FEDERAL TRADE COMMISSION, Petitioner, v. RECKITT BENCKISER PHARMACEUTICALS, INC., Respondent	)	Misc. No. 3:14-mc-005-REP

The FTC filed its enforcement petition before this Court because it erroneously believes that the Fourth Circuit embraces a different standard for determining attorney-client privilege claims than every other judicial circuit in the United States. The FTC is aware of the twelve related class actions that are already pending in the Eastern District of Pennsylvania, and of that court's order requiring Reckitt to produce all documents Reckitt provides to the FTC in compliance with the underlying civil investigative demand at issue here. (Dkt. No. 25 at 3-4 & n.5.) The FTC is also aware that, in the face of an adverse ruling by this Court on its privilege claims, Reckitt would be forced to petition Judge Goldberg, the presiding judge in the Eastern District of Pennsylvania cases, to enter a protective order upholding the attorney-client privilege as to the documents at issue. (Dkt. No. 14 at 9.) The FTC thus understands the potential for conflicting rulings, but chooses largely to ignore this fact in arguing for its choice of forum.

Reckitt should not have to litigate its assertion of privilege twice, in two different courts. Indeed, "§ 1404(a) was designed to prevent" the needless waste "of time, energy and money" associated with the litigation of "two cases involving precisely the same issues . . . in different District Courts." *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 26 (1960). Yet if the FTC were to succeed both in opposing transfer and in vitiating Reckitt's claimed privilege, Reckitt would be forced to rebrief and reargue the identical issue before a second judge when moving for a protective order in the Eastern District of Pennsylvania. Such a duplicative burden is unwarranted, unjust, and entirely avoidable. The Eastern District of Pennsylvania should resolve the issues raised by the FTC's petition in the first instance.

Against this logic, and the numerous cases cited in Reckitt's opening brief, the FTC offers only one real argument against transfer: deference to its initial choice of forum. But this forum is not the FTC's home, and it is not where the FTC traditionally seeks to enforce civil

applicable law than does the federal court in South Carolina."). No court therefore has special competence in deciding the issues raised by the FTC's Petition.

Accordingly, in determining whether transfer is appropriate, this Court must be guided by the traditional § 1404(a) factors, modified as appropriate for the summary nature of this case.

In response, the FTC concedes that there is a risk of inconsistent rulings: "[T]he Philadelphia court [may] differ[] in its resolution" of the privilege issues. (Dkt. No. 25 at 12.) This concession should end the transfer inquiry, but the FTC nonetheless attempts to downplay the risk in two ways. Neither withstands scrutiny.

First, the FTC tries to minimize the likelihood of inconsistent rulings, noting that "the Philadelphia court *may* never address or resolve any privilege issues" or, if it does need to address them, "it *may* well defer to this Court." (Dkt. No. 25 at 12 (emphases added).) Not only do these hypotheticals not address the risk of inconsistent rulings, but the former scenario is also only possible if this Court were to deny the FTC's petition, as Reckitt maintains is the appropriate outcome under Fourth Circuit law. (*See* Dkt. No. 14 at 2-3; Dkt. No. 21-1 at 2.) If the Court were to grant the FTC's petition, however, Reckitt would immediately present the same privilege issues to Judge Goldberg in the Eastern District of Pennsylvania. (*See* Dkt. No. 14 at 9.) And when the Eastern District of Pennsylvania addresses the privilege issues, it would determine for itself whether Reckitt has sustained its claim under the federal common law as applied in that jurisdiction. *See, e.g.*, *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996) (affirming district court's treatment of certain documents as privileged, notwithstanding contrary holding of a different district court in another case); *cf. FTC v. Cephalon, Inc.*, No. 2:08-cv-2141, 2013 BL 242290, at *9 (E.D. Pa. Sept. 11, 2013) (Goldberg, J.) (upholding Cephalon's claim of privilege against FTC challenge to documents requesting or reflecting legal advice concerning, *inter alia*, "regulatory filings" and "handwritten notes regarding the terms of a draft agreement with a generic pharmaceutical company").

Second, despite acknowledging the risk of inconsistent rulings, the FTC suggests that result would be "hardly anomalous" and not a cause for concern because "Reckitt would not face

mutually inconsistent legal obligations." (Dkt. No. 25 at 12-13.) This suggestion is contrary to law, as the District of Columbia has convincingly explained: "If this Court, for instance, were to find that reverse-payment settlements are lawful while the district court in Pennsylvania reached the opposite result, or vice versa, Cephalon would face a classic case of conflicting judgments," even though Cephalon could comply with both judgments by not entering such settlements.

In sum, the FTC can only speculate that a transfer will cause undue delay. There is simply no reason to believe that, if this matter is transferred to him, Judge Goldberg will give it any less attention than this Court. Should it be transferred, the FTC's Petition would be heard by a judge who is already familiar with the facts and related issues, promoting judicial economy.

The FTC believes that it has discovered a quirk in "Fourth Circuit precedent" regarding the federal common law of privilege that would require a favorable result that it could not obtain anywhere else. (Dkt. No. 25 at 4.) It thus urges great deference be given to its initial choice of forum. (*Id.* at 6-8.) For the reasons explained in Reckitt's opening brief, however, this argument fails. (Dkt. No. 14 at 10-12.)

"The level of deference" afforded to a Plaintiff's choice of forum "falls along something of a continuum, and varies based upon [1] the plaintiff's relationship to the chosen forum, [2] the nexus between the events giving rise to the cause of action and the chosen forum, [3] evidence of tactical forum shopping, and [4] other factors." *Microaire Surgical Instruments, LLC v. Arthrex, Inc.*, No. 3:09-cv-78, 2010 BL 158407, at *5 (W.D. Va. July 13, 2010). Here, these factors urge discounting the FTC's choice of forum.

First, the FTC has no relationship to this forum. It is headquartered, and its lawyers are located, in the District of Columbia. (Dkt. No. 14 at 11.) While this district is adjacent to the District of Columbia, (Dkt. No. 25 at 9), this division is not. Thus, because the FTC is a foreigner, the Court should not "accord [the FTC's] choice of forum great weight ." *Samsung Elecs. Co. v. Rambus Inc.*, 386 F. Supp. 2d 708, 717 (E.D. Va. 2005).

Second, the events giving rise to this cause of action are the service of the FTC's CID and Reckitt's production in response to the CID—neither of which occurred in this forum. *See Fed. Hous. Fin. Agency v. First Tenn. Bank N.A.*, 856 F. Supp. 2d 186, 192 (D.D.C. 2012) (explaining

relevant events giving rise to process enforcement action). The FTC itself cannot determine whether to define the events giving rise to this action broadly or narrowly. At times, it asserts that "there is no overlap between the privilege issues in this process-enforcement action and the antitrust merits in the private class action suit[s]." (Dkt. No. 25 at 10.) But then, in seeking to show that the events giving rise to this action are connected with this forum, the FTC takes a broader view of "the critical conduct and most of the relevant decisions about activities the FTC is investigating," noting that the conduct and decisions involved actors from Richmond (and elsewhere). (Dkt. No. 25 at 7.) Simply put, the FTC cannot have it both ways. Either this process-enforcement action is not related to the merits, in which case it does not arise in this forum, or it is related to the merits and should be transferred where the merits cases are pending.

Third, there is ample evidence of tactical forum shopping. Contrary to the FTC's suggestion that it chose to file in Richmond so as not to inconvenience Reckitt, it cannot credibly dispute that its intent throughout its investigation has been to force this dispute into the Fourth Circuit. The FTC does not deny that it knew about the pending actions in the Eastern District of Pennsylvania, as well as that Court's discovery order, yet chose not to file its Petition there. (Dkt. No. 14 at 1 & Exh. A.) And the FTC likewise does not deny that it customarily files competition-related process-enforcement actions in the District of Columbia, regardless where the respondent is located or headquartered. (*Id.* at 11-12.)[2]

Long ago, the Fourth Circuit confronted a similar forum-shopping effort by a foreign plaintiff seeking to take advantage of a putative circuit split. *See Clayton v. Warlick*, 232 F.2d

[2] While the FTC notes that it has filed three other process-enforcement actions in other fora in the past decade, it neglects to mention that *none* of those additional cases relate to investigations of anticompetitive conduct. (Dkt. No. 25 at 8 n.9.) Thus, in the past decade, every

699 (4th Cir. 1956). The Court denied a writ of mandamus to review the transfer of that action to a more appropriate forum, notwithstanding the plaintiff's preference, reasoning that "[w]e have no sympathy with shopping around for forums." *Id.* at 706.

The situation here is concededly less stark than that in *Clayton*, because there is some nexus between the facts underlying the FTC's investigation and this forum, as there is a nexus

I hereby certify that on this 16th day of September, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will then send a notification of such filing (NEF) to the following:

Burke W. Kappler