UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
ESTHER SALAS
UNITED STATES DISTRICT JUDGE

MARTIN LUTHER KING
COURTHOUSE
50 WALNUT ST.
ROOM 5076
NEWARK, NJ 07101
973-297-4887

January 30, 2015

LETTER ORDER

Re: ***Mylan Pharmaceuticals Inc. v. Celgene Corporation***
Civil Action No. 14-2094 (ES) (MAH)

Dear Counsel:

The Court has received the parties' submissions in conjunction with Defendant Celgene Corporation's motion seeking an interlocutory appeal of the Court's December 23, 2014 Order granting in part and denying in part Celgene's motion to dismiss, (D.E. No. 54). (D.E. No. 58, Motion to Certify Order Denying Motion to Dismiss for Interlocutory Appeal ("Def. Mov. Br."); D.E. No. 62, Mylan's Brief in Opposition to Defendant Celgene Corporation's Motion to Certify Order Denying Motion to Dismiss for Interlocutory Appeal ("Pl. Opp. Br."); D.E. No. 67, Reply Brief in Support of Defendant Celgene Corporation's Motion to Certify Order Denying Motion to Dismiss for Interlocutory Appeal). The Court has considered the parties' submissions and decides this motion without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons below, Celgene's motion to certify the Court's Order for interlocutory appeal is granted.

Celgene seeks certification of the following question: Whether a prior, voluntary course of dealing is required to allege an actionable refusal to deal under Section Two of the Sherman Act, 15 U.S.C. § 2.

To certify an interlocutory appeal under 28 U.S.C. § 1292(b), the Court must find that: (1) the decision "involves a controlling question of law," (2) there is "substantial ground for difference of opinion" as to the correct resolution of that question, and (3) the "immediate appeal" can "materially advance the ultimate termination of the litigation." The Court finds that each criteria is satisfied in this case. First, whether Mylan is required to plead a prior, voluntary course of dealing between the parties is a controlling question of law regarding the pleading requirements under § 2 of the Sherman Act. Though Mylan alleged that Celgene engaged in voluntary dealings with others, it does not allege a prior course of dealing with Mylan. (Pl. Opp. Br. at 8). Second, the Court acknowledges that there is conflicting precedent and the absence of controlling law in the Third Circuit on this issue. As Celgene points out, cases in other Circuits have weighed "prior course of dealing" more heavily in determining whether an actionable § 2 claim exists. (Def. Mov. Br. at 6). The Third Circuit, however, has not had opportunity to broadly examine this issue, and has certainly not done so under the factual circumstances presented here. (*See id.*). Finally, the

Court finds that an interlocutory appeal in this case would advance the ultimate termination of the litigation because it could potentially eliminate the need for costly discovery and trial.

In sum, the Court finds that the question of "[w]hether a prior, voluntary course of dealing is required to allege an actionable refusal to deal under Section Two of the Sherman Act, 15 U.S.C. § 2" is appropriate for interlocutory appeal under 28 U.S.C. § 1292(b).

Accordingly, it is on this 30th day of January, 2015,

ORDERED that Defendant Celgene Corporation's motion for certification of this Court's December 23, 2014 Order, (D.E. No. 54), for interlocutory appeal is hereby GRANTED; and it is further

ORDERED that the specific question to be certified is as follows: *Whether a prior, voluntary course of dealing is required to allege an actionable refusal to deal under Section Two of the Sherman Act, 15 U.S.C. § 2*; and it is further

ORDERED that Defendant Celgene Corporation shall file a Petition for Permission to Appeal with the United State Court of Appeals for the Third Circuit in accordance with Federal Rule of Appellate Procedure 5(a)(2).

The Clerk shall terminate docket entry number 58.

SO ORDERED.

s/Esther Salas
Esther Salas, U.S.D.J.