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CLARKSBURG, WV 26301
1:18cv202

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re Kerydin Patent Litigation	MDL No. 2884

THE MYLAN DEFENDANTS' RESPONSE TO ANACOR PHARMACEUTICALS, INC.'S MOTION TO TRANSFER TO DISTRICT OF DELAWARE

Defendants Mylan Pharmaceuticals Inc. ("MPI") and Mylan Inc. (together, "the Mylan Defendants") respectfully oppose Anacor Pharmaceuticals, Inc.'s ("Anacor") Motion to Transfer *Anacor Pharmaceuticals, Inc. v. Mylan Pharmaceuticals, Inc. & Mylan Inc.*, Case No. 1:18-cv-00202-IMK, pending in the United States District Court for the Northern District of West Virginia, to Judge Richard G. Andrews in the United States District Court for the District of Delaware, for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 ("Motion to Transfer"). Anacor's motion is part of a series of procedural maneuvers designed to end-run around the fact that Delaware is an improper venue in which to litigate against the Mylan Defendants.

When Anacor first considered potential forums in which to bring its Kerydin patent claims, it knew that the District of Delaware recently held that venue was improper in Delaware as to MPI.[1] Nevertheless, Anacor set out to manufacture circumstances in an attempt to yank the Mylan Defendants back into Delaware, even if only for pre-trial proceedings alone. First, Anacor filed its Kerydin patent claims against thirteen other defendants in two lawsuits, both filed in Delaware, and also filed a third and fourth lawsuit against just the Mylan Defendants in Delaware and West Virginia, respectively. Second, Anacor moved to stay all four lawsuits,

[1] *E.g., Bristol-Myers Squibb Co., et al. v. Mylan Pharmaceuticals Inc., et al.*, C.A. No. 17-379-LPS (D. Del.).

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including both actions against the Mylan Defendants. Third, Anacor comes before the JPML claiming that centralization is necessary to remedy the situation that Anacor itself created.

In view of these circumstances, Ancacor's Motion to Transfer is not only manipulative, it is also premature. Anacor seeks to transfer the above-referenced action from West Virginia to Delaware, but Anacor already maintains an identical lawsuit against the Mylan Defendants in the District of Delaware. Further, in the Delaware action against Mylan, motions for improper venue, failure to state a claim, and a stay are currently pending. Resolution of those motions could entirely moot Anacor's Motion to Transfer. Regardless, centralization is inappropriate because it would not produce the efficiencies that Anacor claims, and it would significantly prejudice the Mylan Defendants by depriving them of the rights afforded under plain language of 28 U.S.C. § 1400(b). Thus, the Panel should deny Anacor's motion.

BACKGROUND

Anacor's litigation strategy has created a complicated set of underlying circumstances, including two district court actions against the Mylan Defendants, motions to stay both actions filed by Anacor, and Rule 12 motions filed by the Mylan Defendants in the Delaware action. The details are outlined herein.

In October 2018, Anacor filed four Hatch-Waxman actions concerning Kerydin, a topical antifungal medication. Mem. in Supp. of Mot. to Transfer ("Mem.") at 1. The four actions allege that fourteen defendants individually filed an Abbreviated New Drug Application ("ANDA") for generic tavaborole that infringes upon four of Anacor's patents (collectively, the "patents-in-suit"). Two of those defendants, MPI and FlatWing Pharmaceuticals, LLC, had earlier petitioned for *inter partes* review of the patents-in-suit. Case Nos. IPR2018-01358-61 (joined with Nos. IPR2018-00168-71). Anacor sued four of the fourteen defendants in the District of Delaware on October 17, 2018. *See* No. 1:18-cv-001606-RGA (D. Del.). On October

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18, 2018, Chief Judge of the District Court for the District of Delaware, Leonard P. Stark, ruled in another Hatch-Waxman patent infringement case that venue in Delaware is improper as to MPI.[2] One week later, Anacor sued another nine of the fourteen defendants in Delaware. *See* No. 1:18-cv-001673-RGA (D. Del.). Then, on October 29, 2018, Anacor sued the Mylan Defendants in Delaware. No. 1:18-cv-01699-RGA (D. Del.). The District of Delaware subsequently assigned all three of Anacor's Delaware actions (the "Delaware Actions") to Judge Richard G. Andrews (Mem. at 5). Thus, all defendants and all claims in Delaware are currently before Judge Andrews, but the actions have not been consolidated, nor has Anacor moved under Rule 42 to consolidate them.

One day after it sued the two Mylan entities in Delaware, Anacor sued the same two Mylan entities in a mirror-image action in the Northern District of West Virginia. *See* No. 1:18-cv-00202-IMK (the "West Virginia Action"). As Anacor admits, it filed the duplicative West Virginia action because the parties "dispute that venue is proper in the District of Delaware" and "[b]ecause Mylan indicated that it would not object to venue" in the Northern District of West Virginia. Mem. at 2.

The Mylan Defendants moved to dismiss Anacor's Delaware action under Rule 12(b)(3) for improper venue and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. No. 1:18-cv-01699-RGA (D. Del.) ECF Nos. 14-15. Were it not for Anacor's strategic decision to file a duplicative West Virginia lawsuit and use that to justify its need to bring the Mylan Defendants back into Delaware through its multi-district litigation request – despite the District of Delaware's recent decision finding venue improper as to MPI – the Panel would have

[2] *Bristol-Myers Squibb Co., et al. v. Mylan Pharmaceuticals Inc., et al.*, C.A. No. 17-379-LPS (D. Del. Oct. 18, 2018).

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nothing to consider, as all three Delaware actions are before Judge Andrews – including Anacor's action against the Mylan Defendants. Instead, Anacor has manufactured a purported need for the creation of a multi-district litigation by choosing to conduct its Kerydin litigation in piecemeal fashion, and by suing the Mylan Defendants twice on the same facts in two different districts. The Mylan Defendants filed a Motion to Dismiss for Improper Venue and Failure to State a Claim in Delaware.

Further complicating the above circumstances, Anacor has also filed motions to stay both the Delaware and West Virginia actions against the Mylan Defendants. Thus, Anacor's litigation strategy includes filing two mirror image complaints in different venues, requesting the Court in each venue to stay the action, and – while its stay motions remain pending – requesting this Panel to intervene and transfer one of the actions to the venue where the other mirror image action is pending.

ARGUMENT

Contrary to Anacor's contention that transfer of Hatch-Waxman litigation is effectively *de rigueur*, Mem. at 6-7, "[c]entralization of any litigation – including patent cases – is not automatic, and will necessarily depend on the facts, parties, procedural history and other circumstances in a given litigation." *In re Bear Creek Techs., Inc. ('722) Patent Litig.*, 858 F. Supp.2d 1375, 1379 (J.P.M.L. 2012). Rather, as the party seeking transfer, Anacor bears the burden of establishing that it is necessary and appropriate to transfer the West Virginia Action to Delaware for pretrial proceedings. *In re Best Buy Co. Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1379 (J.P.M.L. 2011) ("the proponents of centralization" bear the "burden of demonstrating the need for centralization."). To satisfy its burden, Anacor must demonstrate that: (1) the Delaware Actions involve "common questions of fact" with the West Virginia Action, and (2) the transfer will "promote the just and efficient conduct" of the action for "the

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convenience of the parties and witnesses." 28 U.S.C. § 1407(a). Failure to establish either prerequisite mandates denial of the Motion to Transfer. In this case, Anacor cannot satisfy its burden to show either factor.

I. **Anacor's Motion Is Premature**

What constitutes "common questions of fact" for the purpose of § 1407(a) often requires assessing far more than just what a plaintiff has alleged. The Panel routinely looks beyond the mere face of the complaints in question to determine whether the actions satisfy this first prong. For example, the Panel has found that a movant failed to show that common questions of fact exist where, as here, "the litigation has not progressed to a point that the parties have determined the specific nature of th[e] alleged infringement or to what extent infringement allegations will be common to the defendants across these actions"; this is so even when "all actions allege that defendants infringe the [same] patent." *In re Select Retrieval, LLC, ('617) Patent Litig.*, 883 F. Supp. 2d 1353, 1354 (J.P.M.L. 2012) (denying centralization).[3]

Anacor's motion should be dismissed as premature. Notably, there are multiple pending issues across the cases that should be resolved before any motion to transfer would be timely. First, Anacor itself seeks "to stay all three of the Delaware actions . . . until the PTAB enters a final written decision . . . [and] through any appeal of the PTAB's decision" in the *inter partes* review. Mem. at 2-3. Second, this motion is premature because the Mylan Defendants and

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[3] The Hatch-Waxman MDL consolidation cases that Anacor cites are inapposite. In most, the Panel was unmoved by non-movants' concerns that pretrial consolidation would "engender delays in a litigation in which time is of the essence." *In re Alfuzosin Hydrochloride Patent Litig.*, 560 F. Supp. 2d 1372, 1374 (J.P.M.L. 2008); *In re Brimonidine Patent Litig.*, 507 F. Supp. 2d 1381, 1381-82 (J.P.M.L. 2007) (same); *In re Desloratadine Patent Litig.*, 502 F. Supp. 2d 1354, 1355 (J.P.M.L. 2007) (same); *In re Metoprolol Succinate Patent Litig.*, 329 F. Supp. 2d 1368, 1370 (J.P.M.L. 2004) (same). However, the concern here is quite different: the motion to transfer is premature and transfer is improper for reasons unrelated to delay.

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