IN THE
SUPREME COURT OF THE UNITED STATES

No. ___________

ELI LILLY AND COMPANY, et al.,
Petitioners,

v.

NOVARTIS PHARMA AG
Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), Petitioners Eli Lilly and Company, Eli Lilly Italia S.p.A., Eli Lilly Kinsale Limited, Eli Lilly Ges.m.b.H, and Eli Lilly Nederland B.V. (collectively, "Lilly" or "Petitioners"), hereby move for an extension of time of sixty (60) days, to and including December 9, 2022, for the filing of a petition for a writ of certiorari. The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") entered its judgment on June 16, 2022. (Exhibit 1). The Fourth Circuit denied Lilly's petition for rehearing and rehearing en banc on July 12, 2022. (Exhibit 2). Unless extended, the time for filing a petition for a writ of certiorari will expire on October 10, 2022. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). This application for an extension is timely under Rules 13(5) and 30(2) and Lilly has not previously sought to extend this filing deadline. In support of its application, Petitioners state the following:

1. Lilly's petition for a writ of certiorari will address a circuit split concerning important questions of federal law relating to the jurisdiction of United States federal courts under 28 U.S.C. § 1782 to provide assistance in gathering evidence for use in foreign tribunals. In relevant part, 28 U.S.C. § 1782 states that "The district court of the district in which a person resides or ***is found*** may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." 28 U.S.C. § 1782(a) (emphasis added). The dispute here rests on the meaning of the statutory phrase "is found," and under what circumstances federal district courts may exercise jurisdiction pursuant to these requirements.

2. Lilly is a global pharmaceutical company that produces and markets Taltz®, an advanced treatment for plaque psoriasis, psoriatic arthritis, and pediatric plaque psoriasis. In 2020, Respondent Novartis Pharma AG ("Novartis") purchased a portfolio of patents relating to antibodies to the protein interleukin-17A/F and began a worldwide litigation campaign against Lilly. The dispute has included claims by Novartis for patent infringement in Germany, Ireland, Italy, Austria, and Switzerland. Lilly has also filed a series of claims against Novartis under both European patent law, seeking revocation of the patents in suit, and unfair competition law. Novartis continues to prosecute patents before the United States Patent and Trademark office, located in Alexandria, Virginia, that are related to the patent at issue abroad. Based on this conduct by Novartis, on June

16, 2021, Lilly filed a petition in the United States District Court for the Eastern District of Virginia seeking documents from Novartis in the United States for use in these foreign legal proceedings. The magistrate judge agreed that Novartis was "found" in that district for purposes of 28 U.S.C. § 1782 and granted Lilly's petition. The district court reversed, holding that the phrase "is found" in 28 U.S.C. § 1782(a) requires that the party have some physical presence in the district for the district court to have jurisdiction. *In re Eli Lilly & Co.*, 580 F. Supp. 3d 334, 339 (E.D. Va. 2022). In addition to the case below in the Eastern District of Virginia, Lilly has also filed an application for discovery from Genentech, the previous owner of the patent portfolio in question, in the Northern District of California under 28 U.S.C. § 1782. Novartis has also filed an application seeking discovery from Lilly under 28 U.S.C. § 1782 in the Northern District of Indiana.

3. On appeal, the Fourth Circuit created a split of authority by holding that the word "found" means that the corporation must be "physically present by its officers and agents carrying on the corporation's business." Exhibit 1 at 165. The opinion conflicts with the Second Circuit's decision in *In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019), which is the only other circuit court decision to have considered this issue. The Second Circuit held that "§ 1782's 'is found' language extends to the limits of personal jurisdiction consistent with due process," and is not limited to "physical presence." *Id.* at 528. The Second Circuit specifically eschewed the "cramped" reading of the statute's language that would require physical presence

and explained that "Courts have consistently given broad interpretation to similar 'found' language in other statutes." *Id.* (citing cases).

4. The Fourth Circuit's holding also conflicts with other courts' interpretation of similar statutory language found in other portions of the U.S. Code. Those decisions held that the language "is found" or "may be found" is synonymous with personal jurisdiction. *See, e.g.*, *AF Holdings, LLC v. DOES 1-1058*, 758 F.3d 990, 996 (D.C. Cir. 2014) (interpreting the "may be found" language in 28 U.S.C. § 1400(a) to reach the full extent of personal jurisdiction); *Waeltz v. Delta Pilots Ret. Plan*, 301 F.3d 804, 810 (7th Cir. 2002) (holding that, under 29 U.S.C. § 1132(e)(2), "[a] fund can be found in a judicial district if it has the sort of minimum contacts with that district that would support the exercise of personal jurisdiction"). Instead, the Fourth Circuit interpreted this Court's opinions in *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79 (1918), and *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), to require that corporations be present in a district by its officers and agents carrying on the corporation's business for that corporation to be "found" in a district. Exhibit 1 at 164. This Court's later opinion in *Freeman v. Bee Machine Co.*, 319 U.S. 448, 454 (1943), emphasized that "'found' in the venue sense does not necessarily mean physical presence," however, which is consistent with this Court's jurisprudence on corporate personal jurisdiction as outlined in *International Shoe v. Washington*, 326 U.S. 310 (1945), and its progeny.

5. At least since the Second Circuit's opinion in *In re del Valle Ruiz*, the federal district courts have uniformly agreed that the word "found" in 28 U.S.C. § 1782 grants the district court jurisdiction to grant petitions seeking discover from parties within the personal jurisdiction of the court. *See, e.g., In re Tovmasyan*, No. 21-mc-353, 2021 WL 3737184, at *3 (D.P.R. Aug. 20, 2021); *In re Servotronics, Inc.*, No. 2:18-mc-00364, 2021 WL 1521931, at *3 n.2 (D.S.C. Apr. 16, 2021); *In re Fialdini*, No. 21-mc-0007, 2021 WL 253455, at *3 (D. Colo. Jan. 26, 2021); *In re de Leon*, No. 19-mc-0197, 2002 WL 1047742, at *2 (D.D.C. Mar. 4, 2020). The Fourth Circuit's decision has therefore created differing application of the same federal statute across the United States.

6. Petitioners request this extension to permit counsel to prepare a petition that fully addresses the important questions raised in the split in federal court treatment of 28 U.S.C. § 1782 created by the Fourth Circuit. Due to the circuit split on this issue, there is a reasonable prospect that this Court will grant the petition, such that it warrants this additional time for these consequential questions to be fully addressed. No prejudice would result from the requested extension. Further, due to the sprawling and multi-faceted dispute between the parties, counsel is involved in numerous other related proceedings in both the United States and Europe, including an oral argument in the United States Court of Appeals for the Ninth Circuit on November 16, 2022 (*Eli Lilly & Co. v. Novartis Pharma, AG*, No. 22-15433 (9th Cir. 2022)), and proceedings before the Court of Appeal of Ireland relating to discovery in the Irish litigation between the parties.

Lilly's counsel has also been heavily engaged with other matters and has other commitments that make a shorter extension impracticable, including deadlines in the United States Court of Appeals for the Second Circuit (*Givaudan SA v. Conagen, Inc.*, No. 22-1711 (2d Cir.)), the United States District Court for the District of Massachusetts (*Dana-Farber Cancer Inst., Inc. v. Bristol-Myers Squibb Co.*, No. 1:19-cv-11380-PBS (D. Mass.)), the United States District Court for the Southern District of New York (*In re Chase Romick*, No. 1:22-mc-00194-KPF (S.D.N.Y.), *Myers, et al. v. Dana-Farber Cancer Inst., Inc.*, No. 22-mc-00198-KPF (S.D.N.Y.)), and the United States District Court for the Northern District of Texas (*Ipsen Biopharm Ltd. v. Galderma Labs., L.P.*, No. 4:22-cv-00662-O (N.D. Tex.)). The parties are also discussing an alternative solution which may obviate the need for Petitioner's filing of a petition.

Conclusion

For the reasons stated above, Petitioners respectfully request that this Court grant an extension of 60 days, until December 9, 2022, within which to file a petition for a writ of certiorari.

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Respectfully submitted,

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