



October 27, 2017

VIA E-FILING

The Honorable Leonard P. Stark
U.S. District Court for the District of Delaware
844 North King Street
Wilmington, DE 19801

**Re: Bristol-Myers Squibb Co. et al. v. Mylan Pharm. Inc.,
C.A. No. 17-379-LPS**

Dear Chief Judge Stark,

Under the guise of a discovery dispute, Defendant Mylan Pharmaceuticals Inc. (“MPI”) is seeking untimely reconsideration or relief from the Court’s September 11, 2017 order denying its motion to dismiss and ordering it to submit to venue-related discovery. (D.I. 36 & 37.) In MPI’s view, the Federal Circuit’s decision in *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017), “changed the landscape” of patent venue law and called into doubt all authority that came before it. (D.I. 45 at 1.) But *Cray* did no such thing.

Cray clarified that a “regular and established place of business” requires a physical place in the district and emphasized that the inquiry about whether a defendant has such a place is fact-intensive. This Court applied the same reasoning in the September 11th opinion and denied MPI’s motion to dismiss because the relevant facts had not yet been developed. That remains true today. Discovery is still necessary to determine whether MPI has a physical location in Delaware, whether other entities maintain a physical location here on MPI’s behalf, and whether MPI’s many Delaware-incorporated affiliates act as its alter egos here. Plaintiffs request that the Court therefore deny MPI’s request for relief, allow venue-related discovery to commence, and defer ruling on the effect of *Cray* on this case until MPI files any renewed motion to dismiss.¹

I. MPI’s request for relief should be denied because it is an untimely and procedurally flawed motion for reconsideration or relief.

MPI’s request is procedurally flawed and should be denied regardless of its merits. MPI has not objected to any of Plaintiffs’ specific discovery requests. Rather, MPI is using the discovery matters procedure to seek reconsideration or relief from the Court’s September 11th order. (D.I. 37.) This is improper. To the extent MPI is seeking reargument of its motion to dismiss in light of *Cray*, MPI’s request is untimely. Local Rule 7.1.5 requires a motion for reargument to be filed within 14 days of the underlying order, but MPI did not file its letter until 17 days after the Court’s order on MPI’s motion and a week after the *Cray* decision. Any argument that the September 21st *Cray* opinion affected the Court’s September 11th order could and should have been raised by September 25th, which MPI failed to do. Likewise, to the extent MPI is seeking relief from the order, Rule 60(b) only allows such relief after a final judgment, which the Court’s September 11th order was not. The Court should therefore deny MPI’s request because it does not raise a discovery dispute—it is a tardy and improperly presented request for reargument of a motion MPI already lost.

¹ MPI will not renew its motion for at least 60 days after this dispute’s resolution. (D.I. 38, ¶ 3.)

II. The Court's September 11th order is consistent with *Cray*.

MPI's request should also be rejected because it lacks merit. Plaintiffs agree that *Cray* resolved ambiguity about what constitutes a "regular and established place of business" by requiring a defendant to have a physical presence in the district. But this Court's decision also required that. In denying MPI's motion to dismiss, this Court expressly held that "some *physical* presence is . . . required" to establish venue. (D.I. 36 at 30.) That is consistent with the Federal Circuit's holding. *See, e.g., Cray*, 871 F.3d at 1364 ("In the final analysis, the court must identify a physical place, of business, of the defendant."). Even independent commentators have noted that *Cray* implicitly ratified this Court's reasoning.²

Both this Court and the *Cray* court emphasized that facts matter in deciding whether a defendant has a sufficient physical presence. Indeed, the Federal Circuit held that "no precise rule has been laid down and each case depends on its own facts." *Id.* at 1362. It explained that a multitude of facts might be relevant to each of the "regular and established place of business" factors, "stress[ing] that no one fact is controlling." *Id.* at 1366. *Cray* did not address many of the factors outlined in this Court's opinion, nor did it set forth an exhaustive checklist of relevant contacts for the venue inquiry.

Unlike the record here, the *Cray* record was sufficiently robust to allow the court to find that the defendant lacked a physical presence in the district—the district court's opinion describes extensive document productions and depositions, *see Raytheon Co. v. Cray, Inc.*, No. 2:15-cv-1554, 2017 WL 2813896, at *1-2 & n.1 (E.D. Tex. June 29, 2017). MPI, however, did not produce nearly enough information to allow the Court to resolve its motion, despite venue being a "fact-intensive inquiry." (D.I. 36 at 35.) *Cray* did not mitigate the need for more facts to assess whether Mylan can carry its burden of establishing that venue is improper in Delaware.

III. Venue-related discovery remains necessary to test MPI's declaratory evidence and to probe the relationships between MPI and its 40 Delaware affiliates and subsidiaries.

Because the venue-related facts in this case are sparse and contradictory, discovery remains necessary. Indeed, it is telling that MPI seeks to block *all* discovery surrounding its bare venue allegations. MPI has yet to produce anything beyond the two *single-page* declarations that it submitted with its motion to dismiss, which it again asks Plaintiffs and the Court to accept at face value. As the Court recognized last month, it should not do so. (D.I. 36 at 35-39.)

MPI's declarations are both narrowly worded and insufficient to address the venue-related facts discussed in *Cray*. They focus only on basic, conclusory allegations (e.g., about whether MPI owns or leases property in Delaware) and address only MPI—not any of its many Delaware-incorporated affiliates and subsidiaries. (D.I. 36 at 38.) The declarations fail to address, for example, whether any MPI employees, officers, or contractors regularly conduct business at a place in Delaware on MPI's behalf, nor do they address whether MPI "exercises other attributes of possession or control over [a physical] place" here. *Cray*, 871 F.3d at 1363. MPI's declarations are also silent about whether it has entered into arrangements with others to

² Andrew Williams, *Views on Venue*, PatentDocs (Sept. 24, 2017), <http://bit.ly/2gI02z9> (noting that both the *Cray* panel and this Court based their holdings on the language of the patent venue statute and governing precedent rather than adopting a new framework, and concluding that "it does not appear that the Delaware Court's *BMS* case is inconsistent with the . . . *Cray* case").

“stor[e] materials at a place in the district so that they can be distributed or sold from that place,” and they only superficially address whether MPI “holds out a place for its business” in this district. *Id.* MPI’s declarations are thus insufficient to show that venue is improper.

Moreover, MPI’s declarations also do not address its relationships with other Delaware-incorporated Mylan companies—of which there are at least 40. (D.I. 36 at 36.) As the Federal Circuit has held and as this Court recognized, “venue in a patent infringement case [may be] proper with regard to one corporation by virtue of the acts of another, intimately connected, corporation.” *Minn. Min. & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1265 (Fed. Cir. 1985); *see also* D.I. 36 at 44. MPI attempts to limit *3M* to its facts (D.I. 45 at 3), but courts routinely cite *3M* to establish venue and jurisdiction over defendants based on their alter egos. *See, e.g., In re Rosuvastatin Calcium Patent Litig.*, C.A. No. 07-359-JJF-LPS, 2009 WL 4800702, at *5 (D. Del. Dec. 11, 2009) (citing *3M*’s holding that a “court which has jurisdiction over a corporation has jurisdiction over its alter egos”). *Cray* did not address *3M*, let alone undermine it. Because the 40 Mylan Delaware entities are at least intricately—and likely intimately—connected with MPI, MPI must submit to discovery about its relationships with them so Plaintiffs can test whether those entities’ Delaware presence can be imputed to MPI. (D.I. 36 at 44.)

Even aside from these substantive deficiencies in MPI’s declarations, venue-related discovery is necessary to test the statements in them. This is not a case in which there is no “reason to doubt the veracity of Defendants’ declarations.” *Bos. Sci. Corp. v. Cook Grp. Inc.*, C.A. No. 15-980, 2017 WL 3996110, at *15 (D. Del. Sept. 11, 2017). To the contrary, even without discovery, certain statements in MPI’s declarations are questionable. For example, MPI’s declarant states that MPI “had no sales in Delaware during 2016 and to date in 2017.” (D.I. 36 at 38 (citing MPI Decl. ¶ 7).) But recently uncovered evidence shows that MPI advertises that “[i]n 2016, *Mylan generics saved Delaware \$74 million.*” (Ex. 1 (emphasis added).) MPI holds most of the regulatory approvals that allow the Mylan family to sell its products. Therefore, it appears from public statements that MPI continues to have significant sales in Delaware. At a minimum, the tension between MPI’s declaration and Mylan’s public statements suggests that the declarations do not fully describe MPI’s Delaware footprint.

IV. The scope of Plaintiffs’ discovery requests is consistent with *Cray*.

MPI has not objected to any of Plaintiffs’ specific discovery requests, but rather has only disputed that the general topics the Court discussed in its September 11th opinion are consistent with *Cray*. (D.I. 45 at 3.) To the extent MPI suggests that Plaintiffs’ requests are too broad, that dispute is not properly before the Court. In the parties’ only meet and confer about venue since Plaintiffs served their requests, MPI represented that it had not reviewed them. But even to the extent MPI objects to the scope of Plaintiffs’ requests, its objections lack merit. Plaintiffs drafted their requests after *Cray* was decided and focused them on topics that *Cray*, this Court, and other controlling authority deem relevant to the venue analysis. (D.I. 45-2.) MPI has not explained how the requests are inconsistent with *Cray*, nor has it explained why Plaintiffs should not be able cross-examine its declarant and test the evidence it has presented.

* * *

“Most of the pertinent evidence” for MPI’s venue challenge, even after *Cray*, is still “in the possession and control of MPI (and other Mylan entities).” (D.I. 36 at 43.) The Court should therefore reaffirm its September 11th order and reject MPI’s attempt to deny Plaintiffs from taking *any* venue-related discovery.

Respectfully submitted,

/s/ Michael J. Farnan

Michael J. Farnan

cc: All Counsel of Record (Via Electronic Mail)