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When to lift an injunction before the case on the merits is completed...

Anders Valentin (Bugge Valentin) · Sunday, May 21st, 2017

On April 26 2017, the Eastern High Court of Denmark gave an interesting decision in a case between Orifarm Generics A/S and Novartis A/S, who is the holder of a patent and a number of utility models regarding a transdermal patch. On August 12 2014, the Maritime and Commercial Court had found that Orifarm by its marketing of its transdermal patches had infringed the patent and the utility models belonging to Novartis. The court therefore granted an interim injunction against Orifarm, which has since been appealed. The main question in this case before the Eastern High Court was whether the interim injunction should be lifted or not.

In the action on the merits, decided on September 21 2016, the Maritime and Commercial Court had found the patent and the utility models to be invalid. This judgment has been appealed to the Eastern High Court by Novartis and the appeal is scheduled for trial in 2018.

Despite the fact that a final judgment regarding the validity of the patent and the utility models has not yet been rendered, the Eastern High Court decided to cease the interim injunction against Orifarm. The court found that a number of different circumstances had raised substantial doubts about “the right”, and, accordingly, there was no longer a basis for maintaining the injunction.

The court attached great importance to the expert opinion given in the case on the merits and to a number of foreign judgments regarding the patent-in-suit, in all of which an interim injunction had not been granted.

The court also took into account that EPO in 2015 had declared the patent-in-suit invalid. EPO’s decision has since been appealed. The Eastern High Court found that EPO’s decision weakened the presumption of the validity of the patent, but it was, however, not in itself sufficient to lift the injunction. For the same reason, the Eastern High Court did not consider the decision by the Maritime and Commercial Court of September 21 2016, which is under appeal, as sufficient basis to cease the interim injunction.

In conclusion, the Eastern High Court decided to lift the interim injunction due to substantial doubts regarding the patent before the decision regarding the validity of the patent-in-suit has been made.

Reported by Cecilie Frost Adamsen

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