NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

CUBIST PHARMACEUTICALS LLC,
Plaintiff-Appellant

v.

MYLAN LABORATORIES LIMITED, AGILA SPECIALTIES INC., FRESENIUS KABI USA, LLC, SAGENT PHARMACEUTICALS, INC., CRANE PHARMACEUTICALS LLC, DR. REDDY'S LABORATORIES, LTD., DR. REDDY'S LABORATORIES, INC.
Defendants-Appellees

2016-1652, -1653, -1796, -1853, -2057

Appeals from the United States District Court for the District of Delaware in Nos. 1:12-cv-00367-GMS, 1:13-cv-01679-GMS, 1:14-cv-00914-GMS, 1:15-cv-01164-GMS, 1:15-cv-01214-GMS, 1:16-cv-00030-GMS, and 1:16-cv-00072-GMS, Judge Gregory M. Sleet.

ON MOTION

Before LOURIE, O'MALLEY, and CHEN, *Circuit Judges*.

LOURIE, *Circuit Judge*.

O R D E R

Upon consideration of the parties' competing motions to stay or resolve these appeals, we consider whether summary affirmance is appropriate.

These Hatch-Waxman Act appeals concern abbreviated new drug applications ("ANDAs") filed by generic drug manufacturers Fresenius Kabi USA, LLC ("Fresenius"), Agila Specialties Inc. and Mylan Laboratories Limited (collectively, "Mylan"), Sagent Pharmaceuticals, Inc., Crane Pharmaceuticals LLC, and Dr. Reddy's Laboratories, Ltd. and Dr. Reddy's Laboratories, Inc. Each ANDA challenges certain patents owned by Cubist Pharmaceuticals LLC ("Cubist") purporting to cover Cubist's antibiotic product, Cubicin®.

The district court entered consent judgments in favor of the appellees in these cases following this court's decision in *Cubist Pharmaceuticals, Inc. v. Hospira, Inc.*, Nos. 2015-1197, -1204, -1259 ("the *Hospira* appeal"). In that case, this court affirmed the district court's judgment that the asserted claims of U.S. Patent Nos. 6,468,967, 6,852,689, 8,058,238, and 8,129,342 are invalid. In March 2016, Cubist filed a petition for a writ of certiorari in the the *Hospira* appeal, which remains pending.

While the *Hospira* appeal was pending before this court, the appellees and Cubist entered into agreements in efforts to narrow the issues and to stay the cases pending the *Hospira* appeal. After this court issued its decision in *Hospira*, the district court entered consent judgments in these underlying cases, in which the parties stipulated that the asserted patents were invalid in light of this court's decision in *Hospira*. Cubist then appealed.

Fresenius and Mylan each move to summarily affirm because, among other things, collateral estoppel applies based on the judgment in the *Hospira* appeal. Cubist opposes and moves to stay this appeal pending disposition

of its petition for a writ of certiorari, arguing that, until its appeal rights before the Supreme Court have been exhausted, collateral estoppel does not apply.

It is well settled that "where a patent has been declared invalid in a proceeding in which the 'patentee has had a full and fair chance to litigate the validity of his patent', the patentee is collaterally estopped from relitigating the validity of the patent." *Miss. Chem. Corp. v. Swift Agric. Chems. Corp.*, 717 F.2d 1374, 1376 (Fed. Cir. 1983) (quoting *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 333 (1971)).

Cubist contends that it has not yet had a full opportunity to litigate the validity of its patents because its petition for a writ of certiorari is still pending before the Supreme Court. However, courts have long held that the pendency of an appeal before the Supreme Court does not preclude the application of res judicata. *See Straus v. Am. Publishers' Ass'n*, 201 F. 306, 310 (2d Cir. 1912) ("The point is also made that the judgment was not res adjudicata because of the appeal pending to the United States Supreme Court. This fact does not suspend the operation of the judgment as an estoppel, *Parkhurst v. Berdell*, 110 N.Y. 386, 18 N.E. 123, 6 Am.St.Rep. 384; *Deposit Bank v. Frankfort*, 191 U.S. 499, 510, 24 Sup.Ct. 154, 48 L.Ed. 276; Freeman on Judgments, Sec. 328.").

The cases relied upon by Cubist are not to the contrary. *Linnen v. Armainis*, 991 F.2d 1102, 1107–09 (3d Cir. 1993), and *Bailey v. Ness*, 733 F.2d 279, 282 (3d Cir. 1984), addressed a very different issue of whether a federal civil rights case should be stayed pending completion of a state criminal matter. *Novo Nordisk Inc. v. Paddock Laboratories, Inc.*, 468 F. App'x 961, 961–62 (Fed. Cir. 2011), and *Kittel v. First Union Mortgage Corp.*, 303 F.3d 1193, 1194–95 (10th Cir. 2002), merely involved the exercise of discretion to stay proceedings. Finally, *Sovereign Software LLC v. Victoria's Direct Brand Man-*

agement, LLC, 778 F.3d 1311, 1316–17 (Fed. Cir. 2015), does not, as Cubist suggests, say that collateral estoppel only applies after all review by the Supreme Court.

Summary affirmance is appropriate when "the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). Because collateral estoppel clearly applies in light of this court's decision in *Hospira* that the asserted patent claims are invalid, we conclude that summary affirmance is appropriate in this case.

Accordingly,

IT IS ORDERED THAT:

(1) The judgments in the above-captioned appeals are summarily affirmed.

(2) All other pending motions are denied as moot.

(3) Each side shall bear its own costs.

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

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