No. 15-8017

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

MYLAN PHARMACEUTICALS, INC.,

Plaintiff-Respondent,

v.

CELGENE CORPORATION,

Defendant-Petitioner.

On Petition for Leave to File Interlocutory Appeal
From the United States District Court for the District of New Jersey
Case No. 14-cv-2094 (Hon. Esther Salas)

BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-PETITIONER'S PETITION FOR LEAVE TO FILE INTERLOCUTORY APPEAL

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a non-profit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited, accountable government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* before this and other federal courts in cases related to the proper scope of federal antitrust laws. *See, e.g., FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *United States v. Apple Inc.*, No. 13-3741 (2d. Cir., dec. pending); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006).

WLF believes that the object of federal antitrust law should be to promote competition and thereby provide consumers with better goods and services at lower prices. While both innovator and generic pharmaceutical manufacturers play an important role in delivering quality health care to the American public, WLF is deeply concerned that the district court's ruling below creates enormous uncertainty for all innovator manufacturers by requiring them to litigate refusal-to-

[1] Pursuant to Federal Rule of Appellate Procedure 29(c), *amicus* WLF states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

deal claims in the absence of any prior, voluntary course of dealing. Because no controlling Third Circuit precedent answers the certified question in this case, Celgene's petition for leave to file interlocutory appeal should be granted.

REASONS FOR GRANTING THE PETITION

This case presents an issue of first impression for this Court: whether a prior, voluntary course of dealing is required to allege an actionable refusal to deal under § 2 of the Sherman Act. In refusing to dismiss Mylan's § 2 claims, the district court held that, despite Celgene's objective business reasons for refusing to sell Mylan samples of its patented drug, Celgene might still owe Mylan a duty to deal if the refusal to sell was motivated in part by Celgene's subjective motivation to obtain long-term, anticompetitive gain. The district court's holding would permit a jury to subject an innovator drug manufacturer to treble damages for antitrust liability under § 2 even if it is undisputed that the defendant had perfectly legitimate business reasons for refusing to sell samples of its patented drug to a potential rival with whom it had no prior course of dealing, if the jury determines the company's refusal to deal was subjectively motivated by a desire to obtain long-term competitive gain. No other court in the country has ever recognized that novel theory of antitrust liability.

As Celgene has persuasively demonstrated in its petition for interlocutory review, this issue involves a controlling question of law on which a substantial

ground for difference of opinion exists, and immediate resolution on appeal would materially advance the ultimate termination of the litigation. WLF will not repeat those arguments here. Rather, WLF writes separately to emphasize the enormous uncertainty the decision below will produce not only for the pharmaceutical industry, but also for the business community as a whole.

Because the district court's decision can, and likely will, be read to expand very substantially the scope of the duty to deal, it poses a threat to the proper enforcement, both private and public, of the antitrust laws. In the absence of a bright-line rule, the lingering uncertainty may deter perfectly lawful innovators from engaging in procompetitive conduct that might expose them to unwarranted litigation. Interlocutory review is also warranted because of the enormous unjustified expense that Celgene will incur if it is forced to defend the instant suit through the discovery phase. The gatekeeping function of Rule 12(b)(6) is particularly salient in the antitrust context, where allowing unmeritorious antitrust litigation to proceed past the pleadings stage imposes extraordinary and unwarranted costs on defendants.

I. IMMEDIATE RESOLUTION OF THIS ISSUE IS CRITICAL FOR THE BUSINESS COMMUNITY.

Whether a duty to deal with a potential rival can exist absent a prior, voluntary course of dealing is of critical immediate importance, not only to the pharmaceutical industry, but also to the wider business community. Because it is

contrary to the holding of *every* federal court of appeals to address this question, the decision below creates enormous uncertainty for all market competitors as to the potential scope of § 2 liability under the Sherman Act. This uncertainty imposes a high cost, forcing companies to make difficult business decisions without knowing what the law is or how it might be enforced against them by potential rivals or the plaintiffs' bar.

Existing and potential business defendants in this circuit cannot function efficiently without authoritative guidance as to what federal antitrust law requires. In the wake of the district court's decision, antitrust defendants are now potentially subject to claims for conduct that Congress never intended the Sherman Act to cover. In the absence of a definitive Third Circuit holding, the business community will not know how to comply with the district court's subjective standard, which permits a jury to impose liability if it does not believe that the defendant's motives for refusing to deal with a potential rival were sincere. If the Third Circuit were to join with the Second, Ninth, Tenth, Eleventh, and D.C. Circuits in resolving this issue,[2] it would clarify the law for all affected

[2] *See Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013); *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009); *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 556 (9th Cir. 2008); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007); *Covad Commc'ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 673 (D.C. Cir. 2005); *Covad Commc'ns Co. v. BellSouth Corp.*, 374 F.3d 1044, 1049 (11th Cir. 2004).

stakeholders, particularly those subject to suit in Delaware, New Jersey, and Pennsylvania.[3]

Increased risk of litigation looms especially large over innovator pharmaceutical manufacturers, given the disturbing recent trend among some courts to hold branded drug manufacturers liable for product design claims brought by patients who were allegedly injured by a generic version of the drug. *See, e.g.*, *Dolin v. SmithKline Beecham Corp.*, No. 12-6403, 2014 WL 804458 (N.D. Ill. Feb. 28, 2014); *Kellogg v. Wyeth, Inc.*, 762 F. Supp. 2d 694 (D. Vt. 2010); *Wyeth, Inc. v. Weeks*, 2014 WL 4055813 (Ala. Aug. 15, 2014). Moreover, the defendant in this case, Celgene, has already been subjected to prior lawsuits in this circuit without having the question of how it must deal with potential rivals definitively answered. *See, e.g.*, *Int'l Union of Bricklayers v. Celgene Corp.*, No. 2:14-cv-6997 (D.N.J. filed Nov. 7, 2014); *Lannett Co. v. Celgene Corp.*, No. 08-3920 (E.D. Pa. Aug. 15, 2008).

[3] Under the Sherman Act's liberal venue provision, that includes almost all firms doing business in the United States. *See* 15 U.S.C. § 22 ("Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business."); *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 292-99 (3d Cir. 2004) (holding that "personal jurisdiction in federal antitrust litigation is assessed on the basis of a defendant's aggregate contacts with the United States as a whole").

The decision below also threatens to chill pro-competitive conduct by firms in a wide variety of markets. The threat of unfounded yet expensive antitrust litigation often deters firms from engaging in the vigorous competition that the antitrust laws were meant to encourage. It would ultimately harm consumers if a lack of clear guidance resulted in any seller hesitating to employ the most efficient distribution system; or failing to adopt product improvements; or (as in this case) compromising on the appropriate level of consumer safety when it sells a dangerous product, solely to avoid the burden and expense of protracted litigation. Many commentators have noted the troubling tendency of rivals to use the antitrust laws as a means of reducing competition. *See, e.g.*, William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1921 n.8 (2003) ("If plaintiffs can extract sizable settlements by filing frivolous lawsuits capable of surviving motions to dismiss, potential defendants will avoid engaging in any behavior that could be construed as anticompetitive, further dampening these firms' incentives to compete aggressively."); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 555-603 (1991) (describing how the exorbitant cost of defending even frivolous antitrust litigation can have a chilling effect on otherwise pro-competitive conduct); William J. Baumol & Janusz Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. ECON.

248, 252 (1985) ("Antitrust, whose objective is the preservation of competition, by its very nature lends itself to use as a means to undermine effective competition. This is not merely ironic. It is very dangerous for the workings of our economy."). The decision below, if allowed to stand, will only exacerbate this disturbing trend.

A potential defendant who cannot predict with any reasonable degree of certainty whether its behavior will afterward be deemed illegal is "particularly vulnerable to guerrilla warfare and intimidation into the sort of gentlemanly competitive behavior that is the antithesis of true competition." Baumol & Ordover, *supra*, at 254. Noting that "obscurity and ambiguity are convenient tools for those enterprises on the prowl for opportunities to hobble competition," Baumol and Ordover recommend establishing bright-line antitrust rules to minimize the danger of misuse of the antitrust laws. *Id.* Bright-line rules identify obviously pernicious conduct, powerfully deter plainly unlawful behavior, and provide clear guidance to businesses and antitrust defendants alike. The district court's decision, in contrast, both blurs the bright line and sweeps too broadly, erroneously extending potential liability to conduct that cannot be fairly described as anticompetitive. By granting leave for interlocutory review, this Court can provide precisely the sort of bright-line rule that both the business community and the antitrust bar so desperately need.

II. INTERLOCUTORY REVIEW IS NECESSARY TO ACCOMPLISH THE IMPORTANT GATEKEEPING FUNCTION OF RULE 12(b)(6).

Interlocutory review is especially warranted given the procedural posture of this case. At the pleading stage, Rule 12(b)(6) serves an important gatekeeping function. Before a plaintiff can impose on a defendant the burden and expense of discovery, a plaintiff must articulate a plausible legal theory that, if supported by the facts, would entitle the plaintiff to relief from the defendant. Motions to dismiss for failure to state a claim exist, in part, to prevent plaintiffs from using the costs and delays of discovery to extort a settlement for unmeritorious claims. Where, as here, legally novel and untenable claims survive a Rule 12(b)(6) motion to dismiss, granting leave for interlocutory appeal serves both the interests of the court and the interests of justice.

Permitting meritless claims to proceed past the pleading stage, particularly in antitrust cases, forces a defendant to "bear [a] substantial 'discovery and litigation' burden." *Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984). Indeed, the unique attributes of antitrust litigation under the Sherman Act reinforce the important role that Rule 12(b)(6) plays in weeding out legally suspect claims. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 30, at 519 (2004) ("Antitrust litigation can . . . involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money.");

Wagener, *supra*, at 1893 ("Strategically minded plaintiffs recognize that defendants risk incurring onerous discovery costs if an antitrust case progresses beyond the pleading stage.").

Antitrust cases routinely require defendants to spend millions of dollars simply to litigate to the summary judgment phase and consume an enormous amount of time and resources of counsel, clients, and the courts. As the Supreme Court has recognized, "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). That is why the Supreme Court has emphasized the importance of district courts' applying their "judicial experience"—along with their "common sense"—in disposing of legally untenable antitrust suits at the proper time: *before* a plaintiff launches intrusive and burdensome discovery. *Id*. at 557-60.

Allowing a legally dubious claim to advance to summary judgment not only wastes substantial resources but creates unfortunate incentives for parties to bring speculative claims in the hopes of achieving a settlement. Because discovery is so often daunting and expensive, antitrust cases can amass substantial settlement value the instant they survive a Rule 12(b)(6) motion. *See* Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1011 (1986). Moreover, the availability of treble damages under the

Sherman Act only heightens the potential for settlements that otherwise would be unjustified. *See* Edward D. Cavanaugh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 809 (1987) ("The lure of treble damages may encourage the filing of baseless suits which otherwise might not have been filed.").

Had this case been brought in any of the five circuits with caselaw directly on point, Celgene would be entitled to immediate dismissal—before undertaking burdensome and expensive discovery. Each of the circuits cited in footnote 2 has applied the prior-dealings requirements in the context of an appeal from the granting of a Rule 12(b)(6) motion. This is precisely the reason why Congress enacted 28 U.S.C. § 1292(b)—to eliminate the "potential for causing a wasted protracted trial if it could early be determined that there might be no liability." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974) (en banc). To vindicate the important gatekeeping function of Rule 12(b)(6), this Court should grant leave for interlocutory appeal.

CONCLUSION

For the foregoing reasons, *amicus* Washington Legal Foundation respectfully requests that the Court grant Celgene Corporation's Petition for Leave to File Interlocutory Appeal.

Respectfully submitted,

February 18, 2015

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COMBINED CERTIFICATIONS

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,361 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

3. Pursuant to Local Rule 46.1, Cory L. Andrews is a member in good standing of the bar for the United States Court of Appeals for the Third Circuit.

4. The text of the electronically filed brief is identical to the text in the paper copies.

5. A virus detection program (VIPRE Business, Version 5.0.4464) has scanned the electronic file and no virus was detected.

Dated: February 18, 2015

/s/ Cory L. Andrews
Cory L. Andrews

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 5 (a)(1) and 25(d), I hereby certify that on February 18, 2015, the foregoing *amicus curiae* brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. To the best of my knowledge, all parties to this appeal are represented by counsel who are registered CM/ECF users and will be served electronically by the appellate CM/ECF system.

/s/ Cory L. Andrews
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