No. 22A_____

IN THE

Supreme Court of the United States

SANOFI-AVENTIS U.S. LLC,

Applicant,

v.

MYLAN INC. and MYLAN SPECIALTY, LP,

Respondents.

APPLICATION TO THE HON. NEIL GORSUCH FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Gregory Silbert
Counsel of Record
Yehudah L. Buchweitz
Eric S. Hochstadt
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Counsel for Applicant

October 14, 2022

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29.6, Applicant Sanofi-Aventis U.S. LLC certifies that it is a wholly owned subsidiary of Sanofi, and no publicly held company owns 10% or more of its stock.

Pursuant to this Court's Rule 13.5, Applicant Sanofi-Aventis U.S. LLC respectfully requests a 57-day extension of time, to and including Friday, December 23, 2022, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review that court's decision in *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices & Antitrust Litig.*, 44 F.4th 959 (10th Cir. 2022) (Attached as Exhibit A). The Tenth Circuit issued its decision on July 29, 2022. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1), and the Applicant's time to file a petition for a writ of certiorari will expire on October 27, 2022 unless an extension is granted. This application is timely because it has been filed more than ten days prior to the date on which the Applicant's time for filing the petition is to expire.

BACKGROUND

This case presents a substantial and important issue of federal antitrust law that has divided the courts of appeals and caused confusion in lower courts across the country.

1. It has been six decades since the Court has addressed exclusive dealing in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), and the courts of appeals are now intractably divided over the standard by which to assess a monopolist's exclusive dealing under the antitrust laws. *Tampa Electric* held that exclusive dealing is impermissible whenever the "probable effect" is to "foreclose competition in a substantial share" of the market. *Id.* at 327, 329. But in the words of

the Tenth Circuit, that standard is "not particularly illuminating." Ex. A at 44. Since *Tampa Electric*, the courts of appeals have developed conflicting tests for monopolization claims involving exclusive dealing, each reflecting their different views on how to best bring exclusive dealing law into alignment with modern economics.

2. In the Third Circuit—where this case was originally filed and where it would be tried—courts apply the "rule of reason" and ask whether the monopolist's exclusivity arrangements would foreclose an "equally efficient rival" from the market. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 277, 281 (3d Cir. 2012). Applying this standard, the Third Circuit has found exclusionary contracts to be anticompetitive where they require dealers to exclude new entrants in order to retain access to a monopolist's "necessary products," *id.*, or to "deal[] exclusively with the dominant market player . . . to avoid being severely penalized financially," *LePage's Inc. v. 3M*, 324 F.3d 141, 147, 159 (3d Cir. 2003) (en banc).

3. Other circuits have applied a "price-cost" safe harbor for some exclusive dealing claims, which differs from the ordinary rule-of-reason test. Drawing from the Supreme Court's predatory pricing (as opposed to exclusive dealing) precedents, they have held that a monopolist's exclusive conduct is lawful as long as the monopolist's "prices . . . are above some measure of incremental cost." *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 901 (9th Cir. 2008) (citing *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993)). This price-cost safe harbor also derives from the equally efficient competitor principle. It is based on the premise that

"a firm's ability to offer above cost discounts is attributable to 'the lower cost structure of the alleged predator, and so represents competition on the merits . . . .'" *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1061 (8th Cir. 2000) (quoting *Brooke Grp.*, 509 U.S. at 223).

4. In this case, the Applicant Sanofi challenged defendant Mylan's use of exclusive contracts to maintain a monopoly on the EpiPen, a device used to treat a life-threatening allergy condition called anaphylaxis. Applying the Third Circuit's rule-of-reason approach, Sanofi presented abundant, direct evidence that Mylan structured exclusionary contracts to block competition, and that Mylan's exclusionary contracts were anticompetitive because they made it impossible for even an equally efficient rival to compete. But the Tenth Circuit refused to consider that evidence—because it rejected the Third Circuit's rule-of-reason approach, mistaking it for a "per se illegality" rule. Ex. A at 84. It then treated the *safe harbors*—rules of *non*-liability, like the price-cost test, that operate as threshold defenses—as theories of liability, and it faulted Sanofi for declining to embrace those tests. As a result, the Tenth Circuit deemed "immaterial" unmistakable evidence that Mylan intentionally maintained its monopoly on the EpiPen by structuring its exclusionary contracts so that equally or more efficient competitors could not access the market. *Id.* For example, the Tenth Circuit assigned no weight to the fact that the largest dealer in the market told Sanofi that even a 100% discount—giving its competing product away for free—would not be sufficient to access the market, because of the penalty Mylan would inflict for allowing competition. The Tenth Circuit likewise never mentioned

that Sanofi's contemporaneous internal analysis showed it would need discounts above 100% to offset the penalty from Mylan's exclusive contracts. The Tenth Circuit declined even to consider this and other real-world, real-time evidence because it failed at the threshold to discern the correct framework for analyzing Sanofi's exclusive dealing claim.

5. The decision below conflicts with the law of other circuits and undermines the economic aims of the antitrust laws. The courts of appeals are not uniform in their approach to exclusive dealing, but most agree that evidence is material to a monopolization claim if it shows that a monopolist exercised monopoly power in a manner that would prevent equally efficient new entrants from accessing consumers.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicant respectfully requests a 57-day extension of time, to and including December 23, 2022, to prepare a petition for a writ of certiorari on the important question presented by this case.

1. An extension of time is warranted because Applicant's counsel have had a substantial number of significant obligations in the period between the Tenth Circuit's decision and the petition's current due date of October 27, 2022, several of which are ongoing. They include:

a) Oppositions to objections to reports and recommendations of dismissal in two multi-party putative nationwide class antitrust actions in the Southern District of New York set for September 14 and 29 (*see*

Bookends & Beginnings LLC v. Amazon.com, Inc., et al., No. 1:21-cv-02584 (S.D.N.Y.); *In re Amazon, Inc. eBook Antitrust Litig.*, No. 1:21-cv-00351 (S.D.N.Y.));

b) Motion to dismiss (due September 9) and oral argument (held on October 3) in an international commercial case in Supreme Court, County of New York, Commercial Division. *Barzilai, et al. v. Israel Museum*, Index No. 153086/2022.

c) Brief in support of dismissal of securities fraud case in the Delaware Court of Chancery due on September 26 (*see Golden v. ShootProof Holdings, LP, et al.*, No. 2022-0434-MTZ (Del. Ch.));

d) Oral argument in *In re Sears Holding Corp.*, No. 21-2676 (2d Cir.).

e) Responsive pleadings in *Chewy Inc. v. Vetcove, Inc.* NY. Index No. 653326/2021 (Sup. Ct. N.Y. Cnty.);

f) Responsive pleadings in *Chewy Inc. v. Covetrus, Inc.*, Fla. Case No. CACE21017496 (Cir. Ct. Broward Cnty.);

g) Preparation for merger trial in the Northern District of California set for December 8. *Federal Trade Commission v. Meta Platforms, Inc.*, No. 5:22-cv-04325-EJD (N.D. Cal.).

2. The requested extension is warranted to allow counsel to adequately prepare a petition on the important question presented by this case.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari for 57 days, up to and including December 23, 2022.

Respectfully submitted,

Gregory Silbert
Counsel of Record
Yehudah L. Buchweitz
Eric S. Hochstadt
Weil, Gotshal & Manges LLP
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New York, NY 10153
(212) 310-8000

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