

2019-2264, -2265, -2266, -2267

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

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ANACOR PHARMACEUTICALS, INC.

*Appellant,*

v.

FLATWING PHARMACEUTICALS, LLC,

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*Appellee.*

*Appeal from the  
United States Patent and Trademark Office, Patent Trial and Appeal Board  
in IPR2018-00168, IPR2018-00169, IPR2018-00170, and IPR2018-00171.*

**APPELLEE’S RESPONSE TO APPELLANT’S  
MOTION TO REINSTATE ORAL ARGUMENT**

Appellee FlatWing Pharmaceuticals, LLC, the Petitioner below (“FlatWing” or “Petitioner”), respectfully submits this response to *Appellant Anacor Pharmaceuticals, Inc.’s Motion to Reinstate Oral Argument*, ECF No. 46 (“*Motion*”). The Court’s *sua sponte* order cancelling oral argument was correct because the case has been adequately presented. Sound policy counsels limiting and reducing the cost of litigation, not imposing unnecessary burden and expense on a party opponent. Other means that would better serve the public interest exist to meet the stated professional development goals of counsel for Appellant Anacor Pharmaceuticals, Inc., the Patent Owner below (“Anacor” or “Patent Owner”).

## **GROUND FOR DENYING THE MOTION**

FlatWing states its grounds for opposing the motion as follows.

**1. The Panel Correctly Determined That Oral Argument Is Unnecessary.**

As noted in its order, the panel can properly deny oral argument if the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. FED. R. APP. P. 34(a)(2)(C). Anacor contends that the Court could “benefit from hearing” oral argument but does not provide any meaningful support for that assertion. (*Motion* at 2.) Tellingly, Patent Owner admits and affirmatively states that it does not believe oral argument “would cause any delay in the Court’s decision.” (*Id.*) But if oral argument is not going to affect the Court’s decision or even give it pause, then oral argument cannot be significantly aiding that decisional process.

Anacor’s assertion that the case “involves a lengthy administrative record” and “several distinct issues” does not suggest that the briefs and record fail to present the facts and legal arguments adequately. The record is lengthy because it includes duplicative filings in four IPR proceedings addressing related patents with substantially the same specifications and disclosures. Each patent alone is at least 230 pages long (Appx163–401, Appx402–642, Appx643–882, Appx883–1119), together taking up half of the five-volume appendix—but the only language to which plaintiffs point in trying to distinguish the claims is the 5% active ingredient

percentage. This is simply not a complicated appeal, especially given the lengthy list of facts that are undisputed (*see Brief of the Appellee* 5–7, ECF No. 30)—and which, indeed, Patent Owner is estopped from denying based on three previous IPRs and an appeal in this Court invalidating two other patents with substantially the same specification. *See Anacor Pharm., Inc. v. Iancu*, 889 F.3d 1372, 1385 (Fed. Cir. 2018); *Coalition for Affordable Drugs X LLC v. Anacor Pharm., Inc.*, No. IPR2015-01776 (P.T.A.B. Feb. 23, 2017), Paper 70 (Appx3541–3584); *Coalition for Affordable Drugs X LLC v. Anacor Pharm., Inc.*, No. IPR2015-01780 (P.T.A.B. Feb. 23, 2017), Paper 70 (Appx4263–4324); *Coalition for Affordable Drugs X LLC v. Anacor Pharm., Inc.*, No. IPR2015-01785 (P.T.A.B. Feb. 23, 2017), Paper 70 (Appx4325–4384).

Moreover, FlatWing maintains that the facts and legal argument are so overwhelmingly clear and one-sided that the court could properly have denied oral argument under FED. R. APP. P. 34(a)(2)(A) (“the appeal is frivolous”). Indeed, FlatWing carefully considered bringing a motion under FED. R. APP. P. 38. Despite being convinced such a motion had merit, FlatWing ultimately decided not to pursue that course at this time in order to avoid multiplying these proceedings. FlatWing reserves the right to seek its costs and fees in the related district court civil action, in which Anacor maintains that, because it has asserted these invalid

patents, FlatWing is blocked under 28 U.S.C. § 355(j) from receiving final approval from the FDA on its ANDA 211963 until at least March 8, 2021.<sup>1</sup>

## **2. Public Policy Also Favors Reducing the Expense of Litigation.**

Public policy supports reducing the burden and expense of adjudications generally. *See generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (discussing the high cost of antitrust litigation). Congress intended in particular that post-grant proceedings like this one be used to reduce the expense of obtaining adjudications on invalid patents like these. *See* H.R. Rep. No. 112-98, pt. 1, at 48 (2011) (describing IPR as a “quick and cost effective alternativ[e] to litigation”); S. Rep. No. 110-259, at 20 (2008) (describing IPR as “a quick, inexpensive, and reliable alternative to district court litigation”); *see also WesternGeco LLC v. ION Geophysical Corp.*, 889 F.3d 1308, 1317 (Fed. Cir. 2018) (“The proposed administrative review procedures, including IPR, were intended to provide ‘quick and cost effective alternatives to litigation.’”); *Aqua Prods, Inc. v. Matal*, 872 F.3d 1290, 1298 (Fed. Cir. 2017) (“quick and cost-effective”); *PPC Broadband, Inc. v. Corning Optical Commc’ns RF, LLC*, 815 F.3d 734, 741 (Fed. Cir. 2016) (intended to “limit unnecessary and counterproductive litigation costs”).

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<sup>1</sup> *See* Supplemental Information for Patent Cases Involving an Abbreviated New Drug Application (ANDA), *Anacor Pharmaceuticals, Inc. v. Lupin Limited*, No. 1:18-cv-01606-RGA (D. Del, filed Oct. 17, 2018), ECF No. 3.

Reinstating oral argument would impose unnecessary additional burden and expense on Petitioner FlatWing. These invalid patents have already subjected Petitioner FlatWing to undue burden and expense in bringing these IPR proceedings and responding to district court litigation. Regardless of how laudable it may be for Williams & Connolly LLP and its clients to support the professional development its young and diverse attorneys, that is not a reasonable basis to increase the expense and burden of litigation to Petitioner FlatWing by reinstituting a proceeding that the panel has already unanimously and correctly determined is not necessary.

The circumstances in this appeal are markedly different from that which led to the order in *In re Publicover*, No. 19-1883 (Fed. Cir. Apr. 20, 2020), ECF No. 38. That was an appeal from an *ex parte* prosecution, not an *inter partes* patent trial. The appellee there, the Director, did not oppose the motion. Because of the nature of the representation there, arguing that appeal imposed no significant additional burden or expense on the Director, the United States Patent and Trademark Office, or the Office of the Solicitor. For that government agency, its legal representation was a sunk cost already incurred. Here, however, the Petitioner FlatWing does object because reinstating oral argument will increase the burden and expense of this matter with further unnecessary proceedings on invalid patents.

**3. Other Avenues Exist To Meet Professional Development Goals That Serve The Public Good Without Burdening An Opposing Party.**

Other avenues exist for counsel to obtain the desired experience in ways that would serve the public good without imposing a burden and expense on an opposing private party. The Federal Circuit Bar Association sponsors programs including the Veterans Pro Bono Initiative<sup>2</sup> and the Government Employees Pro Bono Program.<sup>3</sup> The Patent Trial and Appeal Board LEAP program<sup>4</sup> also seeks to foster a strong patent bar by providing opportunities for advocates to gain experience in proceedings. These and other similar programs would be more suitable means to seek out opportunities that would not involve imposing additional burden and expense on an opposing party with a proceeding that the panel has already correctly determined to be unnecessary.

**CONCLUSION**

For the reasons set forth above, Appellee FlatWing objects to Appellant Anacor's motion to reinstate oral argument, and respectfully requests that the motion be denied.

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<sup>2</sup> *Veteran's Pro Bono Initiative*, Fed. Cir. B. Ass'n, <https://fedcirbar.org/Pro-Bono-Scholarships/Veterans-Pro-Bono/Overview-FAQ> (last visited Jul. 27, 2020).

<sup>3</sup> *Government Employee Pro Bono Program*, Fed. Cir. B. Ass'n, <https://fedcirbar.org/Pro-Bono-Scholarships/Government-Employees-Pro-Bono/Overview-FAQ> (last visited Jul. 27, 2020).

<sup>4</sup> *Legal Experience and Advancement Program (LEAP)*, USPTO.gov, <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/leap> (last visited Jul. 27, 2020).

If, however, the Court is inclined to reinstate oral argument, FlatWing respectfully requests that the argument date also be rescheduled. The submission date is currently in one week, on Wednesday, August 5. The Court cancelled this argument on July 13. If the Court decides after today to reinstate the argument on its originally scheduled date, the parties would have less than one week to prepare. Especially given the exigencies of the current public health crisis, the need for additional logistical support for telephonic argument, and the need for coordination with the clerk's office to receive training for counsel arguing cases telephonically, if the oral argument is reinstated, then FlatWing respectfully suggests it should be rescheduled for the September calendar.

Dated: July 29, 2020

Respectfully submitted,

/s/ Philip D. Segrest, Jr.

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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**CERTIFICATE OF INTEREST**

**Case Number** 19-2264; 19-2265; 19-2266; 19-2267

**Short Case Caption** ANACOR PHARMACEUTICALS, INC. V. FLATWING PHARMACEUTICALS, LLC

**Filing Party/Entity** FLATWING PHARMACEUTICALS, LLC

**Instructions:** Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 07/29/2020

Signature: /s/ Philip D. Segrest, Jr.

Name: Philip D. Segrest, Jr.

## FORM 9. Certificate of Interest

Form 9 (p. 2)  
July 2020

<b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).	<b>2. Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).	<b>3. Parent Corporations and Stockholders.</b> Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.  <input type="checkbox"/> None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.  <input type="checkbox"/> None/Not Applicable
FlatWing Pharmaceuticals, LLC	Rajneesh Ahuja	Wicker Pharmaceuticals, LLC

☐ Additional pages attached

## FORM 9. Certificate of Interest

Form 9 (p. 3)  
July 2020

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable

☐ Additional pages attached

Husch Blackwell LLP	Philip D. Segrest, Jr.	Marc Wezowski
Eric J. Rakestraw		

**5. Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable

☐ Additional pages attached

In re Kerydin (Tavaborole) Topical Solution 5% Patent Litig., No. 1:19-md-02884-RGA (D. Del., filed Apr. 3, 2019)	Anacor Pharms., Inc. v. Lupin Ltd., No. 1:18-cv-01606-RGA (D. Del., filed Oct. 17, 2018)	Anacor Pharms., Inc. v. Ascent Pharms., Inc., No. 1:18-cv-01673-RGA (D. Del., filed Oct. 25, 2018)

**6. Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable

☐ Additional pages attached


FORM 19. Certificate of Compliance with Type-Volume Limitations

Form 19  
July 2020

**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS**

**Case Number:** 2019-2264, -2265, -2266, -2267

**Short Case Caption:** Anacor Pharmaceuticals, Inc. v. FlatWing Pharmaceuticals, LLC

**Instructions:** When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

- ☒ the filing has been prepared using a proportionally-spaced typeface and includes 1,345 words.
- ☐ the filing has been prepared using a monospaced typeface and includes \_\_\_\_\_ lines of text.
- ☐ the filing contains \_\_\_\_\_ pages / \_\_\_\_\_ words / \_\_\_\_\_ lines of text, which does not exceed the maximum authorized by this court's order (ECF No. \_\_\_\_\_).

Date: 07/29/2020

Signature: /s/ Philip D. Segrest, Jr.

Name: Philip D. Segrest, Jr.