

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
 Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 14-4624 Caption [use short title] _____

Motion for: Expedition of Oral Argument or Immediate Assignment to a Merits Panel for Decision Without Oral Argument The People of the State of New York v. Actavis plc and Forest Laboratories, LLC

Set forth below precise, complete statement of relief sought:
 Defendants-Appellants respectfully request that the Court schedule oral argument in this case no later than the week of March 16, 2015, or alternatively, if oral argument would delay a decision in any way, that the Court immediately assign the case to a merits panel for submission on the briefs without oral argument.

MOVING PARTY: Actavis plc and Forest Laboratories, LLC OPPOSING PARTY: The People of the State of New York
 Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Lisa S. Blatt OPPOSING ATTORNEY: Eric J. Stock
 [name of attorney, with firm, address, phone number and e-mail]
Arnold & Porter LLP New York State Office of the Attorney General, Antitrust Bureau
555 Twelfth Street NW, Washington, DC 20004 120 Broadway, New York, NY 10271
lisa.blatt@aporter.com; Tel. (202) 942-5000 eric.stock@ag.ny.gov; Tel. (212) 416-8262

Court-Judge/Agency appealed from: United States District Court for the Southern District of New York, Judge Robert W. Sweet

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know *

Does opposing counsel intend to file a response:
 Yes No Don't Know

** New York consents to the calendaring proposal, but objects to immediate submission on the briefs.*

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)
 Has argument date of appeal been set? Yes No If yes, enter date: _____

Signature of Moving Attorney: /s/ Lisa S. Blatt Date: 02/26/2015 Service by: CM/ECF Other [Attach proof of service]

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
 Has request for relief been made below? Yes No
 Has this relief been previously sought in this Court? Yes No
 Requested return date and explanation of emergency: _____
 Because this motion requests expedited oral argument or immediate assignment to a merits panel, Defendants-Appellants respectfully request that the Court act on the motion no later than March 4, 2015. Defendants-Appellants waive any reply.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

THE PEOPLE OF THE STATE OF NEW
YORK, by and through ERIC T.
SCHNEIDERMAN, Attorney General,

Plaintiff-Appellee,

v.

ACTAVIS plc and
FOREST LABORATORIES, LLC,

Defendants-Appellants.

Case No.: 14-4624

**EMERGENCY MOTION OF DEFENDANTS-APPELLANTS FOR
EXPEDITION OF ORAL ARGUMENT OR IMMEDIATE ASSIGNMENT
TO A MERITS PANEL FOR DECISION WITHOUT ORAL ARGUMENT**

Defendants-Appellants Actavis plc and Forest Laboratories, LLC (together, “Forest”) respectfully request—in accordance with this Court’s prior order granting expedition and directing that “[o]ral argument shall be scheduled as soon as practicable” after expedited briefing concludes—that this Court schedule oral argument in this case no later than the week of March 16, 2015. Alternatively, Forest respectfully requests that the Court immediately assign the case to a merits panel for submission on the briefs without oral argument. Forest respectfully requests that the Court act on this motion no later than March 4, 2015.

Forest submits this motion to ensure that a merits panel hears this case as soon as practicable, in accordance with the Court's prior order. New York has

informed Forest that it does *not* object to Forest's calendaring request, but does not consent to the proposal for submission of the case without oral argument.

On February 26, 2015, the clerk's office proposed the week of May 14, 2015, for oral argument. ECF No. 297. As described below, given the specific timing circumstances of this case, that is too late.

I. Background

As described in Forest's motion for a stay and its opening merits brief, Forest holds or licenses patents on two currently-marketed Alzheimer's drugs: twice-daily Namenda IR and once-daily Namenda XR. ECF No. 67 at 6-9; ECF No. 262 at 15-18; SA 33, 37. On July 11, 2015, Forest's exclusivity on Namenda IR ends. Before that date, Forest can sell Namenda IR free of competition. But on that date, five generic drug manufacturers are poised to enter the market immediately. SA 33. Forest's patent and regulatory exclusivities over Namenda XR, by contrast, last through at least 2026. SA 37.

When generic competitors enter the market, New York's generic substitution law will require pharmacists to fill prescriptions for Namenda IR with generic IR, unless overridden by a doctor. Because Namenda XR is an improved drug with different dosing, however, New York's law does not allow pharmacists unilaterally to substitute generic IR for XR. SA 57-58, 185, 190-92.

In November 2014, Forest announced a plan to change the distribution of IR

by making it available through a specialty mail-order pharmacy only to patients whose doctors deem IR medically necessary. SA 66. Other patients would switch to XR. Forest did so because XR supplants any market need for IR, JA 815, and to ensure that after July 11, generic manufacturers could not automatically capture the market by free-riding on New York's mandatory substitution law.

On November 5, 2014, Plaintiff-Appellee the People of the State of New York filed an amended complaint challenging Forest's distribution plan under federal and state antitrust laws. JA 605-45. Following an expedited hearing from November 10 to 14, 2014, the district court on December 15 issued the preliminary injunction that is the subject of this appeal. JA 12; SA 137-38. The court acknowledged that "[t]he calendar ... dictated the timing of the issuance of [the] opinion," explaining that, "[w]hile the issues are deserving of an exhausting treatment, their significance requires resolution in time to permit the possibility of appellate review." SA 3 n.1. By the time of the injunction, Forest had ceased producing IR. JA 994. The injunction thus compelled Forest to restart production of IR and sell it until July 11, 2015, when exclusivity for that drug expires, and for 30 days thereafter, to guarantee sales for generic competitors. SA 137-38.

On December 17, 2014, Forest filed a motion in this Court for a stay of the preliminary injunction and for an order expediting the appeal. ECF No. 19. New York opposed a stay and disagreed with Forest on what the expedited schedule

should be, but the State did *not* dispute that the appeal should be decided well before mid-summer. In particular, New York recognized that the appeal should be “decide[d] ... sufficiently in advance of July 11, 2015, when generic versions of Namenda IR will enter the market,” and argued that such expedition would obviate any need for a stay. ECF No. 77 at 2-3; *see also infra* pp. 5-6.

On January 6, 2015, this Court granted the motion to expedite, while denying a stay. ECF No. 101. On January 12, 2015, the Court ordered a briefing schedule that accepted Forest’s previously submitted opening brief, ordered New York to file its answering brief on February 12, 2015, and ordered Forest to file its reply brief on February 19, 2015. And most significantly here, the Court further ordered that “[o]ral argument shall be scheduled as soon as practicable thereafter.” Order, ECF No. 121 (emphasis added).

As of February 24, 2015, the parties had filed the joint appendix, their final form briefs, and their oral argument statements, which indicated no dates in which counsel for either side would be unavailable for argument. ECF. Nos. 228, 230-33, 270, 276, 285, 287. This case accordingly is fully briefed and ready to be scheduled for argument, heard, and decided. Nevertheless, on February 26, an entry was posted on the docket proposing the week of May 14 for argument. ECF No. 297.

II. Request

If this Court does not hold argument “as soon as practicable,” and instead holds argument during the week of May 14 as proposed by the Clerk’s office, this Court is exceedingly unlikely to decide the case sufficiently before generic entry on July 11. As Forest explained in its motion for stay, in order to fully implement its plan to switch patients to once-daily XR and prevent the case from becoming effectively moot, Forest needed either a stay or a decision by this Court by February 16, 2015. ECF No. 67 at 19-20. Since this Court denied a stay and that date has passed, Forest cannot implement its original business plans and has forever lost the full business opportunity it had previously planned for. Forest also has already begun large-scale production of IR under the injunction.

Forest nevertheless seeks expedited oral argument or immediate submission on the briefs to ensure that the expedited treatment of this case ordered by the Court on January 12, 2015 has meaning, and to preserve the possibility that if it prevails, it can obtain some relief from the injunction before it expires. New York does not oppose the Court’s holding oral argument immediately. And again, the parties and the district court proceeded expeditiously to facilitate appellate resolution well before generic entry. Although this court denied a stay, both parties agreed to expedite briefing so that this Court could decide the merits sufficiently in advance of July 11.

Furthermore, New York opposed a stay in the district court on the ground that it was unnecessary because the appeal could be decided well in advance of generic entry. JA 1019. And it made the same argument to this Court: it asserted that Forest “will experience no cognizable harm from the preliminary injunction *as long as the Court decides their appeal sufficiently in advance of July 11, 2015*, when generic versions of Namenda IR will enter the market.” ECF No. 77 at 2 (emphasis added). It was thus common ground that, in order for this Court to grant Forest meaningful relief, it would have to decide this appeal in time to allow Forest to switch patients to XR before generics enter the market on July 11.

Based on the parties’ briefing, Forest believes it will prevail on the merits. Moreover, the *sixteen* amicus briefs filed in this case (including ten in support of Forest) demonstrate the importance of this case and the substantiality of Forest’s challenge to the injunction. Now that the case is fully briefed it would seem to make little sense for this Court to delay disposition until shortly before—or even worse, after—July 11, 2015, the central date at the heart of the appeal. Unless the Court were to reverse course and stay the district court’s injunction, Forest believes this Court, like the district court, should decide this case quickly, in advance of generic entry.

Although this Court denied the stay, the harms to Forest wrought by the injunction are real and continuing. Whether or not it can still achieve a portion of

its original business plan, the fact remains that Forest is still being forced to make and sell a product it has no desire to make, in complete derogation of patent law. Forest has diverted its limited production capacity to IR, an old drug, delaying the launch of Namzaric, a new fixed-dose combination of XR and donepezil. The FDA approved Namzaric on December 23, 2014, but because of the injunction, Forest has been postponed in producing and marketing it. JA 994-95.

* * * * *

When denying Forest's motion for a stay, this Court ordered that "[o]ral argument shall be scheduled as soon as practicable." In accordance with that order, Forest respectfully requests that this Court schedule oral argument no later than the week of March 16, 2015. New York consents to this proposal. In making this request, Forest appreciates the Court's busy calendar and the burden that oral argument may impose on the Court. For that reason, if holding oral argument would delay this Court's ability to render a decision in any way, Forest respectfully requests that the Court immediately assign the case to a merits panel for submission on the briefs without oral argument.

Dated: February 26, 2015

Respectfully submitted,

By: /s/ Lisa S. Blatt

Lisa S. Blatt
Sarah M. Harris
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
Tel: (202) 942-5842
Fax: (202) 942-5999
lisa.blatt@aporter.com
sarah.harris@aporter.com

Jack E. Pace III
Martin M. Toto
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
Tel.: (212) 819-8200
Fax: (212) 354-8113
jpace@whitecase.com
mtoto@whitecase.com

J. Mark Gidley
Peter J. Carney
Claire A. DeLelle
701 Thirteenth Street, NW
Washington, DC 20005-3807
Tel.: (202) 626-3600
Fax: (202) 639-9355
mgidley@whitecase.com
pcarney@whitecase.com
claire.delelle@whitecase.com

George T. Conway III
WACHTELL, LIPTON,
ROSEN & KATZ
51 W 52nd Street
New York, NY 10019
Tel: (212) 403-1260

Fax: (212) 403-2260
GTConway@wlrk.com

*Counsel for Defendants-
Appellants Actavis plc and
Forest Laboratories, LLC*