IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RECKITT BENCKISER PHARMACEUTICALS INC., RB PHARMACEUTICALS LIMITED, and MONOSOL RX, LLC,	)	
Plaintiffs,	)	CA NO. 13-1461-RGA
v.	)	
PAR PHARMACEUTICAL, INC., INTELGENX TECHNOLOGIES CORP., and LTS LOHMANN THERAPY SYSTEMS CORP.,	)	
Defendants.	)	
RECKITT BENCKISER PHARMACEUTICALS INC., RB PHARMACEUTICALS LIMITED, and MONOSOL RX, LLC	)	
Plaintiffs,	)	CA NO. 13-1674-RGA
v.	)	
WATSON LABORATORIES, INC., and ACTAVIS INC.,	)	
Defendants.	)	
RECKITT BENCKISER PHARMACEUTICALS INC., RB PHARMACEUTICALS LIMITED, and MONOSOL RX, LLC	)	
Plaintiffs,	)	CA NO. 13-2003-RGA
v.	)	
ALVOGEN PINE BROOK, INC., and ALVOGEN GROUP, INC.,	)	
Defendants.	)	

Discovery Dispute before JUDGE RICHARD G. ANDREWS at 11:06 a.m., on Monday, April 7, 2014, at 844 North King Street, Wilmington, Delaware.

APPEARANCES:

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BY: JAMES F. HIBEY, ESQ.
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RICHARDS LAYTON & FINGER
BY: STEVEN J. FINEMAN, ESQ.

-and-

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BY: JAMES K. LYNCH, ESQ.
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SHAW KELLER LLP
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WINSTON & STRAWN LLP
BY: DAVID P. DALKE, PH.D., J.D.

-and-

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BY: MEGAN C. HANEY, ESQ.
Counsel for Watson Laboratories, Inc.

THE COURT: These are three cases, the first of which is Reckitt Benckiser Pharmaceuticals vs. Par Pharmaceutical, Civil Action Number 13-1461. Who's Ms. Severance.

MS. SEVERANCE: That would be me.

THE COURT: All right. So who have you got with you here?

MS. SEVERANCE: I have Jim Hibey and Tim Bickham from Steptoe & Johnson on behalf of MonoSol, and closest to you is Dan Ladow from Troutman Sanders on behalf of Reckitt.

THE COURT: All right. And Mr. Fineman?

MR. FINEMAN: Good morning, Your Honor. Steve Fineman on behalf of Par and IntelGenX. And Your Honor may recall Jim Lynch from Latham & Watkins, who I have with me.

THE COURT: All right. Good morning. And Mr. Castellano?

MR. CASTELLANO: Good morning, Your Honor. Jeff Castellano for Alvogen Pine Brook, and this is Steven Sklar right here from Leydig, Voit & Mayer.

THE COURT: All right. Ms. Haney?

MS. HANEY: Good morning, Your Honor. Megan Haney from Phillips, Goldman & Spence. And this is David Dalke; he is from Winston & Strawn.

THE COURT: All right. So I guess there are three little disputes here. Why don't we take care of the FDA bar first. I take it two of the three defendants, Par and Watson -- who wants to speak for no more than one minute on this topic?

MR. LYNCH: Your Honor, on behalf of Par, James Lynch, Latham & Watkins. Thank you. I'm not even sure it would require a minute. I do think the papers cover the topic.

THE COURT: Okay. You don't have to take the full minute.

MR. LYNCH: If Your Honor has questions, I'm happy to address them, but I think that it's very well presented.

THE COURT: All right. Well, does anybody want to say anything on behalf of the plaintiffs?

MR. LADOW: Your Honor, we also think it's covered in the papers, but I would

say that you have to have no faith in the enforceability of the protective order in order to actually be in favor of this clause. Because we already have a clause, as our letters point out, saying that you can't use confidential information in communicating with -- you can't use confidential information from the case for purposes other than the case.

And that provision already protects against using confidential information in such things as citizen's petitions, et cetera. And that's one of the reasons why plaintiffs think it's unnecessary.

THE COURT: All right. Well, I think there's agreement in the letters that there's good cause for issuance of the protective order as a whole. The parties seeking the FDA bar, which here is Par and Watson, have a burden to show good cause to obtain it.

Quoting liberally from the Federal Circuit, The party seeking the imposition of the FDA bar must show the information designated to trigger the bar and the scope of activities

prohibited by the bar, the duration of the bar and the subject matter covered by the bar reasonably reflect the risk presented by the disclosure of proprietary competitive information.

I don't think Par and Watson have shown good cause. Two of the three bar areas that are in the docket, Item 70, Exhibit 1, Paragraph 6.4, are grossly overbroad. I note that there's been some retreat from the breadth in their reply letter, CI-74, Page 3. But at the time, the suggested narrowly-crafted bar was in discussion between the parties, not in the letters to me.

This is, of course, done against the background of Section 14.1. Plaintiff just mentioned it already prohibits the use of any confidential information in any challenge involving the FDA. The proposed bar, unlike the patent prosecution, the bar that's right above it doesn't appear to contain a durational limit.

In any event, I do not believe that the proposed FDA bar reasonably reflects the risk presented by the disclosure of

proprietary competitive information, which also seems to have been Judge Robinson's conclusion in *Eurand vs. Mylan*, Number 08-889 SLR, which is in Docket Item -- in that case was Docket Item 71 in Paragraph 2, which is also Exhibit 2 to Docket Item 70 here.

All right. So let's go on to the question about in-house counsel. And let me see if I have this essentially straight because the parties letters and their attachments, you know, on the one hand, the defendants just presented a clean copy of the proposed protective order, and the plaintiffs presented one with all kinds of markups and parenthetical notes.

And it seemed to me -- and I saw references to four levels of confidentiality, even though I actually only saw three. But it seemed to me that basically the question was, or might be looked at more concretely, is whether the designated in-house counsel for I guess the two defendants other than Watson, it seemed like the things that were listed were access to New Drug Application 22-410, which I assume is the new drug application for whatever Reckitt

Benckiser's branded product is; is that right?

MR. LADOW: Yes.

THE COURT: Right. Okay. The ANDAs and the three related actions; nonpublic correspondence with the FDA presumably relating to the ANDAs, maybe the NDA; the products presently in development are undergoing FDA approval or future products that are not the subject of the three ANDAs; products presently in development are undergoing FDA approval or future products; and patent applications that are not yet published; and highly-sensitive financial information.

And this is what I was thinking. It seemed to me that in-house counsel -- well, it seemed like the parties sort of maybe thought that highly-sensitive financial information, or at least some of the parties, was in a slightly different category. But when I looked at this, it seemed to me that in-house counsel -- and that's presumably the two counsel who submitted declarations, and if I went this way I guess Watson could sign on, too. But they seem to me that the in-house counsel ought to have access

to the New Drug Application 22-410. They ought to have access to the ANDAs and the three related actions, and they ought to have access to the nonpublic correspondence with the FDA that presumably either relate to the new drug application or the three ANDAs.

It seemed to me that in order to do their job, and I guess this is particularly the plaintiffs' counsel -- or actually, no. I guess this is -- obviously it applies for everybody. But it seemed me that those are things that the in-house counsel or managing and directing litigation or whatever exactly they're doing, those are things that they need to be informed.

It seemed to me that products presently in development are undergoing FDA approval or future products, you know, unless products are the ones that are the subject of the ANDAs, which presumably, that's not what we're talking about. Patent applications that are not yet published and the highly-sensitive financial information, I couldn't really figure out why the in-house counsel would need them to

do their jobs in this case.

And so what I was thinking was, and it doesn't matter to me exactly how you do it, but it seems to me that the latter three items should be sort of outside counsel only, and the other three items could be given to the in-house counsel to have access to. Does anybody want to comment on that?

MR. LYNCH: Thank you, Your Honor. James Lynch on behalf of Par. Par and Alvogen agreed, as the letter we submitted to Your Honor notes, that they were found excluding financial information from in-house counsel review. And so we certainly take no exception to that.

With respect to the two other categories, which in the submissions we made, Exhibit 1, Paragraph 2.5, Numbers 3 and 5, we take Your Honor's point and note that, at least with respect to category five, which relates to unpublished patent applications or information that constitutes a trade secret, that could be implicated in the matter that the Court -- which is probably the third issue that we're going to come to today.

And I guess what I would say to Your Honor is as long as we can come back to you at some future date and ask that those two categories, which for the moment are going to be excluded from in-house counsel review, and make a new case why under some circumstances it would be appropriate and necessary for them to see those kinds of documents. Is that something that you'd be amenable to hearing if it came to that?

THE COURT: Probably. All right. So I hear what you're saying. What about on this side?

MR. LADOW: Your Honor, for the plaintiffs with respect to the NDA and nonpublic correspondence with FDA, let me take those separately. So I think from our point of view the question is are the in-house counsel competitive decision makers, and do they have a need for this information under the standards by the caselaw?

THE COURT: Well, I think they are competitive decision makers, and I do think they also have a need.

MR. LADOW: Okay. So let me address the second part then. In terms of needs, we would say to Your Honor that with respect to the NDA, it's not necessary for those in-house counsel to have unfettered access to plaintiffs' NDA because the NDA in and of itself doesn't factor into infringement.

What infringement is going to depend on are the claims of the asserted patents, as Your Honor knows, and the generic's proposed products. So what's in there. And the NDA won't really factor into that, at least on its face. They could come back to the Court if it did in some way and that became necessary.

On validity, I don't see how the NDA necessarily factors into a validity analysis. They're going to depend on mainly prior art and expert testimony. So from our point of view, as far as the NDA is concerned, we just don't see a demonstrable need by the identified in-house counsel for that information in order to perform the tasks that they need to. And from our point of view, that's outweighed by the desire of the plaintiffs to keep a tighter

confidentiality restriction around that information.

And the same basically is true with respect to the nonpublic correspondence with FDA. I don't think that's going to factor into the patent merits issues, but what it can do is provide the in-house generic counsel with the potential roadmap for some additional strategy that they're going to undertake with respect to these proposed products or with other aspects of the products.

So it's the same situation where we don't see a demonstrable need in terms of management and the legal side of the case, and we think that it's outweighed by a legitimate concern to keep that confidential until such time as something actually comes up and they want to either take it to us, and if we can't work it out, to take it to the Court.

THE COURT: All right. Does anybody else want to say anything?

MR. LYNCH: Your Honor, I think these points are pretty well addressed in the papers. I would just emphasize that, as Your

Honor is aware, as we cite in Par and Alvogen's submission, the purpose of allowing in-house counsel access is to put the decision makers making the judgment calls internal to the company in the same position as outside counsel. That person can't function, can't serve their client, their in-house client, if they aren't able to do that.

So if the information is central enough to the case to be discoverable and used in the litigation and available to outside counsel, it ought to be available to in-house counsel unless there is some kind of unique reason that would make it subject to abuse or unfair advantage.

And for the reasons that counsel says that we have to believe in the enforceability of the protective order, and for the same reason that the Courts note that in-house counsel like -- I was going to say outhouse counsel -- like outside counsel are officers of the Court and are subject to the same duties and obligations. We have to expect that they can comply.

THE COURT: Yeah, the question of the integrity of in-house counsel, that's not at issue. It's never at issue in these things. I mean, because, you know, we're talking about inadvertent disclosure. And so it does seem to me that while I hear what the plaintiff has said, it does seem to me that there's a certain amount of context relevant to the decisions that in-house counsel has to make in the case. And being aware of what's going on with FDA and having the NDA seems to be part of what's necessary to give them the context for decisions that they make.

And so I think that the two identified counsel, who I accept they're competitive decision makers, that it's reasonable justification for allowing them access to those documents.

MR. LADOW: Your Honor, may I ask for clarification?

THE COURT: Yes.

MR. LADOW: Understanding that that's the Court's ruling, with respect to the ANDAs, the A-N-D-As, and the generics'

correspondence with FDA, do I understand Your Honor to say that that information will be reciprocally available to plaintiffs' in-house counsel?

THE COURT: I would think it would be. And certainly, I mean, I keep hearing in these cases about, I guess, plaintiffs' counsel. And maybe it's outside counsel, so maybe it's not usually what I hear about. It's not clear exactly who's being spoken about, but it seems that the production of the correspondence with the FDA on the ANDAs is routine; routine, at least, in the sense of somebody gets it on your side.

And I do think that the same logic applies that your counsel, in order to do their job -- because it's very specific to this case, that's the reason why they have a greater need for it. And some of the other things, you know, in some larger perspective would inform their judgments, but they're not very specific to this case, and it is very sensitive information. So did that give you the clarification you wanted?

MR. LADOW: I think so. I have a

very specific question then along those lines, and that is we sent an interrogatory to the defendants about whether they have received an acceptance for filing letter from the FDA. So this is correspondence --

THE COURT: This is to Par?

MR. LADOW: All three. And they've responded. And Watson has told us that we can give up that information to our in-house counsel. We don't have a response yet from Alvogen and Par.

But what I understand the Court is saying today on this issue is that that kind of information that's reflected in correspondence from the FDA to the generics, that if they can see the plaintiffs' correspondence with FDA, that our in-house counsel would have access to the reciprocal information, including this so-called AFF letter, or acceptance for filing information.

THE COURT: Right.

MR. LADOW: Thank you, Your Honor.

THE COURT: All right. Knowing that that's what my view is, can you come to a

protective order between yourselves without anything more from me?

MR. LYNCH: I believe that we can, Your Honor. I think that your order is clear.

MR. LADOW: I believe so, Your Honor.

THE COURT: Okay. All right. So let's go to the third issue, which is this exciting stuff about the trade secrets. So I wrote down that there were sort of three issues. One is the question of whether or not, I guess, the plaintiffs said they were going to file another suit against Par momentarily or --

MR. LADOW: It's been filed, Your Honor.

THE COURT: Oh, it has? Okay. And have you and Par discussed this issue between yourselves in terms of -- because I saw what you said is you want to dismiss the first lawsuit. And I think you went second in this, so Par didn't have a chance to respond. So I have no idea what their point of view is. Or if they did, I missed that in the letter.

But what you want to do is

essentially dismiss the present suit and presumably slide the second suit right in with nothing changed other than the 30-month deadline runs from whenever the relevant date is in connection with that, as opposed to what it was with the first suit? Is that right?

MR. LADOW: Actually not, Your Honor.

THE COURT: Oh, okay.

MR. LADOW: We haven't discussed this with Par, so we haven't had that discussion. But the situation is one where, as you know, we believe that they had a premature Paragraph IV --

THE COURT: Right. I got that.

MR. LADOW: -- which kicked the whole thing off early. The difference between when the 30-month stay would run from when we got their initial letter back in July and present letter in mid March of this year is about eight months and two weeks.

And from our point of view and understanding, we haven't discussed it with them yet, but from our point of view, it would reward

them for filing a premature Paragraph IV letter by being able to push the schedule, get the trial at the same time as a legitimate first filer. And really the schedule should be decoupled in some way that makes sense to the Court such that they don't have a trial date that's on the same date.

And I will tell you, Your Honor, that Alvogen is going to fall into the same group. And either by way of a stip or by way of a motion, plaintiffs intend to proceed that way and to ask for that kind of relief from the Court. And so from our point of view --

THE COURT: Well, hold on just a second. Are you saying in so many words Watson, in your opinion, has done things right and the other two have not?

MR. LADOW: Yes, Your Honor. And just to be clear, I'm not making any assertion that anybody misrepresented anything.

THE COURT: No. No. I'm sorry. By *right*, I just meant legally correct manner.

MR. LADOW: Yes, Your Honor. Basically, the bottom line is that we believe

that Watson initiated their Hatch-Waxman process --

THE COURT: We don't need to go into detail. I think I've got what you're saying. All right. So defendants -- you know, we're not going to resolve anything here today because either we're going to need to have some briefing or you need to discuss things with the plaintiff. But is there anything either Par or Alvogen wants to say, or I guess even Watson wants to say since all these things possibly impact each of you?

MR. LYNCH: Yes. Thank you, Your Honor. We haven't had a chance to discuss this with counsel, so this is unrehearsed, and forgive us for whatever sloppiness that imparts on the process. But it seems to me the very sensible thing to do is the practical thing. There isn't a controversy about when the 30-month stay begins to run. Counsel's correct. It's going to run beginning in March of 2014. The infringement allegations in the new complaint mirror those. One thing we can do very simply is Par could file a response to this

new complaint. We could file it -- today's Monday. We could file tomorrow or Wednesday.

THE COURT: And presumably you just take the old one and change the case number.

MR. LYNCH: Well, you make it sound so simple. No, that's exactly what we'd do. No, but I think we can file it very quickly. And whatever mechanically and practically the Court wants to do to make sense out of that, maybe consolidate those two matters or whatever, Par can stay on the same schedule that we're on. It makes a lot of sense to do that, and that would be a very simple solution to this.

And I take from Your Honor's input that you don't want to hear sort of back and forth about whether the Paragraph IV letters are premature, what the implications for that are. I'm happy to address that if you'd like to hear it, but it doesn't change the fact that Par is not going to dispute when the 30-month stay runs. And if we need to memorialize that in a stipulation or in some other way, we're prepared to do that.

THE COURT: Is Alvogen of the same

point of view?

MR. SKLAR: This issue was raised last week or recently by plaintiff, and we're dealing with our clients and how to address it. I don't have a position of how best to work that out. It's something we need to address.

THE COURT: All right. Does Watson have anything they want to say here?

MR. DALKE: Similarly to Alvogen, Your Honor, this is new to us, and I did not yet have a chance to hear input from our client.

THE COURT: Okay. Well, so what I said when I was addressing the plaintiff and assuming what they wanted to do, that was just an assumption on my part. I'm open to the four of you talking to each other. And I guess what I'd say is I expect that Reckitt vs. Watson is going to stay on the schedule it's on. Whether or not Reckitt vs. Par and Alvogen stays on that schedule or not, you know, that's something I'm not going to offer an opinion on right now.

MR. LADOW: Just to offer one comment on that. The Reckitt/Watson schedule, the sequence here is that, as you know, the Par

case was the first one filed. And so when we were in front of --

THE COURT: Right.

MR. LADOW: When we were in front of the Court on the scheduling order, we backed up the whole case. We shoehorned the whole case. We set it up structure-based on the fact that the 30-month stay could end at a certain day in January of 2016 because of the Par case.

THE COURT: But Watson filed about a month later.

MR. LADOW: Yeah. So it's about six or seven weeks later, I believe. So I'm only making the point that from our point of view that if the Watson case was -- if we put a little more room in the schedule, we can talk to Watson about it by four weeks, five weeks, or something. It might make sense because it was actually arranged off of the Par initial filing rather than the Watson initial filing. And simply because you had said that it wouldn't necessarily remain the same, I just wanted to raise that now.

THE COURT: All right. Well, you

can talk with Watson, too. I won't make any promises to anybody about anything. And so at least two of the three defense counsel had said they were still talking or in the process of talking things over with their clients. So why don't you all talk to your clients, talk to each other.

I foresee that -- well, it seems like the plaintiff and Watson might very well agree to something or other. It seems to me that from what I've heard, it seems less likely that Par and Alvogen and the plaintiff are going to come to some harmonious agreement. But if you do, that's great. If you don't, what kind of schedule would you like to set to come back and talk with me about it?

MR. LADOW: From the plaintiffs' point of view, I think the difference is that we discussed it with our clients, so we are basically prepared to proceed with the Court or with defendants as they are ready to do so.

MR. LYNCH: Your Honor, for Par I would just say that, as I said earlier, with respect to when the duration, the beginning and

end of the 30-month stay --

THE COURT: Right. I understand that's not going to be disputed.

MR. LYNCH: It's not a controversy. It's Count 1 of the new complaint. I think we can get around that pretty readily. The balance of the complaint is the same. We can answer it. We will do that this week. I think we would submit whatever the appropriate motion or request is to consolidate the matters, and that's what we would intend to do.

Obviously, we'll talk to counsel for plaintiffs and see if there is some accomodation or stipulation to be reached, but I would think that that's the most sensible approach. And I'm not sure there's going to be a controversy to be resolved unless there's something Your Honor's thinking of that we're missing.

THE COURT: Well, because I don't see the plaintiff stipulating to something that you want to do, but I could be wrong about that.

Well, I guess what I'd like to do is set a date to hear from you all. And so just

tell me what you think is a reasonable date. I understand the plaintiff to say they don't need too much time. But I'd like to pick something that suits everybody, so that's a slightly longer period of time. When would you like to send me something?

MR. LYNCH: Your Honor, for Par I think we could probably send you a letter in the next couple days.

THE COURT: So we have two other --

MR. SKLAR: I was hoping to have a week to two weeks to deal with my clients to figure out what course of action makes sense here and converse with plaintiffs.

THE COURT: So what if we said two weeks, and that gives you a chance to communicate with your clients, communicate with each other. I mean, there is, after all, four parties, so I imagine that might be the case that all the defendants don't end up on the same page. I mean, maybe they will. I don't know. So do you want to say in two weeks you'll either file a stipulation or a status report or one or more motions?

MR. LYNCH: Your Honor, we can do that. I guess my question is, and I think I may have just simply missed this, the new complaint that was filed last Friday was against Par. And I guess counsel is saying that there is going to be a new complaint against Alvogen?

THE COURT: That's certainly what I heard.

MR. LADOW: No, Your Honor.

THE COURT: No. Okay.

MR. LYNCH: So I'm confused how Alvogen is involved.

MR. LADOW: I said that Alvogen is in the same basket. I don't want to say things here that I understand are confidential.

THE COURT: Okay.

MR. LADOW: But in terms of what Your Honor just asked, what happens in a couple weeks, one way to look at it, at least in regard to Par, because there is a complaint against Par, is that the schedule in this new Par case is going to be up to the Court. And I was thinking of it as a matter -- if Your Honor wants a motion, we'll make a motion. But it

could be in the nature of a scheduling conference, if you will, as to how the schedule of that case should or should not marry up with the other cases.

THE COURT: And so that's the reason why -- you know, I have plenty of motions. So I'm perfectly amenable to doing something some other way. So I said status report, stipulation, motion, because I really am happy to give you all flexibility to do this however you think best. But I'm also perfectly happy to -- I don't have my calendar with me to set another time for you.

MR. LADOW: Your Honor, we would propose something like a letter to the Court, as we've been doing for these proceedings, where if don't have agreement, we can both write you a letter saying what we think the positions should be on that, and then the Court will go from there.

THE COURT: All right.

MR. LYNCH: And Par is certainly amenable to that. My thought of it is it doesn't sound to me that whatever issue might

implicate Alvogen has matured to the point that they need to be on the same schedule in this regard as Par.

I think what I would propose is obviously we'll meet with counsel, and I would expect to be able to present to Your Honor relatively quickly the fact that Par has answered the new complaint, that it has submitted or is prepared to submit a request to consolidate the matters, and that we have, in discussion with counsel, identified any disputes that we have about how the schedule should be handled for Par going forward. And we can frame that in a short letter to the Court.

THE COURT: All right. Mr. Bickham?

MR. BICKHAM: Your Honor, Tim Bickham on behalf of MonoSol. Just to be clear, the original or the existing complaint against Par, our position is there's no jurisdiction over that. There would not be a consolidation between the new complaints and the old one. There's going to be a dismissal of the old, and we'll go forward with the new.

THE COURT: Well, no. I had the

impression from your letter that that was very much your position. So I understand your position. All right.

So today's a Monday. Two weeks from today if you can. Ideally, do you think it's possible that instead of getting competing letters I can get just a joint letter so that you have a chance to have some dialogue back and forth, and yet I don't get one letter from each of you and yet a responsive letter from each of you? Maybe one letter setting forth all your various points of view, and we'll go from there. Okay?

And you know, Alvogen and Watson, one way or another I expect you to be participating in this, too.

MR. SKLAR: Right.

THE COURT: Right?

MR. SKLAR: Yes.

THE COURT: Okay. So one other thing, which is I don't know where we are in terms of the existing schedule, but everyone should regard the existing schedule as being active until told otherwise. So if somebody has

something they're supposed to be doing, they should keep on doing it. Okay?

MR. LYNCH: Yes, sir.

THE COURT: All right. So that was issue number one, which I guess is not resolved. And then issue number two -- and I apologize. I saw footnotes and such, but I didn't make enough notes to myself to recall exactly what I got out of them.

We've got this declaratory judgment counterclaim, which seems to me to be ripe for being dismissed for lack of subject matter jurisdiction itself. And yet, even though the plaintiffs, who just all nodded their heads yes, haven't filed anything -- and there could be a lot of reasons for this. But is one of the reasons that because if you file something you think that might hinder later on if you do claim there is a trade secret violation?

MR. HIBEY: That's part of the reason, Your Honor, among the other reasons that were discussed at the last hearing.

THE COURT: Yeah, I don't remember

the last hearing, but hold that thought. I forget. It's just Par that's done this, right?

MR. HIBEY: Right.

THE COURT: Because they're the only ones who have a relationship with MonoSol.

MR. HIBEY: Yes, sir.

THE COURT: And what's your view on subject matter jurisdiction at this point?

MR. LYNCH: I think the complaint adequately alleges an interesting controversy. I accept the denial by the plaintiffs that such a controversy exists. But because they haven't moved to dismiss, it remains in the case.

And I think their decisions, whatever they are, or reasons for not moving to dismiss, which I have always expected and includes this concern, they would not be able to or it would hinder their ability to re-file later. That's a tactical decision, and it leaves a claim in the case. So I'll take your questions, but there's a further part of that answer.

THE COURT: No. Go ahead. I'm sorry.

MR. LYNCH: So that's part of it. And then you recall the last time we were here, or you may not --

THE COURT: No. Actually, I don't know if I recall it, but since you're busy quoting me, I did read the relevant portions of the conference.

MR. LYNCH: Yeah. And so when we were here, the debate then was about the balance of the ANDA that hadn't been produced by Par to one of the plaintiffs. And the representation at the time was that if there's a trade secret misappropriation claim in there, it's going to have to be found in the ANDA.

And they've now had nine weeks or so to study the ANDA, and they've responded to a second interrogatory saying that they haven't found information in there that independently and necessarily establishes a misappropriation, but that they have more work that they need to do that includes fact discovery, that includes depositions, and it may well include expert analysis.

And as we've pointed out in our

submissions, they've now propounded discovery, which very clearly is directed to trade secret issues. And so what we have is a ripe claim or a claim that's at least still in the case, the plaintiffs' representation and admission in an interrogatory that they need further discovery to assess the existence of a trade secret claim, and then discovery that's directed precisely to that.

THE COURT: All right.

MR. LYNCH: So that's a very long way of saying, if they are going to demand documents, which they have, which we think you know, arguably -- and they say this in the their papers, and I give that point some credit -- arguably, some of the documents they demand could relate to plaintiffs' issues.

But I think there's no question that the way they're framed, they reach well beyond that as well. And I think that if we're going to do trade secret discovery, we need to have an identification of those alleged secrets.

MR. BICKHAM: Well, Tim Bickham on behalf of MonoSol, Your Honor. With all due

respect to counsel, I think he's wrong on the facts, wrong on the law. That line out of the transcript where I said that if there is a trade secret claim it would be found in the ANDA or something like that, if there was a trade secret or if there is a trade secret misappropriation, it would be found in the product which is embodied in the ANDA.

The claim is, or the issue here, is how did Par get the information that allowed them to develop the product. So we have the -- the ANDA is just the FDA submission. And we never said that, you know, the trade secret misappropriation claim, if there is one, would live or die just on the ANDA. It's how they got the information and how it was used.

And frankly, that kind of discovery is at issue in nearly all or maybe all Hatch-Waxman cases. It's the development of the generic product. You know, that's not trade secret specific. That's patent specific. That's going to the infringement issues.

That's going to the issues like in this case. The generic companies say that the

patents were or are obvious. And one of the issues will be how much work did it take for them to come up with their generic products. And so the work, the back work leading to the ANDA is relevant in the patent case. It's relevant in the trade secret case if there is a trade secret case.

But we did not -- and I don't think that the tenor of the transcript, even if those words might be in there and buried in a paragraph, that the tenor wasn't that we would know in a binary way yes or no whether there was a trade secret claim just by looking at the ANDA. And the counterclaim, the motion to dismiss that we've spoken about this morning, would also incorporate the counterclaim from our point of view.

THE COURT: When you say the motion to dismiss we've spoken about, you mean the motion to dismiss what we'll call the old Par case?

MR. BICKHAM: Yes, Your Honor.

THE COURT: Okay.

MR. LYNCH: And so it sounds like

the motion to dismiss then would be directed also to the declaratory judgment trade secret claim.

THE COURT: I think that's what he just said. Yes.

MR. LYNCH: I just wanted to make sure I heard that correctly. So we can take that as it comes. My only response to that -- and I take counsel's statements about his intent in the last hearing and what he meant in the transcript, and I didn't read that transcript differently. I think he said the ANDA will either show it or that there could be more work to be done. It's the more work to be done that is the issue presented by our letter brief.

When we talked last, Your Honor, I acknowledged and Par acknowledged in its papers that the two sort of reasons to require a trade secret identification include to prevent the fishing expedition and to frame discovery, number one; and two, to prevent the molding, the framing of the exact articulation of the trade secrets on a post hoc basis based on what's found in the opposing party's documents. Here

those go together, right?

There's no question that in the ANDA case, much of the discovery that gets done and is necessary and will get done could relate to a trade secret claim. There's no question about that. But here there's also a lot of discovery that we believe they intend to do and have done, as evidenced by the document request that we've identified, and what they've said to the Court in their letter about needing depositions and possibly expert testimony to identify possible misappropriation claims.

And so they're acknowledging -- plaintiffs are acknowledging and actively seeking discovery for the purpose of framing a potential trade secret claim, and that's where these two policies come together. It is now a fishing expedition that is at great risk of molding asserted trade secrets on a post hoc basis. And that is -- it's the whole ball of wax, as Your Honor knows, when you're the defendant in a trade secret claim.

MR. HIBEY: Could I -- Jim Hibey. Could I --

THE COURT: Just remind me, are you two --

MR. HIBEY: We're together.

THE COURT: Oh, okay. You're partners. I wasn't sure. Go ahead.

MR. HIBEY: Thank you. If I could address it, maybe we need to step back a bit. But maybe even before I step back, if Par is willing to stipulate to a dismissal of their counterclaim without prejudice, this whole issue goes away. We're going to move to dismiss.

THE COURT: Well, okay.

MR. HIBEY: And the concern is whether it's with or without prejudice because as you've said --

THE COURT: Well, you know, dismissing a declaratory judgment without prejudice, what does that just mean? That just means that you don't think there's a ripe controversy. So it's not as though there's a ruling on the merits on whether or not there is or is not a trade secret misappropriation.

MR. HIBEY: And so that it's clear that we are not foreclosed somewhere down the

road if there is a misappropriation of a trade secret. We're not foreclosed from bringing that claim, then this whole issue goes away for now.

THE COURT: Okay. So here's what I think. I looked at the interrogatories, and it seems to me -- or not interrogatories, the request for production. It seems to me that the request for production number 76 looked like a trade secret request for production. The other three seem to me -- they're the kind of things that normally you're back and forth on, and you'd eventually agree on doing something, and they have some relevance to the patent issues.

So what I'd say about the interrogatories -- I'm sorry. I keep wanting to call them interrogatories. What I'd say about the request for production is I certainly wouldn't make -- certainly wouldn't make Par answer number 76.

And the other three I would leave for you to work out, but it certainly seems like there's a core there that's a perfectly relevant, a perfectly permissible kind of request for production. You know on the --

MR. LADOW: May I speak on that, Your Honor?

THE COURT: Yes.

MR. LADOW: So on request 76, Any communication with any current or former employee or consultant of any of the plaintiffs.

THE COURT: Wait a second. Maybe I got the numbers mixed up. Hold on a minute. Which exhibit number was it?

MS. SEVERANCE: Number 5, Your Honor.

THE COURT: No, I don't think that's it.

MR. LYNCH: You may be thinking of 71 or 72.

THE COURT: Well, hold on. I've got one with five exhibits, and one that probably has five hidden exhibits. And, in fact, I tabbed the right page. I'm sorry. I got that mixed up. That's what happens when you do it from memory.

It's not 76 that I was going to get rid of. It was 72. All documents and things relating to the communication by

defendant to another defendant or to any third party of any information generated, produced, or conveyed by MonoSol, including any confidential information regarding film technology.

MR. LADOW: Okay. So let me ask a clarifying question then. From Reckitt's point of view on the patent case, not on the trade secret issue, we want to be able to find out to what extent -- I'm sorry, not to what extent. We want to be able to find out the source of the information that either Par or its partner in formulation, IntelGenX, had in coming up with whatever its technology was. Because it goes to the validity side of the case insofar as they're alleging obviousness. So we want to know how they came up with their product, what work did that entail. And we don't want to be foreclosed in doing that.

THE COURT: Well, I think if you say anything that they gave to IntelGenX in connection with generating the product, that's a different question. But I'm just looking at a very broad thing. Any defendant, any third party --

MR. LADOW: Okay, Your Honor.

THE COURT: So that's one of the reasons why I don't like deciding requests for production or interrogatories. Because they're usually written so broadly that they include anything, so it's often hard for me to know what's there. But reading it the way it's written, it looks like a request for trade secrets. To the extent that you narrow it down to things given to IntelGenX, that may be an entirely different question.

MR. LADOW: Thank you, Your Honor.

THE COURT: But I also, from the back and forth I've gotten over time on the trade secret counterclaim, I really don't think there is subject matter jurisdiction right now. There's the most ethereal of reasons to believe that there's an actual controversy.

And so I think to the extent there is actually trade secret discovery being done, I'm going to essentially stay that until I get this motion to dismiss. And I have to say that I really can't imagine I'm not going to grant this motion to dismiss. But I really don't see

-- everything I see just tells me that having trade secret in this is that there's no concrete dispute. There's no real controversy between the parties right now.

And in any event, you know, certainly the request for production as it is right now, I don't like it. It's extremely broad. If plaintiff narrows it down, certainly what I say doesn't have any impact on that. The other ones I expect in the normal course you'd narrow it down anyhow. But they didn't strike me as they looked like trade secret requests for production in disguise, or maybe not in disguise. So does that resolve everything?

MR. LYNCH: It does address it, Your Honor. One other point that I wanted to make is -- and I take Your Honor's point about your view on the present merits of the trade secret declaratory judgment claim, and we had this discussion when we were before you last. And as I said at that time, the principal concern that Par has is that this claim will come out very near the end of the case and that will push the 30-month stay and so forth --

THE COURT: If it comes up near the end of the case, it's going to end up as a separate case. I'm not going to -- I say this as definitively as I can at this point because you can never tell, but I think the Delaware counsel who've seen me in these ANDA cases, we stay on schedule for the trial. Sometimes the counsel will take it off, and then they may or may not live to regret that.

But when I've had disputes and things arising late on, I've handled them as best I can and told you to just keep heading to trial.

So once I get these things scheduled, for lots of reasons, it's more important than in most cases to keep on schedule.

MR. LYNCH: Understood. And I suppose one last thing is we will, in connection with the discussions we're going to have with counsel and the submission we'll make within the next two weeks to Your Honor, we'll identify a date by when they would submit a motion to dismiss the existing Par complaint or the first

Par complaint.

THE COURT: Well, why don't you talk with them. It might not be necessary. But if it is necessary, you can come up with a date.

MR. LYNCH: Very well.

THE COURT: Okay? Covered everything that's on the agenda here?

MR. HIBEY: Yes, Your Honor.

THE COURT: Okay. When do you think that I might expect to see the protective order?

MR. LYNCH: I would think that's something we would be able to work out by the end of this week. That would be my expectation.

THE COURT: Okay. I will tell my staff to keep an eye open for it next Monday, but I will regard that as a soft deadline. Okay?

All right. Well, if there's nothing else have a good day, and I will see you all probably soon.

(The matter concluded at 12:00 p.m.)

CERTIFICATE OF REPORTER

I, Justine C. Kiechel, court reporter and a Notary Public, do hereby certify that the foregoing is a true and accurate transcript of the foregoing proceeding.

I further certify that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

/s/Justine C. Kiechel

Justine C. Kiechel

Dated: 4/9/14

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