IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ELI LILLY AND COMPANY, Plaintiff, v. ACCORD HEALTHCARE, INC., APOTEX, INC. and APOTEX CORP., Defendants.	)	Case No. 1:12-cv-00086-TWP-DKL (consolidated)

PLAINTIFF ELI LILLY AND COMPANY'S MOTION TO CONSOLIDATE

Pursuant to Fed. R. Civ. P. 42(a) and Local Rule 42-1, Plaintiff Eli Lilly and Company ("Lilly"), through undersigned counsel, respectfully requests that the Court consolidate this case with *Eli Lilly and Company v. Accord Healthcare, Inc., USA*, Case No. 1:13-cv-00335-TWP-DKL for all purposes. Defendants Apotex, Inc. and Apotex Corp. ("Apotex") have indicated that they do not oppose this motion. Defendant Accord Healthcare, Inc. ("Accord") does not consent to consolidation.

BACKGROUND

On January 20, 2012 and April 17, 2012, Lilly filed patent infringement actions against Accord and Apotex as a result of their filings of Abbreviated New Drug Applications ("ANDAs") with the U.S. Food and Drug Administration ("FDA") seeking approval to manufacture and sell a generic version of Lilly's ALIMTA® before the expiration of U.S. Patent No. 7,772,209 ("the '209 patent"). Dkt. No. 1, Civil Action No. 1:12-cv-00086-TWP-DKL; Dkt.

No. 1, Civil Action No. 1:12-cv-00499-TWP-DKL. These actions were consolidated on July 23, 2012 under Civil Action No. 1:12-cv-00086-TWP-DKL. With respect to Accord, the case alleged infringement of the '209 patent as a result of Accord's filing of ANDA No. 203485 for Accord's Pemetrexed Disodium for Injection, 100 mg/Vial and 500 mg/Vial Products.

Accord subsequently notified Lilly that Accord had filed an amendment to ANDA No. 203485, seeking approval to manufacture and sell Accord's Pemetrexed Disodium for Injection, 1000 mg/Vial Product ("Accord's 1000 mg ANDA Product"), a generic version of ALIMTA® in a larger vial, prior to the expiration of the '209 patent. On February 28, 2013, following the receipt of this notification, Lilly filed a second patent infringement action against Accord, also asserting infringement of the '209 patent, as a result of the amendment to ANDA No. 203485 for Accord's 1000 mg ANDA Product. Case No. 1:13-cv-00335-TWP-DKL, Dkt. No. 1.

Both cases are pending before Judge Pratt and have been assigned to Magistrate Judge LaRue.

ARGUMENT

Rule 42(a) permits a court to consolidate cases that "involve a common question of law or fact." Fed. R. Civ. P. 42(a). "Rule 42 is designed to encourage the consolidation of actions where a common question of law or fact is present and where consolidation would not cause prejudice to any party." *Hansa Med. Prods., Inc. v. Bivona, Inc.*, Case Nos. IP-85-340-C, IP-85-1056-C, 1987 WL 14496, *1 (S.D. Ind. Jan. 14, 1987). "Courts have consolidated cases for the purpose of promoting convenience and judicial economy." *Id.* The consolidation of cases "conserves scarce judicial resources and promotes the efficient and comprehensive disposition of cases." *McCracken v. Grand Victoria Casino & Resort*, Case No. NA 02-143-C B/H, 2002 WL 31521165, *2 (S.D. Ind. Nov. 6, 2002) (quoting *Ridge Gold Standard Liquors, Inc. v. Joseph E.*

Seagram & Sons, Inc., 572 F. Supp. 1210, 1212-13 (N.D. Ill. 1983)). The decision to consolidate under Rule 42 is "necessarily committed to the sound discretion of the trial court." *Hansa Medical Prods., Inc.*, 1987 WL 14496, at *1.

Here, Case No. 1:12-cv-00086 and Case No. 1:13-cv-00335 should be consolidated because the two cases present common questions of fact and law. The two cases are actions alleging infringement of the same patent; both parties to Case No. 1:13-cv-00335, Lilly and Accord, are parties to Case No. 1:12-cv-00086; and the parties are represented by the same counsel in both actions. The questions of infringement and invalidity at issue in the two cases are expected to be the same, as are the potential witnesses on both sides. The only expected difference in subject matter between the two cases is the size of the vial in which the proposed ANDA product is to be sold—a difference that is not expected to affect the analysis of infringement or invalidity.

Consolidation will minimize the burden to all parties and this Court. Because the two cases involve substantially the same issues and discovery, Lilly and Apotex agree that Case No. 1:13-cv-00335 can proceed according to the schedule and Case Management Plan already adopted in Case No. 1:12-cv-00086. In addition, while Accord opposes consolidation, its counsel has represented that Case No. 1:13-cv-00335 can proceed according to the existing schedule for case No. 1:12-cv-00086. Thus, consolidation will eliminate unnecessary duplication without causing any added inconvenience, delay, prejudice, or expense to any party.

After consultation with counsel for Defendants, it is Lilly's understanding that Apotex does not oppose this Motion for Consolidation. Accord does oppose consolidation.

RELIEF REQUESTED

For the foregoing reasons, Lilly respectfully requests that the Court consolidate this case (Case No. 1:12-cv-00086) with Case No. 1:13-cv-00335, and that the Case Management Plan and Scheduling Order entered with respect to Case No. 1:12-cv-00086 (Dkt. Nos. 58 & 60) govern the consolidated action.

Respectfully submitted,

/s/ *Jan M. Carroll*

Dated: May 30, 2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by the Court's ECF system on May 30, 2013 upon the following counsel of record:

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