

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SANOFI-AVENTIS U.S., LLC,
Plaintiff–Appellant–Cross-
Appellee,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, *et al.*,
Defendants–Appellees–
Cross-Appellants.

Nos. 21-3167, 21-3379

NOVO NORDISK INC., *et al.*,
Plaintiffs–Appellants–Cross-
Appellees,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, *et al.*,
Defendants–Appellees–
Cross-Appellants.

Nos. 21-3168, 21-3380

ASTRAZENECA PHARMACEUTICALS LP,
Plaintiff–Appellee,

v.

SECRETARY, U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES, *et al.*,
Defendants–Appellants.

No. 22-1676

**UNOPPOSED MOTION FOR A 30-DAY EXTENSION OF TIME
TO FILE A PETITION FOR REHEARING EN BANC**

The federal defendants move for a 30-day extension of time, to and including April 17, 2023, in which to file a petition for rehearing en banc in these cases. I certify that counsel for the plaintiffs do not oppose the requested extension.

1. “Under Section 340B, drug makers that want to take part in Medicare or Medicaid must offer their drugs at a discount to certain healthcare providers” known as “covered entities.” Opinion at 5. The plaintiff manufacturers in these appeals have placed various restrictions on covered entities’ use of contract pharmacies to dispense drugs purchased under the 340B Program. Opinion at 8 (describing the plaintiffs’ policies). HHS issued violation letters to the plaintiffs stating that “their policies were unlawful” under the 340B statute, 42 U.S.C. § 256b. Opinion at 9. On January 30, 2023, a panel of this Court issued its decision in these consolidated cases, “enjoin[ing] HHS from enforcing against” the plaintiff manufacturers “its reading of Section 340B [42 U.S.C. § 256b].” Opinion at 18. A petition for rehearing en banc would be due March 16, 2023. *See* Fed. R. App. P. 35(c), 40(a)(1)(B)-(C).

2. There is good cause for the requested extension. The panel’s decision addresses significant issues concerning the operation of the 340B

Program and the statutory terms under which participating manufacturers and covered entities operate. Before the government may file a petition for rehearing en banc, such a petition must be authorized by the Solicitor General. *See* 28 C.F.R. § 0.20(b). The decision whether to seek rehearing, as well as decisions regarding the substance of any petition, require consultation with and coordination among HHS, its subagency the Health Resources and Services Administration, and interested components of the Department of Justice. The requested extension of time is necessary to allow the Solicitor General to complete ongoing consultations and deliberations on the issue. The government has not requested any prior extensions of time.

3. An extension is further warranted because Daniel Aguilar, the attorney who represents the federal defendants in these cases, is also responsible for the following matters during the time in which a rehearing petition would be due: an answering brief in *Leachco v. Consumer Product Safety Commission*, No. 22-7060 (10th Cir. filed Feb. 16, 2023); an answering brief in *Rodriguez v. Social Security Administration*, No. 22-13602 (11th Cir. filed Feb. 24, 2023); oral argument in *Osmon v. United States*, No. 22-2045 (4th Cir. scheduled March 7, 2023); oral argument in *Lundquist v. United States*, No. 22-55709 (9th Cir. scheduled March 9,

2023). Additionally, counsel contracted COVID earlier this month is still recovering from that illness.

4. A petition for rehearing en banc would currently be due on March 16, 2023, and the requested 30-day extension would make any petition due on April 15, 2023. Because April 15 is a Saturday, the time for filing a petition would continue to run until April 17, 2023, a Monday. *See Fed. R. App. P. 26(a)(1)(C).*

CONCLUSION

For these reasons, the federal defendants respectfully request a 30-day extension of time in which to potentially file petition for rehearing en banc, to and including April 17, 2023.

Respectfully submitted,

/s/ Daniel Aguilar

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February 2023

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the length limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 543 words. I also certify that it complies with the typeface and style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in Georgia, a proportionally spaced typeface, in 14-point font.

/s/ Daniel Aguilar
Daniel Aguilar