UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE WELLBUTRIN SR ANTITRUST LITIGATION THIS ACTION RELATES TO: ALL ACTIONS	Master File No. 04-CV-5525 Judge Bruce W. Kauffman
SHEET METAL WORKERS LOCAL 441 HEALTH & WELFARE PLAN, Plaintiffs, v. GLAXOSMITHKLINE PLC, Defendants.	No. 04-CV-5898 Judge Bruce W. Kauffman
MEDICAL MUTUAL OF OHIO, INC., Plaintiffs, v. GLAXOSMITHKLINE PLC, Defendants.	No. 05-CV-0396 Judge Bruce W. Kauffman

DEFENDANT GLAXOSMITHKLINE'S MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL AND FOR STAY OF PROCEEDINGS

Pursuant to 28 U.S.C. § 1292(b) and (c) defendant GlaxoSmithKline ("GSK") hereby moves this Court to certify for interlocutory appeal its March 9, 2006 Order and to stay further

District Court proceedings in this matter until the United States Court of Appeals for the Federal Circuit issues its ruling. The reasons for this motion are set forth in the accompanying memorandum of law with *Glaxo Wellcome, Inc. v. Eon Labs. Mfg., Inc.* trial record filed as an exhibit.

Respectfully submitted,

/s/ David P. Gersch
David P. Gersch
Kenneth A. Letzler
Amy Ralph Mudge
H. Holden Brooks
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, D.C. 20004
202-942-5000

Mark S. Stewart
Leslie E. John
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1725 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 864-8225

Counsel for GLAXOSMITHKLINE plc and SMITHKLINE BEECHAM CORP. d/b/a GLAXOSMITHKLINE, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE WELLBUTRIN SR ANTITRUST LITIGATION	Master File No. 04-CV-5525
THIS ACTION RELATES TO:	Judge Bruce W. Kauffman
ALL ACTIONS	
SHEET METAL WORKERS LOCAL 441 HEALTH & WELFARE PLAN,	No. 04-CV-5898
Plaintiffs,	Judge Bruce W. Kauffman
v.	
GLAXOSMITHKLINE PLC,	
Defendants.	
MEDICAL MUTUAL OF OHIO, INC.,	No. 05-CV-0396
Plaintiffs,	Judge Bruce W. Kauffman
v.	
GLAXOSMITHKLINE PLC,	
Defendants.	

DEFENDANT GLAXOSMITHKLINE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL AND FOR STAY OF PROCEEDINGS

On March 9, 2006, the Court denied GlaxoSmithKline's ("GSK's") Motion to Dismiss (the "Order") after concluding that, as a matter of law, (i) it could not consider the public record in the patent suits that are challenged by the complaints in this case and (ii) it could not examine post-complaint developments in evaluating whether the patent suits were objectively baseless. A wealth of cases resolve sham antitrust cases at the complaint stage precisely by looking to the record of the challenged cases, including developments that post-date the challenged complaints. These legal determinations are controlling issues of law, resolution of which will materially advance the ultimate termination of the litigation.

Because of the importance of these issues to the resolution of an ever increasing number of sham antitrust suits arising out of unsuccessful patent cases and because the challenged suits are petitioning activity presumptively protected by the First Amendment, GSK moves the Court for certification of the Order to the Federal Circuit pursuant to 12 U.S.C. § 1292(b). As Judge Posner, sitting by designation, counseled in one such case, there must be "some threshold of plausibility [that] must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase." *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003).

I. STANDARD OF REVIEW FOR A § 1292(b) APPEAL

28 U.S.C. § 1292(b) allows a district court to certify an interlocutory order for immediate appeal when the order (1) involves a "controlling question of law," (2) offers "substantial ground for difference of opinion" as to its correctness, and (3) if appealed immediately may "materially advance the ultimate termination of the litigation."

The statute was framed with special attention to the problems that arise in antitrust cases. A committee of the Judicial Conference, which proposed the statute, stated that it "should and will be used [ ] where a decision of the appeal may avoid protracted and expensive litigation, as

in antitrust and similar protracted cases." *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1244 (E.D. Pa. 1980).

A controlling question of law is one that is "'serious to the conduct of the litigation, either practically or legally.'" *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974) (en banc) (quoting Hearing on H.R. 6238 Before the H. Subcomm. on the Judiciary, 85th Cong. 11, 21 (1958) (statement of Judge Maris). The related requirement that the appeal "materially advance the ultimate termination of this litigation" is satisfied where a case "involves questions of patent law which will require extensive discovery, employment of expert witnesses, and investigation of numerous complex legal issues" and an interlocutory reversal "would resolve [the] matter without this cost to all involved in both time and resources." *Zeneca Ltd. v. Mylan Pharm., Inc.*, 968 F. Supp. 268, 277 (W.D. Pa. 1997), *rev'd on other grounds*, 173 F.3d 829 (Fed. Cir. 1999). "Substantial grounds for difference of opinion exist when there is genuine doubt or conflicting precedent as to the correct legal standard." *Bradburn Parent Teacher Store v. 3M*, No. Civ. A. 02-7676, 2005 WL 1819969, at *4 (E.D. Pa. Aug. 2, 2005) (citations omitted).

II. THE COURT'S MARCH 9, 2006 DENIAL OF GSK'S MOTION TO DISMISS

The Order is premised on the proposition that the Court's analysis "must . . . be based exclusively on the allegations in the Plaintiffs' Complaints . . . ." *In re Wellbutrin SR Antitrust Litig.*, Nos. Civ. A. 04-5525, Civ. A. 04-5898, Civ. A. 05-396, 2006 WL 616292, at *7 (E.D. Pa. Mar. 9, 2006). The Court reasoned that it was barred from looking at any part of the public record in the patent suits against Eon and Impax (the "Patent Litigation")[1] because (i) that would

[1] "Patent Litigation" refers to the proceedings in *Glaxo Wellcome, Inc. v. Eon Labs. Mfg., Inc.,* and *Glaxo Wellcome, Inc. v. Impax Labs., Inc.*, including the decisions on summary judgment, *Eon*, No. 00-cv-9089, 2002 WL 1874831 (S.D.N.Y. Aug. 13, 2002) (McKenna, J.); *Eon*, No. 00-cv-9089, 2002 WL 1874830 (S.D.N.Y. Aug. 13, 2002) (McKenna, J.); *Impax*, 220 F. Supp. 2d 1089 (N.D. Cal. 2002) (Patel, J.); *Impax,* 356 F.3d 1348 (Fed. Cir. 2004), and the

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impermissibly controvert the allegations of the complaints, *id.* at *6-7, and (ii) the Court's analysis "should be limited to the law and the facts as they existed when the decision to file suit was made." *Id.* at *11; *see also id.* at *6, *8.

Applying this approach, the Court declined to consider and evaluate the objective reasonableness of GSK's legal positions, the factual basis for its claims, or the meaning of Judge McKenna's statements and rulings denying Eon's motion for summary judgment and granting GSK's motion for a preliminary injunction. Had the Court reviewed the record, it could have fully evaluated these issues and its analysis would have been materially different.

III. THE ORDER SHOULD BE CERTIFIED PURSUANT TO § 1292(b)

The Order presents a textbook illustration of a case that should be certified for interlocutory review. On a motion to dismiss sham litigation claims, whether the Court is prohibited from considering the public record on the underlying patent litigation and whether the Court is barred from looking at post-complaint developments are controlling and important questions of law. A different resolution of either question will materially advance the termination of the lawsuit by leading to dismissal. And, with due respect to the Court's ruling, there is a substantial ground for difference of opinion.

FilmTec Corp. v. Hydranautics, which this Court cites as "controlling authority," *Wellbutrin SR*, 2006 WL 616292, at *11, held that a court reviewing a sham litigation antitrust suit "must make its own assessment of the objective merits of the predicate [patent] suit." 67 F.3d 931, 937 (Fed. Cir. 1995) (citation omitted). The Federal Circuit then reviewed the record in the patent suit, ruling that "[t]he facts of this case have been established by prior litigations and are therefore law of the case." *Id.* at 938. In determining that FilmTec's suit was not a

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Footnote continued from previous page
Eon trial record (attached as an exhibit to this motion, copies of which have been previously provided to Plaintiffs and relevant portions of which were filed with the motion to dismiss).

sham, the Federal Circuit specifically relied on the fact that the trial judge ruled for FilmTec and the Federal Circuit found that the trial court's ruling "does support the conclusion that FilmTec's theory was more than a sham." *Id.* at 939.

Twin City Bakery Workers & Welfare Fund v. Astra Aktiebolag relied on the public record to dismiss a sham litigation, ruling that "this Court, even on a motion to dismiss, may take cognizance not only of those orders of Judge Jones expressly referenced in the Amended Complaint but also of her other orders and related public records in the case before her." 207 F. Supp. 2d 221, 224 (S.D.N.Y 2002). In dismissing the sham complaint, the court did not limit its review of the record to what was before Judge Jones at the outset of the patent complaints, but also considered her rulings on summary judgment and the fact that certain patents went unchallenged throughout pretrial proceedings. *Id.*

In *Covad Communications Co. v. Bell Atlantic Corp.*, the D.C. Circuit affirmed dismissal of an alleged sham claim under Fed. R. Civ. P. 12(b)(6) by reviewing the decisions in the challenged case and the arguments advanced by the antitrust defendant/patent plaintiff: "[w]ith the opinions of the patent courts before us, we see no barrier to our determining now whether Bell Atlantic's suit was a sham and hence without *Noerr-Pennington* immunity from antitrust liability." 398 F.3d 666, 677 (D.C. Cir. 2005), *reh'g denied*, 407 F.3d 1220 (D.C. Cir. 2005).

In *Bio-Technology General Corp. v. Genentech, Inc.*, the Federal Circuit affirmed dismissal of sham litigation claims based on the findings of the administrative law judge ("ALJ") in the challenged ITC proceeding and the entire ITC record, including denials of motions for summary determination and the ALJ's initial determination of patent infringement. 267 F.3d 1325, 1332-33 (Fed. Cir. 2001).

Movers & Warehouseman's Ass'n of Greater N.Y., Inc. v. Long Island Moving & Storage Ass'n dismissed a sham claim based on the record of the underlying litigation. The court held

that "[e]ven on a Rule 12(b)(6) motion this court may properly take judicial notice of documents outside the four corners of the complaint." No. 98 CV 5373, 1999 WL 1243054, at *6 (E.D.N.Y. Dec. 16, 1999). In dismissing the sham allegations, the antitrust court cited the parties' settlement of one challenged action and the court's statements in dismissing claims in the second, each of which events occurred after those suits were filed. *Id.* at *6-7.

In *Gen-Probe, Inc. v. Amoco Corp.*, the court dismissed a sham suit based on the public record of the underlying lawsuits, including the rulings on summary judgment: "Gen-Probe contends that it would be improper for the Court to consider facts outside the pleadings in ruling on [the] motion to dismiss. The Court disagrees. The Court may take judicial notice of the decisions in the underlying . . . lawsuits . . . ." 926 F. Supp. 948, 958 n.13 (S.D. Cal. 1996).

In *Harris Custom Builders, Inc. v. Hoffmeyer*, the court granted a motion to dismiss based on review of the record in the challenged copyright suit. The court explained that on a motion to dismiss, "a court focuses on the complaint, but may also take into account matters of public record, orders and items appearing in the record of the case." 834 F. Supp. 256, 261 (N.D. Ill. 1993). In dismissing the case, the court relied on "the evidence submitted on the two prior summary judgment motions that have been decided in this case." *Id.*

Finally, the Supreme Court's decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* confirms that in the context of a summary judgment motion the court's evaluation of whether the litigant had an objectively reasonable ground for bringing suit can, and should, be based on developments after the challenged suit was brought. 508 U.S. 49, 64 (1993). Thus, the Supreme Court held that "a winning lawsuit is by definition . . . not a sham," something that can only be determined by looking at post-complaint events. *Id.* at 61 n.5. Moreover, in deciding that the challenged litigation was not objectively baseless, the Supreme Court expressly relied on the fact since *PRE* had been filed, other courts had resolved the key

legal issue differently and on the fact that commentators criticized the reasoning and result in the challenged litigation – all matters that postdated filing of the challenged lawsuit. 508 U.S. at 64-65. While *PRE* was decided on summary judgment, it is not apparent that the mode of analysis should be any different on a motion to dismiss.

Because of the wealth of authority holding that the court may look to the record in the challenged suit when considering a motion to dismiss, including developments after the filing of the complaint, there is a substantial ground for difference of opinion and the Order should be certified pursuant to § 1292(b).[2]

IV. THE FEDERAL CIRCUIT HAS EXCLUSIVE JURISDICTION FOR THE APPEAL

Because this case raises substantial questions of patent law, the Federal Circuit has exclusive jurisdiction to hear GSK's appeal pursuant to 28 U.S.C. §§ 1292(c) and 1295. Section 1292(c)(1) provides that the Federal Circuit "shall have exclusive jurisdiction of an appeal from an interlocutory order . . . in any case over which the court would have jurisdiction under section 1295." Under 28 U.S.C. § 1295, the Federal Circuit has exclusive jurisdiction of an appeal if the district court's jurisdiction was based in any part on 28 U.S.C. § 1338, which provides that the district courts have jurisdiction of any action "arising under any Act of Congress relating to patents."

[2] The cases holding that courts review the record in the underlying patent case when deciding a motion to dismiss are also consistent with a line of Third Circuit authority. *See S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 427 (3d Cir. 1999) (holding that where a judicial opinion is relied upon and referenced in a complaint, a court can "examine the decision to see if it contradicts the complaint's legal conclusions or factual claims"); *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 259 (3d Cir. 1998) (allowing review of public utility commission records to rebut allegations in the complaint of harm to competition); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425-26 (3d Cir. 1997) (allowing review of annual report to rebut allegations in the complaint of material fraud).

This Court has jurisdiction under 28 U.S.C. § 1338.[3] The Sheet Metal Workers agree. Sheet Metal Compl. ¶ 19. Under the Supreme Court's test, § 1338(a) jurisdiction extends to "those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808-09 (1988).

Here, Plaintiffs' claims depend on resolution of substantial questions of patent law such that the Federal Circuit has exclusive jurisdiction of an appeal. For example, Plaintiffs allege that GSK "engaged in sham litigation by asserting infringement under the Doctrine of Equivalence for equivalents it knowingly and purposefully disclaimed during patent prosecution." SAJ Compl. ¶ 5. To prevail, Plaintiffs must show GSK's positions, involving complicated and evolving areas of patent law, were objectively baseless and, as this Court correctly held, Federal Circuit law is controlling on such issues. *Wellbutrin SR*, 2006 WL 616292, at *11.

Thus, on the face of Plaintiffs' complaints, jurisdiction is appropriate under § 1338 because substantial questions of federal patent law must be resolved to determine whether GSK's patent infringement suits were "sham" and whether Plaintiffs are entitled to relief for their claims based upon GSK's conduct in enforcing its patent rights.

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[3] The Sheet Metal Workers Plaintiffs rely upon § 1338 as a basis for jurisdiction. Sheet Metal Compl. ¶ 19. Although SAJ and MMOH Plaintiffs do not cite § 1338 as a basis for jurisdiction within their complaints, the Court is required to examine the allegations and claims within the complaints to determine if a substantial question of patent law must be resolved and, if so, jurisdiction is proper under § 1338. *See Christianson*, 486 U.S. at 809 n.3 (explaining that a plaintiff cannot "avoid § 1338(a) jurisdiction by omitting to plead necessary federal patent-law questions").

V. CONCLUSION

For the foregoing reasons, the Court should certify its March 9 Order for immediate appeal and stay the proceedings until the Federal Circuit issues its ruling.

Respectfully submitted,

/s/ David P. Gersch
David P. Gersch
Kenneth A. Letzler
Amy Ralph Mudge
H. Holden Brooks
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, D.C. 20004
202-942-5000

Mark S. Stewart
Leslie E. John
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
1725 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 864-8225

Counsel for GLAXOSMITHKLINE plc and
SMITHKLINE BEECHAM CORP. d/b/a
GLAXOSMITHKLINE, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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MEDICAL MUTUAL OF OHIO, INC., Plaintiffs, v. GLAXOSMITHKLINE PLC, Defendants.	No. 05-CV-0396 Judge Bruce W. Kauffman

CERTIFICATION

THIS MATTER having come before the Court by motion of Defendant GlaxoSmithKline ("GSK"), for certification of the Court's Order of March 9, 2006 for immediate appeal pursuant

to 28 U.S.C. § 1292(b), and the Court having considered GSK's memorandum of law in support of said motion, the Court hereby FINDS:

1. The Court's March 9, 2006 Order presents these controlling questions of law: whether on a motion to dismiss a suit alleging that a patent suit was a "sham" in violation of the antitrust laws (i) the Court is prohibited from considering the public record in the underlying patent litigation and (ii) the Court cannot consider developments occurring after the filing of the challenged complaint.

2. There is substantial grounds for difference of opinion as to whether the Court's March 9, 2006 Order correctly decided the controlling questions of law; and

3. The termination of this litigation will be advanced materially by immediate appellate review of the Court's March 9, 2006 Order.

THEREFORE, the Court hereby CERTIFIES its March 9, 2006 Order for immediate appeal to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1292(b) and (c) and stays these proceedings pending the outcome of the Federal Circuit review.

_____

HON. BRUCE W. KAUFFMAN
UNITED STATES DISTRICT JUDGE

_____

Date

CERTIFICATE OF SERVICE

I certify that the foregoing Motion of GlaxoSmithKline to Certify Order for Interlocutory Appeal and for Stay of Proceedings, GlaxoSmithKline's Memorandum of Law in Support of its Motion to Certify Order for Interlocutory Appeal and for Stay of Proceedings, and Proposed Certification were filed electronically on the Electronic Case Filing ("ECF") system and in hard copy and were served, via First Class Mail, on the counsel on the service list below.

Dated: March 28, 2006

/s/ Angela Y. Kweon
Angela Y. Kweon

SERVICE LIST

Dianne M. Nast
Joseph F. Roda
Michael Stawinski
Jennifer S. Snyder
RODANAST, P.C.
801 Estelle Drive
Lancaster, PA 17601

Daniel E. Gustafson
GUSTAFSON GLUEK PLLC
725 Northstar East
608 Second Ave S
Minneapolis, MN 55402

Arnold Levin
Fred S. Longer
Daniel C. Levin
LEVIN, FISHBEIN, SEDRAN & BERMAN
510 Walnut Street, Suite 500
Philadelphia, PA 19106

Anthony J. Bolognese
Joshua H. Grabar
BOLOGNESE & ASSOCIATES, LLC
2 Penn Center Plaza, Suite 200
Philadelphia, PA 19107

Joseph H. Meltzer
SCHIFFRIN & BARROWAY, LLP
280 King of Prussia Road
Radnor, PA 19087

Michael M. Buchman
J. Douglas Richards
Cydney Rabourn
MILBERG WEISS BERSHAD & SCHULMAN LLP
One Pennsylvania Plaza, 49th Floor
New York, NY 10119

Thomas M. Sobol
David S. Nalven
Wanda Garcia
HAGENS BERMAN SOBOL SHAPIRO L.L.P.
One Main Street, 4th Floor
Cambridge, MA 02142

John W. Turner
William Christopher Carmody
Shawn Rabin
SUSMAN GODFREY L.L.P.
901 Main Street, Suite 4100
Dallas, TX 75202-3775

Neal S. Manne
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, TX 77002-5096

Linda P. Nussbaum
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
150 East 52nd Street, 30th Floor
New York, NY 10022-6017

E. McCord Clayton
BAZELON, LESS & FELDMAN, P.C.
1515 Market Street, Suite 700
Philadelphia, PA 19102-1907