IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TEVA PHARMACEUTICALS INTERNATIONAL GMBH and TEVA PHARMACEUTICALS USA, INC.,

Plaintiffs,

v.

ELI LILLY AND COMPANY,

Defendant.

Civil Action No. 1:18-cv-12029-ADB
[Leave to file granted on January 4, 2019]

PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER, OR, IF NOT TRANSFERRED, THEN TO STAY THIS LITIGATION PENDING *INTER PARTES* REVIEW

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Lilly's reply confirms that the Court should neither transfer this action to Indiana nor stay it pending Lilly's petitions for *inter partes* review. The reply mostly reiterates the same arguments made by Lilly in its opening brief. Nevertheless, Teva submits this sur-reply to briefly address some of the arguments made by Lilly in reply.

A. The Court Should Not Transfer This Case To Indiana

Lilly's reply makes clear that none of the factors courts assess in the transfer analysis "weigh[s] heavily in favor of transfer." *Garcia-Tatupu v. Bert Bell/Peter Rozelle NFL Player Ret. Plan*, 249 F. Supp. 3d 570, 576 (D. Mass. 2017). Lilly does not deny that it has a major presence in Massachusetts, electing to open an office here to take advantage of the local workforce, educational institutions, and thriving life science economy. Lilly does not deny that foundational development of its product took place here, including research into the very method of use that Teva claims infringes its patent. Although Lilly tries to minimize the significance of that work in its reply, its own exhibits demonstrate that Massachusetts does, in fact, have a significant connection to this case. Finally, Lilly wholly fails to recognize that the restrictions imposed by the patent venue statute—limiting Teva's choice of venue to one where Lilly has a "regular and established place of business"—already effectively balances competing concerns about convenience in the § 1404 transfer analysis. Lilly's motion to transfer should be denied.

Teva's choice of forum. Lilly no longer claims that Teva's decision to bring this lawsuit in Massachusetts was "arbitrary." *See* D. 19 at 1, 6, 7. Instead, Lilly argues that this factor should be discounted because "[n]either Teva entity has its principal place of business in Massachusetts or is incorporated in the Commonwealth." D. 29 at 2. This patent case, however, *could not have been filed* in a state where Teva has its principal place of business

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(Pennsylvania)[1] or where it is incorporated (Delaware) because *Lilly* is not located in either state. *See* 28 U.S.C. § 1400(b); *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, __ U.S. __, 137 S. Ct. 1514 (2017). Although the location of the plaintiff's state of incorporation or principal place of business may be a relevant consideration in non-patent cases, it makes less sense here, given the restrictions already imposed by the patent venue statute. In short, Teva should not be penalized for filing this case in one of the seven districts where Lilly intentionally and strategically established a permanent, physical presence. *See In re Cray Inc.*, 871 F.3d 1355, 1361 (Fed. Cir. 2017) ("The statute's 'main purpose' was to 'give original jurisdiction to the court where a permanent agency transacting the business is located[; j]urisdiction would not be conferred by 'isolated cases of infringement,' but 'only where a permanent agency is established.'") (quoting 29 Cong. Rec. 1900 (1897) (statement of Rep. Lacey)).

Convenience of the parties. This factor weighs against transfer for multiple reasons. First, Lilly does not address, let alone deny, that it has the financial means to litigate this case here. That should end the inquiry. *See Boateng v. Gen. Dynamics Corp.*, 460 F. Supp. 2d 270, 275 (D. Mass. 2006) (this factor "focuses on the comparative financial abilities of the parties") (citation omitted); *Motorola, Inc. v. PC-Tel, Inc.*, 58 F. Supp. 2d 349, 358 (D. Del. 1999) (requiring the defendant to "identify some unique or unexpected burden associated with defending this action that militates in favor of transfer"). Second, Lilly improperly flips its burden when it argues that transfer is appropriate because "Teva . . . fails to establish that it would face any greater inconvenience in the Southern District of Indiana than in Massachusetts." D. 29 at 3. To overcome the presumption in favor of Teva's choice of forum, ***Lilly***—not Teva—must "establish that, on balance, the interests of justice and convenience weigh heavily in favor

[1] After Teva filed its initial cases in October 2017 and February 2018, it announced that it was moving its principal place of business from Pennsylvania to New Jersey.

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of transfer." *Garcia-Tatupu*, 249 F. Supp. 3d at 576 (citation and alteration omitted). Lilly asserts, but does not explain, that litigating in Lilly's home jurisdiction of Indiana would somehow be more convenient for Teva. *See* D. 29 at 2-3. That simply makes no sense. Indeed, Congress passed the patent venue statute, in part, to reject a line of cases that held patent cases could only be filed in the defendant's state of incorporation—in this case, Indiana. *See In re Cray Inc.*, 871 F.3d at 1360-61. In doing so, Congress recognized that it was *not convenient* to require a patent holder to bring its lawsuit in the defendant's state of incorporation. *See id.*

Convenience of the Witnesses. Lilly's entire argument for this factor hinges on its claim that an unspecified number of unnamed employees of Lilly will likely have relevant testimony. Once again, Lilly fails to carry its burden: Lilly has neither "specif[ied] the key witnesses to be called" nor provided "a general statement of what their testimony will entail," which it "must" do to succeed on this factor. *Boateng*, 460 F. Supp. 2d at 275 (citation omitted). In short, Lilly has not given Teva or this Court the ability to assess who Lilly's key witnesses are, how many there are, what they will testify about, or why transfer on this ground is appropriate.

In reply, Lilly relies on a single out-of-Circuit opinion to assert that it "has provided the information needed to assess the degree of convenience for the likely witnesses." D. 29 at 3-4 (citing *Nilssen v. Everbrite, Inc.*, 2001 WL 34368396, at *2-3 (D. Del. Feb. 16, 2001)). *Nilssen* does not help Lilly. To begin, the court in *Nilssen* noted (1) "[t]he convenience of a witness is only relevant . . . to the extent that the witness may actually be unavailable for trial in one of the fora" and (2) "witnesses employed by the parties are not considered by a court conducting venue transfer analysis because the parties are obligated to procure the presence of their own employees." *Id.* at *2 (citations omitted). Here, Lilly relies exclusively on the convenience of *its own employees* and fails to address whether any of its witnesses would be unavailable for trial in

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