No. 09-1175 JUN 3, 2010

IN THE
Supreme Court of the United States

FERRING B.V., FERRING PHARMACEUTICALS, INC., and AVENTIS PHARMACEUTICALS, INC.,

Petitioners,

v.

MEIJER, INC., MEIJER DISTRIBUTION, INC., ROCHESTER DRUG CO-OPERATIVE, INC., and LOUISIANA WHOLESALE DRUG CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Petitioners respectfully submit this reply brief in support of their petition for a writ of certiorari.

ARGUMENT

The Second Circuit held that even though disputed patent issues are "the linchpin" of plaintiffs' case, their case is not based "in whole or in part" on patent issues. This remarkable holding is contrary to *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), it is irreconcilable with other circuit decisions, and it would thwart Congress' express goals in establishing the Federal Circuit.

Plaintiffs, reiterating the Second Circuit's analysis, misinterpret *Christianson*. They contend that if a plaintiff combines both patent and non-patent allegations into a single count, the allegations are necessarily "theories" not "claims," and that the Federal Circuit lacks jurisdiction even if the relief sought in the complaint cannot be obtained without resolution of patent issues. Under this rubric, a plaintiff's denomination of allegations as "theories" or "claims" will determine jurisdiction, even if allegations labeled as "alternative theories" are based on different conduct at different times causing different legal injuries.

But that is not what *Christianson* holds, and the Second Circuit rule would gut this Court's reasoning. The jurisdictional test in *Christianson* is based on the substance of a plaintiff's case, not nomenclature. Properly construed, *Christianson* focuses on whether the relief sought by plaintiffs requires patent issues to be resolved, not whether the patent allegations are labeled a "theory" or a "claim."

It is indisputable that the damages and injunctive relief actually sought by plaintiffs *require* the resolution of plaintiffs' patent allegations. Plaintiffs have not alleged the non-patent (citizen petition) conduct as an alternative "theory" of their antitrust claim, separate from the patent fraud and sham patent enforcement allegations. To the contrary, the complaint expressly asserts that the non-patent (citizen petition) allegation is just one aspect of an "overarching scheme" that consists primarily of alleged patent misconduct. Moreover, plaintiffs concede that the relief they seek arises from "Defendants' conduct as a whole," not from the citizen petition alone. Pet. App. 74a; *see* Opp. Br. at 13 (characterizing citizen petition as merely "part of Defendants' over-arching scheme"); *id.* at 32 (separate damages).

If the Second Circuit had followed *Christianson*, it would have concluded that the Federal Circuit has exclusive jurisdiction, regardless of whether plaintiffs' allegations are labeled "theories" or "claims." In order to retain jurisdiction of this appeal, the Second Circuit was compelled to re-write the *Christianson* test to change two key elements. First, the new Second Circuit rule accepts plaintiffs' characterization of their patent allegations as "theories," instead of making an independent assessment of whether they are necessary to plaintiffs' actual claims for relief. Second, it denies Federal Circuit jurisdiction if *any* non-patent theory advanced by plaintiffs can provide *any* relief — even if only a fraction of the relief actually sought in the complaint.

It is uncontested that disputed patent issues are the heart of this case. It is uncontested that the plaintiffs allege both *Walker Process* fraud and sham patent enforcement — claims that are indisputably subject to the exclusive jurisdiction of the Federal Circuit. Any rule holding that such an appeal is not based "in whole or in part" on patent law issues is clearly erroneous and fraught with mischief.

The ramifications of the decision below are of national importance. The decision undercuts the goals of Congress in creating the Federal Circuit: to reduce appellate forum shopping and to reduce the "widespread lack of uniformity" in patent law. Plaintiffs argue that Congressional policy cannot be a basis for disregarding this Court's opinions. They have it backwards.

The *Christianson* decision fully effectuates Congressional policy, by according exclusive jurisdiction to the Federal Circuit if a plaintiff must adjudicate patent issues to obtain the "overall success" of its claims. *Christianson* thus ensured that the Federal Circuit hears all appeals where a plaintiff's right to relief depends upon patent law issues. The Second Circuit's test demonstrably does not. The Second Circuit's misreading of *Christianson* would enable plaintiffs, by the simple expedient of artful pleading, to engage in appellate forum-shopping and deprive the Federal Circuit of patent-based appeals.

By adopting this new jurisdictional test, the Second Circuit was able to address a novel patent issue of sweeping dimensions, becoming the first appellate court to rule that purchasers of a patented product (who lack

standing to challenge the validity of a patent directly) can achieve standing to challenge a patent simply by attacking the patent under the antitrust laws. The Second Circuit thereby expanded the pool of litigants who can challenge patents, apparently unmoved by this Court's warning that antitrust laws should not be permitted to "chill the disclosure of inventions through the obtaining of a patent because of fear of the vexations or punitive consequences of treble-damage suits." *Walker Process Equip. Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 180 (1965) (Harlan, J., concurring). This important issue of patent policy should have been decided by the Federal Circuit.

I. The Court Of Appeals' Decision Conflicts With *Christianson v. Colt*

The court below failed to analyze whether plaintiffs' patent allegations (patent fraud and sham patent enforcement) and non-patent allegations (citizen petition) should be deemed separate "claims" or simply separate "theories" supporting a single claim. Instead, it treated the fact that plaintiffs' counsel had combined all the allegations into a one-count complaint as dispositive, and simply assumed that where a plaintiff frames its allegations as a single "count," the complaint contains only one "claim."

But *Christianson* requires a different and more discerning analysis, cutting through form and focusing on the substantive issue of what relief actually is being sought. 486 U.S. at 811 (construing a single antitrust count as encompassing two different antitrust claims); *see C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1367

(Fed. Cir. 1998) (explaining that one antitrust "count" actually consisted of "three separate claims"). Plaintiffs' allegation that fraud was perpetrated on the Patent Office is not just a "theory" underlying the same claim that, *many years later*, a citizen petition was filed with FDA. Regardless of the label attached to these different allegations, the citizen petition allegations do not, by themselves, give rise to the relief sought by plaintiffs for the "overarching scheme" that is actually alleged.

Plaintiffs' argument that they are the "master" of their complaint does not mean that a court should accept the self-serving labels that they place on their allegations, especially when the labels conflict with the complaint itself. This Court has warned that plaintiffs should not be permitted to determine appellate jurisdiction through their strategic pleading choices. *Christianson*, 486 U.S. at 809 n.3. *See also* S. REP. NO. 97-275, at 19-20 (1981). If the Second Circuit had relied upon its own finding that patent allegations are "the linchpin" of plaintiffs' antitrust count, there would have been no question that the Federal Circuit has jurisdiction — regardless of whether the patent allegations were labeled "theories" or "claims."

Tellingly, when the Second Circuit stated its holding on the merits of this appeal, it flip-flopped and characterized plaintiffs' *Walker Process* "theory" as a "claim": "We therefore hold only that purchaser plaintiffs have standing to raise *Walker Process* claims . . . ." (Pet. App. 25a.) What had been a mere "theory" for jurisdictional purposes suddenly became a "claim" for standing purposes. The inconsistency of the court's characterization of plaintiffs' *Walker Process*

allegations underscores the problems inherent in a jurisdictional standard based on mere labels.

Christianson unambiguously held that the Federal Circuit has exclusive jurisdiction over an appeal as long as the plaintiff must litigate patent issues to obtain the "relief it seeks." Although the Second Circuit held that plaintiffs could plausibly state "a" claim that did not depend on patent law issues, "the" claim for relief asserted by plaintiffs plainly does depend on patent law issues. Their complaint seeks a judgment condemning "Defendants' actions as alleged herein" (including patent fraud), not a judgment condemning the filing of a citizen petition. Pet. App. 107a.

Moreover, plaintiffs seek relief based on defendants' "conduct as a whole" (Pet. App. 74a), including damages for many years before the citizen petition was even filed. Plaintiffs concede that they seek to recover additional damages based upon their patent allegations that would not be recoverable based upon their citizen petition allegations. Opp. Br. at 32.

Simply put, *Christianson* precludes the Second Circuit from asserting jurisdiction. Plaintiffs cannot obtain the relief they seek simply by proving their citizen petition allegation. The patent allegations are "the linchpin" of the "overarching" antitrust scheme that plaintiffs allege, and plaintiffs must prove their patent allegations to obtain the relief they seek.[1]

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1. Thus, plaintiffs' belated attempt to suggest that their case merely "*touches on*" patent issues (Opp. Br. at 3) is refuted by their own complaint.

In order to retain jurisdiction, the Second Circuit articulated a new rule. It held that the Federal Circuit lacks jurisdiction over a patent-based antitrust claim, as long as any non-patent theory advanced by the plaintiff could "plausibly constitute a Sherman Act violation" (Pet. App. 14a) — even if that violation was *not* the actual claim set forth in the complaint, and even if it could only provide a fraction of the "relief [plaintiff] seeks" in the complaint. The Second Circuit's new jurisdictional test flouts *Christianson.*

II. The Court Of Appeals' Decision Creates An Inter-Circuit Conflict

The Second Circuit's ruling cannot be reconciled with the decisions of other courts of appeals.

1. The Federal Circuit has categorically stated that a *Walker Process* claim is "subject to exclusive federal court jurisdiction under 28 U.S.C. § 1338(a) because the determination of fraud before the PTO necessarily involves a substantial question of patent law." (Pet. Br. at 21.) Plaintiffs argue that the Second Circuit's unpublished order in *In re Ciprofloxacin Hydrochloride Antitrust Litig.* (Opp. Br. at 28) is consistent with the Federal Circuit's unequivocal statement, because the Second Circuit transferred a case to the Federal Circuit that had a stand-alone *Walker Process* count while refusing to transfer related cases (which did not include any *Walker Process* counts).

In fact, the Second Circuit's *Ciprofloxacin* order confirms the conflict between the Second Circuit and the Federal Circuit. In *Ciprofloxacin* (as here), the

Second Circuit appears to have given dispositive weight to the labels attached to plaintiffs' allegations, and accepted the fact that the *Walker Process* count in that case was a separate "claim" (thereby triggering Federal Circuit jurisdiction) simply because it was pled as a separate count.

The *Ciprofloxacin* order cited by plaintiffs underscores how troublesome the Second Circuit's erroneous interpretation of *Christianson* is. Where a *Walker Process* claim is drafted as a separate count, the Second Circuit will remit jurisdiction to the Federal Circuit; but where a *Walker Process* claim is drafted as part of an omnibus count, the Second Circuit will retain jurisdiction. The Second Circuit's rule is devoid of substance, and an open invitation to forum-shopping through clever pleading.

2. Plaintiffs also misconstrue the import of the *U.S. Valves v. Dray* cases (Pet. Br. at 22-25). Under *Christianson*, Federal Circuit jurisdiction is triggered if a claim depends upon a contested patent question; patent matters that are not in dispute obviously do not trigger its jurisdiction. Plaintiffs argue that *U.S. Valves* is inapplicable, because all the breach of contract damages sought in that case involved sales of patented valves.

However, some damages related to valves that did not raise any *disputed* patent issues, because the defendant had already conceded that those valves were covered by the patents. *U.S. Valves, Inc. v. Dray*, 190 F.3d 811, 812 (7th Cir. 1999). The remaining damages related to valves that clearly raised disputed patent

issues. The Federal Circuit concluded that it had jurisdiction because "some of the valves" sold (i.e., the contested valves) would require the court to resolve issues of patent infringement. *U.S. Valves, Inc. v. Dray*, 212 F.3d 1368, 1372 (Fed. Cir. 2000). But under the Second Circuit's decision, the Federal Circuit lacks jurisdiction even if "some" of the relief sought requires adjudication of disputed patent issues.

3. Contrary to plaintiffs' arguments, the Second Circuit's ruling is also irreconcilable with *Davis v. Brouse McDowell, LPA*, 596 F.3d 1355 (Fed. Cir. 2010). *See* Pet. Br. at 25-26. There, the plaintiff alleged a "single claim for legal malpractice" based on two allegations — first, that the defendant failed to file foreign patent applications, and second, that the defendant failed to file U.S. patent applications. Like plaintiffs here, the *Davis* plaintiff sought to combine different factual allegations in a single claim, and then characterize them as alternative "theories" supporting the single claim.

The plaintiff argued that the Federal Circuit lacked jurisdiction because one of these "theories" (i.e., failure to file foreign applications) did not raise issues of U.S. patent law. Unlike the Second Circuit, however, the Federal Circuit did not give dispositive weight to the fact that the plaintiff had combined allegations of distinct conduct into a single count. Instead, it ruled that the single malpractice claim actually included two distinct claims, one of which raised U.S. patent law issues. Accordingly, the Federal Circuit had exclusive

jurisdiction. Under the Second Circuit's rule, it would not have had jurisdiction.[2]

III. The Court Of Appeals' Decision Will Undermine Congress' Purpose In Creating The Federal Circuit

The decision below also thwarts Congressional intent. Congress created the Federal Circuit to address two major problems plaguing patent appeals. First, it consolidated patent appeals in a single forum to develop uniform patent precedents in place of the existing hodge-podge of patent rulings in the regional circuit courts, which in some cases resulted in a "morass of conflict." IPO Amicus Br. at 16-18. Second, Congress sought to reduce "forum-shopping" by constraining the ability of patent litigants to steer an appeal to a specific circuit simply by the way in which a complaint was drafted. Pet. Br. at 27-29.

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2. Plaintiffs also cite *Clearplay, Inc. v. Abecassis*, 602 F.3d 1364, 1369 (Fed. Cir. 2010), for the proposition that the Federal Circuit does not have jurisdiction over a case simply because patent issues "are in the air." That is true, but irrelevant. *Clearplay* properly examined each claim raised by the plaintiff, and concluded that the court lacked jurisdiction because the relief sought under each claim could be obtained without adjudicating patent issues. Had the Second Circuit engaged in a similar analysis here, it would have concluded that the relief sought by plaintiffs was *not* obtainable without adjudicating substantial patent issues. But under the Second Circuit's test, the fact that patent issues are necessary to the relief actually sought by plaintiffs is not sufficient for the Federal Circuit to assert jurisdiction. *See also* IPO Amicus Br. at 10.

The decision below undercuts both Congressional goals. The new jurisdictional standard provides plaintiffs' counsel with virtually unfettered power to determine whether an appeal will be heard by the Federal Circuit or the regional circuit. In any lawsuit premised upon the allegation that the defendant wrongfully procured and enforced a patent, plaintiffs' counsel now have two paths open:

(a) If counsel wants the Federal Circuit to hear an appeal, he should allege a separate non-patent count. By labeling his patent-based allegations as a stand-alone "claim" in the complaint, counsel can ensure that the Federal Circuit will assert jurisdiction over the case. Under the Second Circuit's rule, counsel may add as many non-patent allegations as he wishes to the complaint without threatening the jurisdiction of the Federal Circuit — as long as the non-patent allegations are added as separate counts from the patent count.

(b) On the other hand, counsel can ensure that the appeal is heard by a regional circuit rather than the Federal Circuit simply by adding at least one *non-patent* allegation to the count that includes his patent-based claim. Under the Second Circuit's test, it does not matter how minor the non-patent allegation, or if the non-patent claim is based on different conduct at a different time causing a different legal injury. Nor does it matter if the patent claim is needed to obtain 99% of the damages alleged, or 99% of the injunctive relief sought. As long as the non-patent allegation could give rise to "a" claim by itself, then the Federal Circuit will be deemed to lack jurisdiction. Plaintiffs' counsel will exceed his role as master of his own complaint, and become master of the Federal Circuit docket.

As litigants pick-and-choose where to steer their cases, there will once again be thirteen different forums setting substantive patent law precedents, rather than just the Federal Circuit.[3] The lack of uniformity will not only undermine the "even-handedness nationwide in the administration of the patent laws," H.R. REP. No. 97-312, at 22 (1981), but will also inhibit innovation by undermining the confidence of businesses in the stability of patents. *See* BIO/PhRMA Amicus Br. at 15-16.

Unless this Court intervenes to correct the Second Circuit's decision, the bane of patent forum-shopping will again infect the appellate system, the formulation of uniform patent law will be compromised, and the statutory mandate that the Federal Circuit hear all appeals based "in whole or in part" on patent law issues will go unfulfilled.

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3. Plaintiffs suggest that the Federal Circuit would simply apply regional circuit law to determine whether purchasers may challenge patents under the antitrust laws. But the Federal Circuit defers to regional circuit law only on "matters of procedural law that do not implicate issues of patent law." *E.g.*, *Bd. of Trs. v. Roche Molecular Sys., Inc.*, 583 F.3d 832, 840 (Fed. Cir. 2008). The question whether litigants who lack standing to challenge patents directly may challenge patents under the antitrust laws clearly "implicate[s] issues of patent law," and thus would be decided in a uniform manner. The standing issue in *Unitherm* cited by plaintiffs (Opp. Br. at 39), in contrast, did not implicate patent law issues.

CONCLUSION

Petitioners respectfully submit that their petition for a writ of certiorari should be granted.

Respectfully submitted,

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