

NOTE: This order is nonprecedential.

## United States Court of Appeals for the Federal Circuit

2009-1437, -1438

KING PHARMACEUTICALS, INC.,  
and KING PHARMACEUTICALS RESEARCH AND DEVELOPMENT, INC.,

Plaintiffs-Appellants,

v.

EON LABS, INC.,

Defendant-Appellee,

v.

ELAN PHARMACEUTICALS, INC.,

Counterclaim Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of New York  
in case no. 04-CV-5540, Senior Judge David G. Trager.

ON MOTION

Before GAJARSA, Circuit Judge.

### ORDER

King Pharmaceuticals, Inc. and King Pharmaceuticals Research and Development, Inc. (King) move to dismiss these appeals for lack of jurisdiction. In the alternative, King request that Eon Labs, Inc. (Eon) be precluded from further litigating inequitable conduct issues in the district court. Eon opposes. King replies. Elan Pharmaceuticals, Inc. requests that the court dismiss Elan as a party for lack of subject matter jurisdiction. Eon opposes. Elan replies. Eon moves for sanctions against King.

King opposes and moves to stay Eon's motion for sanctions pending disposition of King's motion to dismiss. Eon responds.

King filed a patent infringement action against Eon in the United States District Court for the Northern District of Illinois. The district court granted Eon's motion for summary judgment of invalidity and dismissed other pending claims, including Eon's claim for a declaratory judgment of unenforceability, as moot. The district court entered a final judgment, although Eon's motion for attorney fees pursuant to 35 U.S.C. § 285 remains pending. King and Elan appealed.

King asserts that this court does not have jurisdiction over these appeals because the district court will likely decide inequitable conduct issues when ruling on Eon's pending claim for attorney fees. A "decision on the merits is a final decision for purposes of immediate appeal, even though the recoverability or amount of attorney's fees [under 35 U.S.C. § 285] remains to be determined. Newell Cos. v. Kenney Mfg. Co., 864 F.2d, 757, 761 n. 3 (Fed. Cir. 1988) (citing Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200 (1988)). The case that King cites, Enzo Biochem, Inc. v. Gen-Probe, Inc., 414 F.3d 1376 (Fed. Cir. 2005), is clearly distinguishable. In that case, we noted that there was no final judgment because the district court had not decided or dismissed a claim for a declaratory judgment of unenforceability. Enzo Biochem, 414 F.3d at 1377. Thus, King's motion to dismiss is denied.

Elan's motion concerns the merits of the case. Such arguments should be included in the briefs.

Accordingly,

IT IS ORDERED THAT:

The motions are denied. The appellants' opening briefs are due within 40 days of the date of filing of this order.

FOR THE COURT

SEP 30 2009

Date

/s/ Jan Horbaly

Jan Horbaly

Clerk

cc: F. Dominic Cerrito, Esq.  
James B. Monroe, Esq.  
Martin B. Pavane, Esq.

s20

**FILED**  
U.S. COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT

SEP 30 2009

JAN HORBALY  
CLERK