 So. 2d 1234, 1236 (Miss. 1999) (citing *T.M. v. Noblitt*, 650 So. 2d 1340, 1342 (Miss. 1995)). The motion “should not be granted unless it appears beyond a reasonable doubt that the Plaintiff can prove no set of facts in support of his claim which entitled him to relief.” *Butler v. Bd. of Supervisors for Hinds County*, 659 So. 2d 578, 581 (Miss. 1995).

The allegations in the State’s Amended Complaint should have been the only focus of the chancery court when it ruled on Bayer’s Motion to Dismiss. In light of the findings by the special masters in R&R 33 (adopted by the chancery court) that the State’s Amended Complaint stated claims for which relief may be granted, the court’s analysis should have ended there. Unlike a Rule 56 motion for summary judgment, a Rule 12(b)(6) motion is decided on the face of the complaint alone. *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1210 (Miss. 2001) (citations omitted). The chancery court clearly failed to decide Bayer’s motion properly, and exceeded the scope of its review by considering extrinsic evidence that is not central to the State’s claims. In doing so, the chancery court prematurely and improperly delved into the merits of the State’s claims.

The preclusive effect of the Settlement Agreement is of no consequence to the adequacy of the State’s allegations. The preclusion arguments raised by

Bayer, albeit impliedly, are grounded in the affirmative defenses of accord and satisfaction, compromise and settlement, and/or *res judicata*. M.R.C.P. 8(c). A motion to dismiss is solely concerned with the sufficiency of the complaint, and Bayer's defenses are not a factor in that evaluation. *Stanton & Associates, Inc. v. Bryant Const. Co., Inc.*, 464 So. 2d 499, 505 (Miss. 1985) (finding the sufficiency of the complaint is in "substantial part determined by Rule 8(a) and (e)).

A complaint does not have to anticipate affirmative defenses to survive a motion to dismiss. See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); cf. *Bourn v. Tomlinson Interests, Inc.*, 456 So. 2d 747, 749 (Miss. 1984) (Miss. courts look to federal courts' interpretation of parallel rules of civil procedure). This of course is obvious from the rule that Rule 12(b)(6) motions are decided on the face of the *complaint*, not of the complaint and the answer (which is where affirmative defenses are pleaded). Rule 12 affords Bayer the opportunity to raise an affirmative defense "in any pleading permitted or so ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." M.R.C.P. 12(h)(2). Rule 12(b)(6) is not mentioned. Therefore, the State's claims must survive judicial scrutiny for purposes of a Rule 12(b)(6) attack.

It was therefore error for the chancery court to dismiss the State's complaint as to Bayer for, in essence, failing to anticipate affirmative defenses. This Court should reverse and remand.

C. *Alternatively when Bayer offered the Settlement Agreement with its Motion to Dismiss, the Chancery Court should have converted it to a Motion for Summary Judgment.*

Alternatively, disposition of Bayer's Motion to Dismiss invited recourse to matters outside the pleadings and, therefore, conversion to a motion for summary judgment. "If, on a motion to dismiss for the failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56" M.R.C.P. 12(b); *see Walton v. Bourgeois*, 512 So. 2d 698, 700 (Miss. 1987). Such a conversion by the special masters and chancery court requires proper notice, which was never provided. The failure of proper notice requires rejection of the chancery court's Order of dismissal. *Huff-Cook, Inc. v. Dale*, 913 So. 2d 988, 992 (Miss. 2005) (citing *Palmer v. Biloxi Reg'l. Med. Ctr. Inc.*, 649 So. 2d 179, 181-83 (Miss. 1995)). On this ground, this Court should reverse and remand to allow proper development of the legal and factual issues.

II. *The Trial Court Erred in Finding the 2001 Settlement Agreement Barred the State's Claims For Drugs Not Subject to the Release.*

The chancery court did not specifically provide the legal basis for its decision to dismiss the State's claims -- which may be reversible error in itself. However, the reasonable inference is that the chancery court's finding of preclusion is grounded in the defenses of waiver and release, or in the doctrine of accord and satisfaction. If that is the case, and the chancery court did follow the

special masters in that regard, then not only did the chancery court err by considering the Agreement on a Rule 12(b)(6) motion, but it also committed error by going beyond the “four corners” of the Agreement and dismissing Bayer based on extrinsic and disputed “facts.”

A. The chancery court went outside the “four corners” of the Settlement Agreement in determining its preclusive effect.

Bayer presented no evidence that the federal case and settlement was the result of a “broad-based investigation of Bayer” or that the investigation was “joined in by the 47 states.” R.E. 3 at 1558. Nonetheless, this averment appears to have been accepted below in the present case. That was error.

In the absence of fact-finding regarding the investigation and Settlement Agreement, the special masters ruled the State’s Amended Complaint did not plead additional evidence against Bayer “other than throwing up the names of some new drugs” without providing any “specific allegation to reflect that the previous settlement and investigation leading up to it was inadequate.” R.E. 3 at 1558. They further reviewed the Settlement Agreement and concluded that “had concerns arisen about price reporting” on the Non-Qui Tam Drugs, “it is logical to assume that those concerns would have been addressed” in the Settlement Agreement. R.E. 3 at 1558. But what place do “assumptions” have under Rule 12(b)(6)? Frankly, this is an exercise in telepathy, not a reasonable inference regarding litigation in which the chancery court did not participate, and for which its sole witness is Bayer itself.

The chancery court went beyond the text of the Settlement Agreement by assigning meaning and intent to the Agreement. A court should endeavor to find the "legal purpose and intent of the parties from an objective reading of the words employed in the contract to the exclusion of parol or extrinsic evidence." *Cooper v. Crabb*, 587 So. 2d 236, 239 (Miss. 1991). "The reviewing court is not at liberty to infer intent contrary to that emanating from the text at issue." *Id.* at 241. Thus, the chancery court clearly departed from the basic tenets of contract interpretation. It was not privy to the federal litigation and could not make acceptable inferences thereon -- certainly not on a Rule 12(b)(6) motion.

In interpreting a contract, the cardinal rule is to give effect to the parties' intentions as reflected in the contract. *Holland v. Mayfield*, 826 So. 2d 664, 669 (Miss. 1999). This interpretation must proceed under objective, not subjective, standards. *Simmons v. Bank of Miss.*, 593 So. 2d 40, 42 (Miss. 1992). *See also Cooper*, 587 So. 2d at 241.

The ultimate focus of the chancery court should have been what Bayer and the State said in the Settlement Agreement, as "words employed are by far the best resource for ascertaining intent and assigning meaning with fairness and accuracy." *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077, 1084 (Miss. 2000). Courts must look within the "four corners" of the contract whenever possible to determine how to interpret it. *Id.* The court shall read the contract as a whole, so as to give effect to all of its clauses. *Warwick v. Gautier Utility Dist.*, 738 So. 2d 212, 215 (Miss. 1999).

“Only if the language is unclear or ambiguous can the court go beyond the text to determine intent.” *Turner v. Terry*, 799 So. 2d 25, 32 (Miss. 2001). Furthermore, where a contract is doubtful or ambiguous, any ambiguity must be construed against the drafter. *Banks v. Banks*, 648 So. 2d 1116, 1121 (Miss. 1994) (“When the terms of a contract are vague or ambiguous, they are always construed more strongly against the party preparing it.”).

Contrary to the foregoing legal principles, the chancery court failed to conduct a thorough fact-finding review and likewise failed to apply the appropriate law. The specific provision regarding the release of claims, which will be discussed in more depth later, states that Bayer is released from liability for the “Covered Conduct.” R.E. 9 at 1572-73. According to the Preamble of the Agreement, “Covered Conduct” is defined as

conduct during the period January 1993 through August 1999 involving the marketing and sale of Koate-HP Antihemophilic Factor (Human), Kogenate Antihemophilic Factor (Recombinant), Konyne-80 Factor IX Complex (Human), Gamimune N, 5% Immune Globulin Intravenous (Human, 5%), Gamimune N, 10% Immune Globulin Intravenous (Human, 10%), and Thrombate III Antithrombin III (Human)(collectively referred to hereafter as the Qui Tam Drugs).

R.E. 9 at 1572-73 (emphasis added). It is clear from the definition of “Covered Conduct” that the conduct at issue includes, and is limited to, the “marketing and sale” of the six drugs specified in the explanation of “Covered Conduct,” and that no other drugs are designated by “Qui Tam Drugs.” *Id.*

Pointedly, the 2001 Settlement specifically reserved the right for the State to bring an action against Bayer for the Non-Qui Tam Drugs, noting that

[n]otwithstanding any other terms of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including BAYER) are any and all of the following: . . . Any civil or administrative liability that BAYER has or may have under any state statute, regulation or rule not released in Paragraph III(2) above.

R.E. 9 at 1579. Therefore, the 2001 Settlement not only limits the scope of the release to Qui Tam Drugs, it anticipates future claims for Non-Qui Tam Drugs. Bayer argues that the Release settles all “claims arising out of alleged inflation of AWP.” R.E. 4 at 1927. However, when read as a whole, the Release explicitly defines “Covered Conduct” as the “inflation of AWP” but also specifically includes the six Qui Tam Drugs in the definition – and no other drugs. R.E. 9 at 1572-73. The Release’s Preamble contains very specific language regarding the “Qui Tam Drugs,” as they are the subject of the Covered Conduct. The Dismissal provision references only claims relating to “Covered Conduct.” R.E. 9 at 1579.

Looking at the four corners of the Release in an attempt to harmonize all of the particular provisions, it becomes clear that the Release is concerned only with the “Covered Conduct,” which cannot be read to the exclusion of the six Qui Tam Drugs. Similarly, one cannot read the “Covered Conduct” section of the Release to include the Non-Qui Tam Drugs.

The Settlement Agreement does not provide for the dismissal of any Bayer drugs other than those six drugs cited in the definition of “Covered Conduct.” R.E. 9 at 1572-73. The Agreement does not dismiss the Non-Qui Tam Drugs even though the parties were fully aware of their existence. These provisions are not inconsistent and must be taken at their face value.

Even if there were some perceived inconsistency, “[w]here there is an inconsistency between general provisions and specific provisions of an agreement, the specific provisions ordinarily qualify the meaning of the general provisions,” and the court may apply this rule “when necessary to make clear that which is doubtful.” *Williams v. Batson*, 187 So. 236, 239 (Miss. 1939). Subject to certain qualifications, all circumstances accompanying a transaction may be taken into consideration in construing an agreement. *Id.* Operating under these rules of construction and the fact that the Release is the result of a False Claims Act case involving Bayer’s submission of false claims for the six Qui Tam Drugs, as well as the fact that there are consistently specific references to that suit, the “specific” reference to the Qui Tam Drugs as “Covered Conduct” should govern the scope of the Release versus the “general” reference to Bayer’s conduct. *Williams*, 187 So. at 239. A release is a contract like any other, and Bayer can receive only the benefit of the bargain that it made -- it cannot treat the Release as a “Get Out of Liability Free” card for every drug on which it has ever swindled a state Medicaid agency.

In *Smith v. First Federal Savings & Loan Association of Grenada*, 460 So. 2d 786 (Miss. 1984), by its clear and unambiguous terms, the release discharged and acquitted Smith of all liabilities to First Federal arising out of three enumerated corporate business loans. *Id.* at 790. Smith’s three personal secured loans had no connection with the matters referred to in the release except, of course, for the fact that the secured lender in each instance was First Federal and the debtor in each instance was John Doyle Smith. *Id.* Although Smith argued that

the release was labeled "General Release," there was no substantive term or provision in the release which fairly provided, expressly or impliedly, release from anything other than claims related to the shopping center, so that this Court found the limited release was mislabeled "General Release." *Id.* The Court presumed that Smith and First Federal were fully aware of these three outstanding loans at the time the release was executed on June 2, 1982, and that had they wished to make any provision with reference to those loans, they could easily have done so. *Id.* Their failure to do so, and the absence of language in the release which was broad enough to acquit Smith of any obligations except those arising from or connected with the Times Square shopping center operation, resulted in this Court's conclusion that the release did not affect the three personal secured loans. *Id.*

As with the loans in *Smith*, the State and Bayer were fully aware that Bayer manufactures drugs other than the Qui Tam Drugs, and "had they wished to make any provision with reference to [all Bayer drugs], they could easily have done so." *Smith*, 460 So. 2d at 790. The Release does not capture those claims reserved by the reservation provision, which reads as follows:

Notwithstanding any other terms of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including BAYER) are any and all of the following: . . . Any civil or administrative liability that BAYER has or may have under any state statute, regulation or rule not released in Paragraph III(2) above.

R.E. 9 at 1579. The State's claims squarely fall into the Reservation Provision, since they are for drugs not considered "Covered Conduct," as defined by

Paragraph III(2)(C) of the Release. R.E. 9 at 1572-73. Additionally, the State's claims are reserved by the Reservation Clause. By contrast, in the present case, the chancery court wrongly assumed that it was "logical" that, because the Department of Justice knew of other drugs, they were included in the scope of the Settlement Agreement, despite that Agreement's specific language to the contrary.

The consideration paid was for release of the "Covered Conduct" as indicated in the Preamble of the Release. *Id.* However, as discussed above, "Covered Conduct" is expressly limited to the six Qui Tam Drugs. Bayer paid \$48,608.09 to the State in consideration for releasing Bayer from liability for "Covered Conduct." R.E. 9 at 1576. As previously stated, "Covered Conduct" is limited to six specified drugs. Accordingly, the State's share of the "Individual State Settlement Amount" was attributed to those six drugs only. During the time period at issue in the case, the State reimbursed approximately \$37.7 million for Bayer drugs, *not including* the six Qui Tam Drugs. R.E. 14 at 1561. Moreover, the State alleges that all Bayer drugs for which claims are asserted in the Amended Complaint have spreads of at least 17% during the relevant period. R.E. 7 at 1057-58. If the chancery court was going to draw inferences outside the four corners of the Agreement, then perhaps it should have considered how absurd it would be for the State to sign a document barring any state law claims, involving all Bayer drugs, in exchange for the paltry sum of \$48,608. But that inference would have been improper on a Rule 12(b)(6) motion -- as was the inference actually drawn by the chancery court.

CONCLUSION

For the reasons above, the State of Mississippi requests that this Court reverse the Order of the Hinds Chancery Court dismissing the State's claims against Bayer and remand for further proceedings. The State further requests any other relief as this honorable Court may deem proper.

Respectfully submitted, this the 30th day of March, 2009.

STATE OF MISSISSIPPI

By:


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CERTIFICATE OF SERVICE

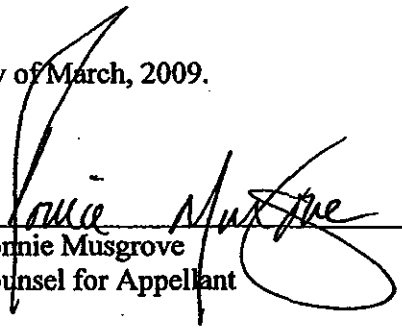
The undersigned counsel hereby certifies that he has caused to be delivered, via United States mail (postage prepaid), a true and complete copy of the foregoing document, to the following:

The Honorable William Singletary
Hinds Chancery Court
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So certified, this the 30th day of March, 2009.



Ronnie Musgrove
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Sep 16 2008
5:18PM

IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

THE STATE OF MISSISSIPPI

PLAINTIFF

VS.

FILED
SEP 16 2008

CIVIL ACTION NO. G2005-2021

ABBOTT LABORATORIES, INC., et al.

EDDIE JEAN CARR, CHANCERY CLERK
BY Vmotor D.C.

DEFENDANTS

ORDER OF SEVERANCE AND TRANSFER

Pursuant to the Court's Order of August 29, 2008 addressing Defendants' Objection to Report and Recommendation No. 38 of Special Masters ("Order"), the Court directs that each of the below severed cases be assigned a separate civil action number and that those cases properly venued in Rankin County, Mississippi shall be transferred in accordance with the terms of this Order. The Court hereby orders as follows:

1. IT IS ORDERED AND ADJUDGED pursuant to the Order, the Honorable Clerk of this Court shall assign new civil action numbers to the severed cases as follows:

- *The State of Mississippi v. Alpharma, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(1)*
- *The State of Mississippi v. Eli Lilly and Company; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(2)*
- *The State of Mississippi v. Forest Pharmaceuticals, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(3)*
- *The State of Mississippi v. Mylan Pharmaceuticals Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(4)*
- *The State of Mississippi v. Abbott Laboratories, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(5)*

- *The State of Mississippi v. Amgen, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(6)*
- *The State of Mississippi v. AstraZeneca Pharmaceuticals LP; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(7)*
- *The State of Mississippi v. AstraZeneca LP; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(8)*
- *The State of Mississippi v. Baxter Healthcare Corporation; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(9)*
- *The State of Mississippi v. Merck & Co., Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(10)*
- *The State of Mississippi v. Novartis Pharmaceuticals Corporation; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(11)*
- *The State of Mississippi v. Otsuka America Pharmaceutical, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(12)*
- *The State of Mississippi v. SmithKline Beecham Corporation d/b/a GlaxoSmithKline; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(13)*
- *The State of Mississippi v. Takeda Pharmaceuticals North America, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(14)*
- *The State of Mississippi v. Watson Pharma, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(15)*
- *The State of Mississippi v. Aventis Pharmaceuticals, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(16)*
- *The State of Mississippi v. ZLB Behring, LLC (formerly known as "Aventis Behring, LLC"); In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(17)*

- *The State of Mississippi v. Sanofi-Synthelabo, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(18)*
- *The State of Mississippi v. Barr Laboratories, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(19)*
- *The State of Mississippi v. Boehringer Ingelheim Pharmaceuticals, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(20)*
- *The State of Mississippi v. Roxane Laboratories, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(21)*
- *The State of Mississippi v. Ben Venue Laboratories, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(22)*
- *The State of Mississippi v. Bristol-Myers Squibb Company; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(23)*
- *The State of Mississippi v. Dey, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(24)*
- *The State of Mississippi v. Eisai, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(25)*
- *The State of Mississippi v. Immunex Corporation; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(26)*
- *The State of Mississippi v. IVAX Pharmaceuticals, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(27)*
- *The State of Mississippi v. Johnson & Johnson; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(28)*
- *The State of Mississippi v. ALZA Corporation; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(29)*

- *The State of Mississippi v. Janssen Pharmaceutical Products, L.P.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(30)*
- *The State of Mississippi v. McNeil-PPC, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(31)*
- *The State of Mississippi v. Ortho Biotech Products, L.P.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(32)*
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- *The State of Mississippi v. MedImmune, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(34)*
- *The State of Mississippi v. Mylan Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(35)*
- *The State of Mississippi v. Par Pharmaceutical Companies, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(36)*
- *The State of Mississippi v. Purepac Pharmaceutical Co.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(37)*
- *The State of Mississippi v. Hoffmann-La Roche Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(38)*
- *The State of Mississippi v. Roche Laboratories Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(39)*
- *The State of Mississippi v. Sandoz, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(40)*
- *The State of Mississippi v. Schering-Plough Corporation; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(41)*

- *The State of Mississippi v. Schering Corporation; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(42)*
- *The State of Mississippi v. Warrick Pharmaceuticals Corporation; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(43)*
- *The State of Mississippi v. Sicor, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(44)*
- *The State of Mississippi v. Teva Pharmaceuticals USA, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(45)*
- *The State of Mississippi v. TAP Pharmaceutical Products, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(46)*
- *The State of Mississippi v. Watson Pharmaceuticals, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(47)*
- *The State of Mississippi v. Watson Laboratories, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(48)*
- *The State of Mississippi v. Wyeth, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(49)*
- *The State of Mississippi v. Wyeth Pharmaceuticals, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(50)*

2. IT IS ALSO ORDERED AND ADJUDGED pursuant to the Order that the following cases against non-resident defendants who had designated a registered agent for process in Rankin County prior to their respective receipt of service of process in this matter and cases against non-resident defendants who have no registered agent in Mississippi and who have consented to venue in Rankin County shall be transferred to the Chancery Court of Rankin County as follows:

- *The State of Mississippi v. Abbott Laboratories, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(5)*
- *The State of Mississippi v. Amgen, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(6)*
- *The State of Mississippi v. AstraZeneca Pharmaceuticals LP; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(7)*
- *The State of Mississippi v. AstraZeneca LP; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(8)*
- *The State of Mississippi v. Baxter Healthcare Corporation; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(9)*
- *The State of Mississippi v. Merck & Co., Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(10)*
- *The State of Mississippi v. Novartis Pharmaceuticals Corporation; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(11)*
- *The State of Mississippi v. Otsuka America Pharmaceutical, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(12)*
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- *The State of Mississippi v. Takeda Pharmaceuticals North America, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(14)*
- *The State of Mississippi v. Watson Pharma, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(15)*
- *The State of Mississippi v. Aventis Pharmaceuticals, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(16)*

- *The State of Mississippi v. ZLB Behring, LLC (formerly known as "Aventis Behring, LLC"); In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(17)*
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- *The State of Mississippi v. Ortho-McNeil Pharmaceutical, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(33)*
- *The State of Mississippi v. MedImmune, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(34)*
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- *The State of Mississippi v. Wyeth Pharmaceuticals, Inc.; In the Chancery Court of Hinds County, Mississippi, First Judicial District; Civil Action No. G2005-2021(50)*

3. The Honorable Clerk of this Court is instructed to make one duplicate copy of the entire record in Civil Action No. G2005-2021 as it exists as of the date of the entry of this ORDER OF SEVERANCE AND TRANSFER, to certify such duplicate record, and to transfer such record to the Chancery Court of Rankin County with all costs taxed to Plaintiff.

CHANCELLOR WILLIAM H. SINGLETARY
William H. Singletary

SO ORDERED AND ADJUDGED, this the 16 day of September 1893.
W. H. Singletary

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