

TWi Must Pay Fees After Ignoring Court Warnings In IP Row

By **Dani Kass**

Law360 (July 1, 2019, 5:49 PM EDT) -- TWi Pharmaceuticals must foot part of Supernus Pharmaceuticals' legal bills after relying on a position that was "squarely at odds with the evidence presented" at a patent infringement trial, a New Jersey federal judge has ruled.

U.S. District Judge Renee Marie Bumb said TWi had been explicitly warned not to make a specific argument about its proposed generic version of Supernus' epilepsy medication Oxtellar XR, but it did so anyway. She declared the case exceptional and granted fees on June 18, and a redacted version of her opinion was made public Thursday by TWi.

"In this court's experience, it is, indeed, a rare and exception circumstance in which a party argues a position at trial that is squarely at odds with the evidence presented, and moreover, does so in a manner that inexorably leads to the conclusion that asserting and maintaining that position was designed to obfuscate the evidence in a manner calculated to mislead, or at a minimum, unnecessarily protract the litigation," Judge Bumb wrote. "But that is what happened here."

TWi said a certain ingredient was only used as a binder in its product, in the hopes of setting it apart from Supernus' patents. Following a fight about privilege, internal testing information about the TWi's drug was released to the court, where it became clear that the ingredient was both a binder and a solubility enhancer, a fact the company "took tactical steps at every turn during discovery to keep ... out of the litigation," the opinion states. Judge Bumb warned TWi not to argue otherwise as the case proceeded, but TWi didn't listen, she said.

"The court could not have been clearer about where the line was drawn at that point in the litigation: 'A lawyer can't say to a client, run A, B, C, D test and they show X and then thereafter argue anything other than they show X,'" the judge wrote, citing earlier proceedings.

Any identifying information about the ingredient is redacted.

The decision to ignore the court's warning was "unreasonable and exceptional," Judge Bumb said. However, she said the misconduct only applies to TWi's noninfringement defense starting on Sept. 19, 2016. The company does not have to pay fees related to its invalidity defenses, as there were no allegations that they were frivolous or that evidence was withheld, she said.

The amount of fees was not determined.

Supernus had sued TWi for infringement in January 2015, saying its planned generic

infringed three patents. After a four-day **bench trial** in 2017, Judge Bumb said the patents were valid and infringed. The Federal Circuit **agreed** in September 2018.

"We are pleased that the district court and Federal Circuit ruled in Supernus's favor on both infringement and validity for all asserted patents, and especially pleased that the district court took the rare additional step of granting our motion for attorney fees," Haug Partners LLP said in a statement on behalf of Supernus.

Don J. Mizerk of Husch Blackwell LLP, an attorney for TWi, said in an email, "While TWi is pleased that the court denied most of Supernus' motion, we respectfully disagree with the court's decision regarding the scope of the attorney-client privilege in the context of an attorney's Paragraph IV investigation and to base a fee determination on that decision."

Paragraph IV is the certification a generic-drug company makes when seeking regulatory approval for its drug, saying no patents will be infringed or those patents are unenforceable.

The patents-in-suit are U.S. Patents Nos. 7,722,898; 7,910,131; and 8,821,930.

Supernus is represented by Charles M. Lizza, William C. Baton and Sarah A. Sullivan of Saul Ewing Arnstein & Lehr LLP and Edgar H. Haug, Nicholas F. Giove, Andrew S. Roper, Erika V. Selli, Jonathan A. Herstoff and Laura A. Chubb of Haug Partners LLP.

TWi is represented by Karen A. Confoy and Allison Linda Hollows of Fox Rothschild LLP and Don J. Mizerk, Marc R. Wezowski and Dustin L. Taylor of Husch Blackwell LLP.

The case is Supernus Pharmaceuticals Inc. v. TWi Pharmaceuticals Inc. et al., case number 1:15-cv-00369, in the U.S. District Court for the District of New Jersey.

--Editing by Peter Rozovsky.