

No. 2018-2097

**In the United States Court of Appeals
for the Federal Circuit**

VALEANT PHARMACEUTICALS INTERNATIONAL, INC., SALIX
PHARMACEUTICALS, INC., PROGENICS PHARMACEUTICALS, INC.,
WYETH LLC, FKA WYETH

Plaintiffs-Appellees

v.

ACTIVAS LLC,

Defendant

v.

MYLAN PHARMACEUTICALS, INC., MYLAN INC., MYLAN
LABORATORIES LIMITED

Defendants-Appellants

*On Appeal from the United States District Court for the District of New Jersey,
Civil Action Nos. 2:15-cv-8180-SRC-CLW (2:15-cv-8353-SRC-CLW, 2:16-cv-
0035-SRC-CLW, 2:16-cv-0889-SRC-CLW, 2:17-cv-6714-SRC-CLW)*

**DECLARATION OF DEEPRO R. MUKERJEE, ESQ. IN OPPOSITION TO
MOTION TO DISQUALIFY KATTEN MUCHIN ROSENMAN LLP**

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I, Deepro R. Mukerjee, hereby declare the following:

I. Background

1. I am a partner in the New York office of Katten Muchin Rosenman LLP (“Katten”). I submit this Declaration, based upon my own personal knowledge, in opposition to the Motion to Disqualify Katten filed by Plaintiffs-Appellees Salix Pharmaceuticals, Inc. (“Salix”) and Valeant Pharmaceuticals International, Inc. (“VPI” and, with Salix, “Movants”) in the instant appeal (the “Appeal”).

2. I am a 2001 graduate of Fordham Law School. Since beginning my legal career that year, my focus has been almost exclusively in complex patent litigation.

3. In 2008, I became a shareholder (partner) at the law firm of Greenberg Traurig, LLP. In or about that year, my professional focus began turning toward pharmaceutical and Abbreviated New Drug Application (“ANDA”) litigation.

II. Past Work with Mylan

4. In early 2009, I lateraled as a partner into the Intellectual Property group at Alston & Bird LLP. From that point forward, I began to work almost exclusively for Defendants-Appellants Mylan Pharmaceuticals, Inc., Mylan Inc. and Mylan Laboratories Limited (together, “Mylan”) and their affiliates.

5. Since 2009, I have worked on approximately 40 complex pharmaceutical and patent cases for Mylan.

6. These cases include, as but examples:

- *Mylan Pharmaceuticals Inc., et al. v. Glenmark Pharmaceuticals Inc., USA, et al.*, Case No. 1:18-cv-00460 (D. Del.);
- *Mylan Pharmaceuticals Inc., et al. v. Glenmark Pharmaceuticals Inc., USA, et al.*, Case No. 1:17-cv-01653 (D. Del.);
- *UCB, Inc. et al. v. Mylan Technologies, Inc., et al.*, Case No. 1:17-cv-00322 (D. Del.);
- *Amgen Inc. v. Mylan Pharmaceuticals Inc., et al.*, Case No. 1:16-cv-00853 (D. Del.)
- *Forest Laboratories, LLC, et al. v. Mylan Pharmaceuticals Inc., et al.*, Case No. 1:16-cv-01114 (D. Del);
- *Cosmo Technologies Ltd., et al. v. Mylan Pharmaceuticals Inc.*, Case No. 16-cv-00152 (D. Del.);
- *Cadence Pharmaceuticals, Inc. et al., v. Mylan Laboratories Limited, et al.*, Case No. 1:14-cv-01499 (D. Del.)
- *Otsuka Pharm. v. Mylan Inc. et al.*, Case No. 1:14-cv-04508 (D.N.J.);
- *Forest Labs, Inc. et al., v. Mylan Pharm. Inc.*, Case No. 1:14-cv-00508 (D. Del.);
- *Shire Development LLC, et al. v. Mylan Inc., et al.*, Case No. 8:12-cv-01190; (M.D. Fla.);
- *Apotex, Inc., et al. v. Mylan Pharmaceuticals Inc., et al.*, Case No. 0:12-cv-60704 (S.D. Fla.);

- *Takeda Pharmaceutical Co., Ltd. et al. v. Mylan Inc., et al.*, Case No. 5:13-cv-04002 (N.D. Cal.).

III. My Team's Involvement in This Case

7. In November 2015 and January 2016, Movants, with Progenics Pharmaceuticals, Inc. and Wyeth LLC, f/k/a Wyeth, filed suit against Mylan in the U.S. District Court for the District of New Jersey (the "DNJ Action"). The claims were based upon ANDAs filed by Mylan seeking approval for the manufacture and sale of generic methylnaltrexone bromide formulations.

8. Since the inception of the DNJ Action, I have been the lead attorney representing Mylan.

9. In my capacity as the lead attorney, I have managed and supervised the team of attorneys staffed on this case, which, since the beginning, has included Mr. Lance Soderstrom, Dr. Jitendra Malik, Ms. Stephanie Roberts and Ms. Alissa Pacchioli (the "Patent Team"), all of whom were colleagues of mine at Alston & Bird when this case was initially filed, and all of whom are experienced patent attorneys.

10. Every substantive aspect of this case, including briefing, court hearings, and defense of Mylan witnesses, has been handled, directed, or overseen by one or more members of the Patent Team.

IV. The Mylan Patent Team Is Now at Katten

11. In or around September 2017, I began exploring a potential lateral move to Katten. Over the next several months, both Mr. Soderstrom and I had a series of meetings with high-level Katten partners.

12. On or about November 30, 2017, during one of those meetings, I provided Katten with a list of matters that I was working on at the time. The list I provided to Katten included this case as well as other cases I was working on for Mylan.

13. During my discussions with Katten in late 2017, I was informed that Katten represents Bausch & Lomb, Inc. (“Bausch & Lomb”). While I had been adverse to Bausch & Lomb while at Alston & Bird, those matters were terminated in 2016. Therefore, I understood that I had no conflict with respect to Bausch & Lomb since I had no current matter pending against them.

14. Discussions with Katten continued into the first quarter of 2018.

15. On April 11, 2018, I accepted an offer from Katten to join the New York office as a partner.

16. On April 15, 2018, Mr. Soderstrom accepted an offer from Katten to join the New York office as a partner.

17. On April 17, 2018, I began working at Katten’s New York office.

18. On that same day (April 17, 2018), I called Mr. Justin Hasford, a partner at Finnegan Henderson Garret & Dunner LLP (“Finnegan”), counsel for plaintiffs in the DNJ Action and Movants in this case, and left him a message indicating that I had moved to Katten. The call was of a personal nature and I did not raise any work related issues other than informing him that I expected that he and I would likely continue working on opposite sides of this case.

19. Later that day, Mr. Hasford left me an equally cordial and gracious message wishing me the best and acknowledging that it sounded like our work relationship would not be changing.

20. On April 29, 2018, all new matter forms were filled out and sent to Katten.

21. On May 1, 2018, the instant matter was assigned a Katten Client/Matter Number for internal record keeping purposes.

22. On May 3, 2018, files from Alston & Bird began being transferred to Katten. This process continued over the course of several weeks, with the final transfer of materials related to this case occurring on Friday, May 25, 2018.

23. By May 4, 2018, the entire Patent Team had lateraled to Katten from Alston & Bird.

24. Since joining Katten, my team and I have continued to manage all aspects of this matter.

25. My team and I have never had any access, involvement, or discussions (peripheral or otherwise) regarding any purported work that Katten has done for Bausch & Lomb or any other Valeant entity, including Salix or VPI. My team and I have not received from any Katten source, or otherwise come into the possession of, any confidential information belonging to Bausch & Lomb or any other Valeant entity, including Salix or VPI.

V. Movants Seek Disqualification of Katten in the DNJ Action

26. On May 1, 2018, the district court issued an opinion and order in the DNJ Action granting partial summary judgment in favor of Plaintiffs with respect to the validity of the '025 patent (the "Summary Judgment Order"). *See* 2:15-cv-8180-SRC-CLW (D.N.J.) (the "DNJ Docket"), a true a correct copy of which is attached hereto as Exhibit A, No. 300.

27. On May 3, 2018, local counsel for Mylan filed a notice of change of address form for Mr. Mukerjee and Mr. Soderstrom with the district court, indicating their move to Katten. *See* DNJ Docket No. 301.

28. On May 7, 2018, Mr. Bryan Diner of Finnegan notified me that, due to an alleged concurrent conflict with "Valeant," Movants Salix and VPI, plaintiffs in the DNJ Action, intended to move to disqualify Katten as counsel for the Mylan. While, as noted above, I was aware of Katten's prior engagements with Bausch &

Lomb, this was the first time that someone suggested that Katten had a concurrent conflict of interest with Salix and VPI themselves.

29. On the same day, I was notified that an exclusive wall was created to exclude me and Mr. Soderstrom from matters involving Bausch & Lomb and VPI (I have been informed that matters for other Valeant entities are billed through VPI out of convenience). Thus, Mr. Soderstrom and I, and the rest of the Patent Team, were walled off from any attorneys who had worked on any matters for Bausch & Lomb or their affiliates in the past 18 months.

30. On May 9, 2018, I responded to Mr. Diner by forwarding a letter from Katten's General Counsel, Mr. Michael Verde, outlining Katten's belief that Movants' threatened motion was meritless and unlikely to succeed.

31. On May 10, 2018, the parties in the DNJ Action held a meet and confer regarding narrowing the remaining issues in the case for trial, which was then scheduled to begin on June 4, 2018. Despite the fact that Movants had by this time threatened disqualification and received Katten's response, Plaintiff did not inform the Court of the alleged conflict or their intent to move to disqualify Katten.

32. On May 10, 2018, the Court held a telephone conference to discuss the impact of its grant of partial summary judgment. At no time during that call with the Court did Movants raise the subject of a motion to disqualify Katten.

33. On May 14, 2018, a joint letter (in which Katten was expressly named as outside counsel for Mylan) was submitted to the Court, requesting a telephonic conference to discuss Movants' Rule 54(b) application in the DNJ Action relating to entry of judgment in Movants' favor with respect to the court's grant of partial summary judgment. Again, this letter did not raise the subject of a motion to disqualify Katten.

34. On May 16, 2018, the Court held the requested telephonic conference regarding Movants' Rule 54(b) application. Just as in the May 10 teleconference, Movants did not raise the specter of a disqualification motion. During the May 16 teleconference, the Court adjourned the trial in light of the Movants' pending Rule 54(b) application.

35. On May 23 and 24, 2018, the parties exchanged emails regarding a meet and confer to discuss consolidating the separate pending matters in the DNJ Action. At no time during these communications did Movants raise the subject of a motion to disqualify Katten.

36. On the very next day, May 25, 2018, the Friday evening before Memorial Day Weekend, without any additional forewarning, VPI and Salix filed a motion to disqualify Katten as counsel for Mylan in the DNJ Action (See DNJ Docket Nos. 325, 326.) That motion is fully briefed and remains pending.

VI. Movants Seek Disqualification of Katten in the Appeals Relating to U.S. Patent No. 8,865,688

37. Movants are also seeking Katten's disqualification in two unrelated appeals pending before this Court concerning U.S. Patent No. 8,875,688 (the "'688 Patent Appeals") (*See* Case Nos. 2017-2312 and 2017-2636/2018-1320).

38. On April 23 and 24, 2018, there was an ANDA conference in New York that both Mr. Soderstrom and I attended. At that conference, we saw Mary Bourke of Womble Bond Dickinson, LLP, counsel to Movants in the '688 Patent Appeals, and in the course of a short conversation, the topic of my move to Katten came up. Reference was even made to oral argument in the '688 Patent Appeals, at that time scheduled for July 13, 2018, and Ms. Bourke acknowledged that her law firm had hired an attorney from Alston & Bird LLP as well.

39. On April 27, 2018, Mr. Soderstrom sent an email to all counsel of record in the '688 Patent Appeals requesting that future correspondence be directed to his and my new Katten email addresses.

40. On May 18, 2018, over a month after counsel for Movants in the '688 Patent Appeals was informed of our move to Katten, Mary Bourke sent me an email asserting that Katten's representation of Mylan in those appeals created a concurrent conflict, and demanded that Katten withdraw.

41. After conferring with Mr. Verde, I responded to Ms. Bourke, with a copy to Mr. Verde, that Katten would not withdraw because: (i) Movants were not

clients of Katten under RPC 1.7; (ii) Valeant's Outside Counsel Guidelines did not treat Movants as Katten clients; and (iii) even if a conflict existed, Movants had not, and could not, articulate a justification for the imposition of a drastic remedy like disqualification. My email concluded by asking Ms. Bourke to provide any evidence contradicting the statements in my email or any additional relevant information. No such evidence was forthcoming.

42. Movants filed motions to disqualify Katten in the '688 Patent Appeals on June 5, 2018. Those motions were fully briefed as of June 26, 2018 and remain pending.

43. Oral argument on the merits of the '688 Patent Appeals was originally scheduled for July 13, 2018. That argument has been adjourned in order to first hear and decide the motions to disqualify.

VII. Movants Seek Disqualification of Katten in this Appeal

44. Mylan's instant appeal is from the Summary Judgment Order in the DNJ Action. Final judgment was entered on May 23, 2018. *See* DNJ Docket. 321. Mylan timely appealed on May 25, 2018. *Id.*, 321, 324.

45. On June 27, 2018, Mr. Soderstrom, emailed counsel in the Patent Appeal regarding the joint appendix for the appeal. Later that day, Jessica Lebeis, a Finnegan attorney, responded, indicating Movants' belief that Katten's

appearance would constitute a conflict of interest, and reserving Movants' rights to move for disqualification before this Court should Katten appear.

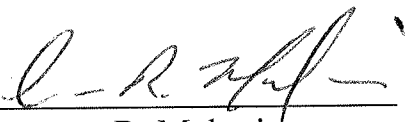
46. Appearances were due in this appeal on July 6, 2018. Accordingly, Katten attorneys, including myself, entered appearances on behalf of Mylan. *See* Docket Entry Nos. 2-6.

47. That same day, Ms. Lebeis emailed me, stating that Movants intended to file a motion to disqualify.

48. At approximately 12:30 am on July 7, 2018, Movants filed the instant motion to disqualify.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 17, 2018
New York, New York



Deepro R. Mukerjee