

Nos. 11-17357, 11-17373

**In the United States Court of Appeals
for the Ninth Circuit**

SMITHKLINE BEECHAM CORP. D/B/A GLAXOSMITHKLINE,
PLAINTIFF/APPELLEE/CROSS-APPELLANT

v.

ABBOTT LABORATORIES,
DEFENDANT/APPELLANT/CROSS-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, NO. 4:07-CV-5702
HON. CLAUDIA WILKEN, PRESIDING

**MOTION FOR 30-DAY EXTENSION OF TIME TO PETITION FOR
REHEARING AND FOR REHEARING EN BANC**

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MOTION FOR EXTENSION OF TIME

Defendant-Appellant and Cross-Appellee Abbott Laboratories (“Abbott”) respectfully moves for a 30-day extension of time within which to file a petition for rehearing and for rehearing en banc in this matter. As set forth below, good cause exists for the requested extension on account of the work schedules of counsel and specific deadlines in other matters, the complexity of the issues presented by the decision, and the need for Abbott to analyze the decision and determine whether to seek further review. *See* Declaration of Daniel B. Levin (“Levin Decl.”) ¶¶ 2, 3. If the requested extension is granted, the petition would be due on March 6, 2014. Plaintiff opposes the requested extension. *See* Levin Decl., ¶ 5.

On January 21, 2014, this Court issued a published opinion in this case, reversing and remanding for a new trial. The panel held that “heightened scrutiny applies to classifications based on sexual orientation and that *Batson* applies to strikes on that basis”; that “a *Batson* violation occurred here”; and that therefore “this case must be remanded for a new trial.” Slip op. at 39. Abbott is evaluating the decision and its options for filing a petition for rehearing and/or rehearing en banc. Levin Decl., ¶ 2.

Under Fed. R. App. P. 40(a)(1), a petition for panel rehearing “may be filed within 14 days after entry of judgment,” unless that time is extended. Under Fed.

R. App. P. 35(c), a petition for rehearing en banc likewise must be filed “within the time prescribed by Rule 40 for filing a petition for rehearing.” Because the panel’s judgment was entered on January 21, 2014, a petition for rehearing and for rehearing en banc would ordinarily be due on February 4, 2014. *See* Fed. R. App. P. 26(a). For good cause, the due date for filing the petition may be extended. *See* Fed. R. App. P. 26(b); Fed. R. App. P. 40(a)(1).

As set forth in the attached declaration, good cause exists for a 30-day extension. This case presents questions of constitutional law that had not previously been resolved in this Circuit and that resulted in a 39-page published opinion. As such, any petition for rehearing requires careful analysis and deliberation. In addition, counsel on this appeal have specific conflicting commitments in other cases that will require considerable attention within the same time period. *See* Levin Decl., ¶ 3. Finally, time is required for Abbott’s review and analysis of the decision and determination whether to seek further review from this Court.

Abbott’s counsel has at all times during this matter exercised diligence in providing timely and professional briefing to this Court, and any petition will be filed within the time requested. *See* Levin Decl., ¶ 4.

Counsel for Abbott has informed counsel for Plaintiff-Appellee/Cross-Appellant (“Plaintiff”) of Abbott’s intention to file this motion, and Plaintiff’s

counsel has stated that Plaintiff objects to the requested extension. *See* Levin Decl., ¶ 5.

For the foregoing reasons, Abbott respectfully submits that a 30-day extension of the due date for filing a petition for rehearing and for rehearing en banc should be granted.

Dated: January 22, 2014

Respectfully Submitted,

MUNGER, TOLLES & OLSON LLP
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STUART N. SENATOR
DANIEL B. LEVIN

By: s/ Daniel B. Levin

DANIEL B. LEVIN

Attorneys for Defendant-Appellant and
Cross-Appellee ABBOTT LABORATORIES

DECLARATION OF DANIEL B. LEVIN

I, Daniel B. Levin, do hereby declare as follows:

1. I am a member of the law firm of Munger, Tolles & Olson LLP, counsel of for Defendant-Appellant and Cross-Appellee Abbott Laboratories (“Abbott”). Except as otherwise stated, the matters set forth herein are based upon my personal knowledge, and I could and would testify competently thereto if called upon to do so.

2. Abbott is evaluating the decision and its options for filing a petition for rehearing and for rehearing en banc.

3. In the absence of an extension, a petition for rehearing and for rehearing en banc would be due on February 4, 2014. Counsel believe that good cause exists for a 30-day extension of time to March 6, 2014, in light of the following factors:

a. The 39-page published opinion in this case decides questions of constitutional law that had not previously been resolved in this Circuit, and any petition for rehearing will require careful analysis and consideration.

b. Counsel who have been actively involved in this appeal have numerous conflicting commitments in other cases that will require considerable attention within the next 45 days, including the following:

c. I have ongoing responsibilities in numerous matters, including the following: I represent Transocean in *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* MDL 2179 (E.D. La.), and have briefs on various issues due on January 24, 2014, and February 17, 2014. In *Skold v. Intel Corp.*, 1-05-CV-039231 (Cal. Super. Ct.), a certified nationwide class action, summary judgment briefs are due on February 21, 2014, and trial is scheduled to begin on May 5, 2014; I will have a substantial role in preparing summary judgment briefing and in preparing for trial. I also have a client meeting out of the country the week of February 10, 2014, which cannot be changed.

d. I am informed that Stuart Senator has ongoing responsibilities in numerous pending matters, including, in particular, a significant deposition out of state the week of February 3, 2014, a March motion to dismiss deadline in a multi-district litigation pending in the Eastern District of Pennsylvania, and work in a new, complex but confidential representation. Mr. Senator also has substantial ongoing work as firm counsel to Munger, Tolles & Olson LLP.

e. I am informed that Jeffrey Weinberger has ongoing responsibilities managing numerous pending matters, including, in particular, a hearing on February 5, 2014, in patent cases involving four

defendants and three actions in the Northern District of California, and a March motion to dismiss deadline in a multi-district litigation pending in the Eastern District of Pennsylvania.

e. I am informed that James Hurst has a trial beginning on February 18, 2014, in *Cubist Pharmaceuticals Inc. v. Hospira, Inc.* (D. Del.).

f. I am informed that Steffen Johnson has the following work conflicts: (i) preparing for oral argument on Feb. 6, 2014, on behalf of Defendants-Appellants in *Tyco Healthcare Group LP v. Mutual Pharm. Co., Inc.* (Fed. Cir. No. 2013-1386), a complex multi-million dollar dispute involving the intersection of patent and antitrust law; (ii) preparing a joint supplemental brief opposing class certification in *Caldera v. The J.M. Smucker Co.* (C.D. Cal. No. CV 12-4936-GHK (VBKx)), a complex putative class action, due February 10, 2014, and requiring extensive coordination with other counsel; and (iii) analyzing a January 21, 2014, decision and advising client on whether to pursue rehearing or certiorari in *United States v. Schulte* (10th Cir. No. 12-1239), a decision raising complex constitutional and statutory issues under 18 U.S.C. § 1001.

4. Abbott's counsel has at all times during this matter exercised diligence in providing timely and professional briefing to the this Court, which we

intend and expect to continue to do such that any petition will be filed within the time requested.

5. On January 22, 2014, I spoke with Brian Hennigan, counsel for Plaintiff GSK, who informed me Plaintiff GSK objects to this request for an extension of time.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California, on January 22, 2014.

/s/ Daniel B. Levin

Daniel B. Levin