13-3437

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

BRISTOL-MYERS SQUIBB & COMPANY,
Plaintiff-Appellant,

—against—

MATRIX LABORATORIES LIMITED N/K/A MYLAN LABORATORIES LIMITED,
Defendant-Appellee.

On Appeal from The United States District Court
for the Southern District of New York, No. 12 Civ. 5846
The Hon. Paul A. Engelmayer, United States District Judge, Presiding

REPLY BRIEF FOR PLAINTIFF-APPELLANT BRISTOL-MYERS SQUIBB COMPANY

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PRELIMINARY STATEMENT

In 50 pages of briefing, Mylan barely mentions the purpose of its contract with BMS. In order to ensure that AIDS victims in India and Africa could access medicine that would otherwise be unattainably expensive, BMS agreed to give away its proprietary technology to a direct competitor, which stood to make a considerable profit selling BMS's patented drugs in dozens of countries where BMS could have chosen to maintain a legal monopoly. BMS sought nothing in return other than an assurance from Mylan that it would sell the drug as widely as possible in the defined territory—and a promise that it would not take this gift and use it to undercut BMS's legitimate business elsewhere in the world.

In its brief, however, Mylan contends that the parties agreed that BMS would have no protection whatsoever if Mylan chose to compete against it in Venezuela—a country, according to Mylan, whose intellectual property laws are so weak that BMS cannot count on patent protection to insulate it from unfair competition (even from a competitor whose ability to produce a competing product is due solely to the fact that BMS handed it the secret formula at no cost). Why BMS would have made such a detrimental business decision—in the context of a charitable endeavor, no less—is left unexplained.

In fact, the contract protects BMS against the exact type of betrayal Mylan attempted in Venezuela. It prohibits Mylan from selling or otherwise transferring

atazanavir to "any third parties it reasonably believes may export the Products outside the Territory where Patents exist." Mylan argues that this language *clearly*—without any possibility of alternative meaning—applies solely to Mylan's sales to third parties located "within" the defined territory. Of course, the contract does not actually say that, and Mylan carefully ignores BMS's allegations, which must be taken as true at this stage, that Mylan *itself* believed that its contract prohibited sales to PAHO (which it claims is located *outside* the Territory) right up until the moment it was forced to defend this lawsuit. There is no greater evidence that the contract is amenable to two meanings than the fact that the defendant once embraced the plaintiff's interpretation. Mylan offers no response on that point.

Instead of grappling with the facts, Mylan spends most of its brief insisting that this Court needn't read BMS's brief at all, because according to Mylan, BMS waived every possible appellate argument by not filing a 50-page brief on this subject in the district court. The claim of waiver is baseless. BMS's position on appeal—that Mylan violated § 3.1(d) by selling atazanavir to PAHO for distribution in Venezuela—is exactly the same as the position it advanced below. And the law in this Circuit is clear that a claim is preserved for appellate review when it is presented to the district court for consideration; on appeal, a party is not limited to the precise arguments it made below in support of a preserved claim.

The district court erred when it adopted Mylan's cramped and illogical reading of the contract provision at issue—a reading that defies the charitable purpose of the agreement and that depends entirely on Mylan's insistence that the court insert the words "within the Territory" into a sentence where such words simply do not appear. We believe that the contract means what it says—that Mylan is prohibited from selling atazanavir to third parties who in turn arrange for its transfer and sale in countries outside the defined territory. At the very least, it is ambiguous enough that the district court should have considered BMS's powerful extrinsic evidence, or permitted further discovery into the parties' intentions when signing the contract. The judgment should be reversed.

ARGUMENT

I. BMS Stated A Claim For Breach Of Contract.

The IFSA prohibits Mylan from "sell[ing], distribut[ing], or otherwise transfer[ring]" atazanavir "to any third parties it reasonably believes may export the Products outside the Territory where Patents exist." A-21. The central dispute in this case is about the meaning of the phrase "export . . . outside the Territory." Mylan believes that the only way a party can "export" a product "outside the Territory" is by taking physical possession of the product while present "within"

the Territory. DB[1] 16, 18, 27-30. Our view is that a party can "export" a product *either* by physically transferring the product itself *or* by purchasing the product and arranging for its transfer from one country to another. PB 15-24.

The Court need not, however, definitely determine the precise meaning of these terms. Because their meaning is *at least ambiguous*, the Court must consider the entirely *unambiguous*—and practically undisputed—extrinsic evidence demonstrating that the parties understood Mylan's conduct to constitute a breach of contract. PB 28-33. And in any event, BMS alleged a breach of contract under *either* party's reading of the IFSA—under our reading, the "third party" exporter is PAHO; under Mylan's reading, it is a common carrier. PB 24-28.

A. The Meaning Of The Contract Is At Least Ambiguous.

Mylan recognizes (DB 48-49) that this Court can disregard BMS's extrinsic evidence only if the IFSA "is complete, clear and unambiguous on its face"—that is, if "there is no reasonable basis for a difference of opinion." *Law Debenture Tr. Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 467 (2d Cir. 2010). Mylan argues—and the district court concluded—that "under the clear and unambiguous language of the [IFSA, its] alleged sale of atazanavir to PAHO for distribution in

[1] Citations to "DB" refer to the Defendant's (Mylan's) brief; citations to "PB" refer to Plaintiff's (BMS's) brief.

Venezuala does not constitute a violation of the Agreement" because PAHO did not take possession of the product "within" the Territory. DB 16, 18.

But the contract doesn't say that—certainly not "on its face." Quite the contrary: Mylan's reading effectively inserts the words "present in the Territory" into the contract. *See* PB 15-16. Without those words, it is at least reasonable to conclude that the contract covers parties that do not physically take possession of the product inside the Territory and then transfer it themselves.

Indeed, the reasonableness of that interpretation is shown by the very dictionary definitions that Mylan quotes in its brief—or at least those portions that Mylan does not selectively emphasize. These definitions include "to take away, carry off"; "[t]o *send out* . . . from one country to another"; "[t]o send *or* carry abroad"; and "[t]o send, *take*, or carry." DB 27 (emphases added and Mylan's emphases omitted) (quoting OXFORD ENGLISH DICTIONARY 577 (2d ed. 1989) & BLACK'S LAW DICTIONARY 660 (9th ed. 2009)); *see also* WEBSTER'S DICTIONARY 682 (2001) (defining "export" as "to send or *transmit* to another place, *esp[ecially]* another country" (emphases added)). BMS's allegations certainly suggested that PAHO "t[ook] away" or "carr[ied] off" the atazanavir—even if not directly from India or Africa. And it is at least reasonable to conclude that PAHO "sen[t] out" the product to a place "outside the Territory"—by arranging for its transfer to Venezuala and taking possession once it was there—

even if it did not possess the product in the defined territory. *See, e.g.*, *id.* at 1743 (defining "send" as "[t]o *cause*, permit, or *enable* to go" (emphases added)); PB 17-18.

Mylan cites a number of cases that, unsurprisingly, interpret the term "export" in various U.S. constitutional and statutory provisions to require that the product leaves the United States. *See* PB 27-28. But none of these cases indicates that a party must take *physical possession* of the product inside the United States in order to export it outside. *Cf. Swan & Finch Co. v. United States*, 190 U.S. 143, 145 (1903) ("[T]he word 'export' . . . generally means the *transportation* of goods from this to a foreign country." (emphasis added)); *Delgado v. United States*, 581 F. Supp. 2d 1326, 1329 (Ct. Int'l Trade 2008) ("'[E]xportation' is defined as a '*severance* of goods from the mass of things belonging to this country, with the intention of uniting them to the mass of things belonging to some foreign country.'" (emphasis added)). A party can accomplish a "transportation" or "severance" of goods without conducting the physical transport itself. *See, e.g.*, *United States v. Am. Union Transp.*, 327 U.S. 437, 442-43 (1946) ("The foreign freight forwarding business is a medium used by almost all export shippers. An exporter, intending to send goods abroad, consigns the merchandise to a forwarder who then makes all the arrangements for dispatching it to a foreign port."); *N.Y. Foreign Freight Forwarders & Brokers Ass'n v. Fed. Mar. Comm'n*, 337 F.2d 289,

292 (2d Cir. 1964) ("An exporter who ships goods abroad customarily consigns the merchandise to a forwarder who then makes all arrangements for dispatch to a foreign port.").

In sum, "export" has been given a variety of different meanings in a variety of different contexts. We believe it encompasses the purchase of a product and the arrangement of its transfer from one country to another—as BMS indisputably alleged PAHO to have done. But the bottom line for purposes of this appeal is that it is far from "unambiguous" that the only way a party can "export" a product "outside [a] Territory" is by taking possession of the product while "present in the Territory." Thus, BMS's extrinsic evidence is critical.

B. The Extrinsic Evidence Is Unambiguous And Largely Undisputed.

Mylan's brief contains a single sentence in support of its view of how the Court should rule if it *does* conclude that the meaning of the IFSA is ambiguous:

> In any event, even if the [IFSA] were ambiguous (and it is not), the district court correctly held that the extrinsic evidence offered by BMS, which consisted of a series of alleged communications between [Mylan] and BMS leading up to and following the alleged sale of atazanavir to PAHO, "have no bearing on the meaning of the Agreement."

DB 49-50 (quoting SPA-17 n.6). Apart from that bald assertion, Mylan does not dispute the meaning of the extrinsic evidence BMS submitted—no wonder, because that evidence is devastating to its position: Mylan expressly stated that

atazanavir would be sold "through" PAHO; it repeatedly requested permission to sell atazanavir for use in Venezuala, including through a "special waiver" under the IFSA; and once alerted to the fact that it had breached its contract, it initially promised immediate action to "prevent the distribution of the Product in the Venezuelan market." PB 29. Thus, as BMS alleged in its complaint, Mylan "acknowledge[d] that the [IFSA] *did not allow [it] to sell* atazanavir in countries where a patent is pending." A-9 (emphasis added). Why else would Mylan ask BMS to "waive" its rights under the IFSA?

Mylan provides no response to our argument that the district court erred in concluding that Mylan may simply have been concerned with the costs of litigation or maintaining a good relationship with BMS. *See* PB 31-32. But even if that *may* have been Mylan's thinking, it is at least reasonable to infer from this evidence that both parties believed that selling atazanavir to PAHO for use in Venezuala would violate the IFSA; on a motion to dismiss, that should end the inquiry. *See Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 685 (2d Cir. 2001) (court must "draw[] all inferences in the plaintiff's favor"). At the very least, the district court should have permitted discovery into the parties' intent when the contract was signed, as BMS requested. *See* SPA-1. If this Court believes the language to be ambiguous enough to make extrinsic evidence relevant to the proper legal

interpretation of the contract's meaning, then if nothing else, the case should be remanded to the district court for discovery into the parties' intent.

C. Even Under Mylan's Reading, BMS Stated A Claim.

Even if the Court agrees with Mylan that the unambiguous meaning of the IFSA is that a party can "export" a product "outside" the defined territory only by taking possession of the product within that territory, BMS still stated a claim for breach of contract. BMS alleged that "pursuant to its agreement with PAHO, [Mylan] *shipped* at least one year's supply of atazanavir to the Venezuelan Ministry of Health." A-15 (emphasis added). As we explained, the best reading of that allegation is that Mylan transferred the atazanavir to a third-party common carrier for export to Venezuala, and thus "transfer[red]" atazanavir to a "third party" within the Territory that then "export[ed]" the drug "outside" the Territory. PB 26-28.

Rather than disputing the utter sensibility of that inference, Mylan predictably hangs its hat on the fact that the "Amended Complaint did not specifically allege that [Mylan] and PAHO . . . used a common carrier to export the atazanavir." DB 39 (internal quotation marks omitted); *see also* DB 40 ("Nowhere does the Amended Complaint mention . . . common carriers."). That of course is true, and we acknowledged as much. *See* PB 27. But it doesn't change the fact that the commonsense meaning (or at least a *reasonable* reading) of what BMS

alleged—that Mylan "shipped" the atazanavir—is that Mylan used a common carrier rather than its own employees to transfer the product. When a person says that he "shipped" something to a foreign country, it is doubtful that a listener would typically conclude that the person traveled to the country himself.

Mylan then argues that "BMS's proposed construction would entirely nullify Section 3.1(d)'s express limitation that it only prohibits exports out of the Territory by '*third parties*[,]' because in every single situation . . . this limitation would be satisfied" by the transfer to a common carrier. DB 46. We agree that this is not the best reading of the contract, but it is entirely consistent with the approach *Mylan* urges. The most logical explanation of § 3.1(d) is that it was designed to prevent Mylan from selling atazanavir to third-party *buyers* who would turn around and distribute it outside the defined territory. But if evidence of the parties' intent is to be ignored in favor of Mylan's cramped reading of the language of the provision, it is hard to understand why a transfer to a third-party *common carrier* for "export" to Venezuela does not violate the contract. Other than pointing out that the common-carrier interpretation would render the scope of the provision very broad, Mylan offers no *reason* why § 3.1(d), as written, would not prohibit transfer to a common carrier inside the Territory.

***

In the end, Mylan urges this Court to interpret the contract in a manner that would give Mylan the ability to evade the strictures of § 3.1(d) by artificially structuring its transactions to ensure that any legal "transfer" of atazanavir takes place outside its home territory. In other words, if Mylan is right that the contract prohibits sales only to entities that are physically present in the defined territory, then all it has to do to comply with the provision is to retain technical ownership of the drugs until they cross a national border. That cannot be what the parties intended, and it is not what the contract says.

II. Mylan's Remaining Arguments Are Wrong.

Lacking support in either the text of the IFSA or any extrinsic evidence, Mylan makes three additional arguments. Each is meritless.

A. BMS Did Not Waive Any Of Its Arguments.

Mylan says that BMS waived a number of its arguments by failing to raise them in the district court, including its arguments (discussed above) that "the 'third party' referenced in Section 3.1(d) need not be physically present in the Territory to export products out of the territory," and that BMS "can state a claim for breach of the [IFSA] even under [Mylan's] interpretation of the Agreement." DB 22, 38. In fact, Mylan doesn't stop there: it also finds it "[r]emarkabl[e]" that "BMS offer[ed] no justification" in the *opening* brief "for its failure to raise these

arguments before the district court." DB 23. We of course had zero obligation to anticipate and preempt every argument that Mylan might make in its opposition brief; that is the very purpose of a reply. But regardless, there was no waiver in the district court to begin with.

As Mylan acknowledges (*see* DB 21), BMS argued to the district court that Mylan violated Section 3.1(d) of the IFSA because its sale of atazanavir to PAHO was a "sale in which the purchaser [ ] 'export[ed] the Products outside the Territory where Patents exist.'" SA-107. BMS also argued that Mylan was wrong to contend that "Section 3.1(d) only prohibits sales to an entity within the Territory that then exports the Product outside the Territory." *Id.* Those are precisely the arguments we are now making on appeal.

Mylan is correct that a party is prohibited from advancing a legal *claim* on appeal that was not advanced in the district court. Thus, BMS may very well have been barred from arguing on appeal that Mylan violated a provision of the IFSA other than Section 3.1(d), or that some separate conduct by Mylan was a breach of that provision. There is no bar, however, to advancing a new *argument* on appeal in support of a legal claim that the party made below. As the Supreme Court has explained, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido,* 503 U.S. 519, 534 (1992); *see also In*

re Air Cargo Shipping Servs. Antitrust Litig., 697 F.3d 154, 161 n.3 (2d Cir. 2012) (same).[2] Similarly, this Court has held that "[a]rguments on appeal need not be identical to those made below . . . if the elements of the claim were set forth and additional findings of fact are not required"; indeed, when (as in this case) "a party raises new contentions that involve only questions of law, an appellate court may consider the new issues." *Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982); *see also Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 142 (2d Cir. 2000) (noting that this Court has "repeatedly recognized" the principle in *Vintero*). These principles are fully applicable here.

Unsurprisingly, the opening appellate brief contains much more detail than the brief in the district court (a brief that was restricted to 25 pages, the vast majority of which were dedicated to responding to Mylan's personal-jurisdiction argument). And it makes certain alternative arguments that take the district court's reading of the IFSA as a given—a reading that BMS had no reason to anticipate below. But *all* of the arguments raised on appeal are directed to the same claim

[2] Thus, the cases on which Mylan relies (DB 19-21, 24-25) are inapposite. *See, e.g.*, *Bogle-Assegai v. Conn.*, 470 F.3d 498, 504 (2d Cir. 2006) (Title VII plaintiff who missed deadline for filing could not argue for the first time on appeal that a longer statutory filing period applied to her claim); *Feldman v. Nassau Cnty.*, 434 F.3d 177, 179 (2d Cir. 2006) (plaintiff waived argument that statutory provision violated the New York Constitution); *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) (defendants waived argument that there were ambiguities in two parts of a lease that it had never mentioned below).

that BMS made in the district court: that "the purchaser" of the atazanavir (PAHO) "'exported the Product[] outside the Territory where Patents exist.'" SA-107. Under well-established law, any arguments in support of that claim—all of which involve purely legal issues and do not require "additional findings of fact"—are preserved.

B. BMS's Complaint Is Not An Attempt To "Circumvent Venezuelan Patent Law."

Mylan argues that "[t]his appeal is part of an ongoing effort by [BMS] to circumvent Venezuelan patent law—specifically, Venezuela's refusal to grant patents for medicinal or pharmaceutical products." DB 1. It argues that "BMS is [ ] attempting to transform the [IFSA] into a broad patent license," in a "desperate" attempt to "maintain its monopoly in Venezuala." DB 1-2.

That is just outrageous: the entire point of including both "patents *and patent applications*" in the contract's definition of the word "Patent" was to protect BMS's business in areas where it had patent applications pending but not granted. Both parties were aware of the potential unavailability of a Venezuelan patent for atazanavir—and that is precisely why BMS bargained for Section 3.1(d), including its reference to a broadly-defined area "where Patents exist," before giving Mylan the knowledge and technology needed to manufacture its tremendously valuable proprietary medication. *See* PB 22-24. BMS's rights under Section 3.1(d) are contractual—they do not rest on, let alone undercut, Venezuelan patent law.

C. The Purpose Of Section 3.1(d) Was To Prevent Mylan From Abusing BMS's Charitable Endeavor By Competing With BMS Outside Of The Specified Territories.

It is important not to miss the forest for the trees. Although Mylan describes the purpose of the Section 3.1(d) in remarkably convoluted terms—"to prevent [Mylan] from claiming immunity under the Agreement by selling to a third party in the Territory who [Mylan] knows intends to ship the Products outside the Territory" (DB 34)—it knows full well that the intent of the provision was a great deal simpler: to prevent Mylan from selling atazanavir to third parties who might undercut BMS's business outside of the Territory. BMS empowered Mylan to help facilitate distribution of the drug to underserved populations in sub-Saharan Africa and India, while ensuring that Mylan did not use the know-how that BMS gave it—*at no charge to Mylan, and at significant cost to BMS*—to compete with BMS in markets where it either owned patents or had patents pending. In other words, the purpose of the IFSA was to prevent Mylan from exploiting the enormous benefits it was receiving as a result of BMS's charitable endeavor to undermine BMS's sales of atazanavir in other parts of the world. *See* PB 22-24.

That precise result occurs any time Mylan transfers atazanavir to a third party that then sells it in countries outside the Territory where patents exist—regardless of where that third party is located or whether it physically transports the drug from the Territory to the country where BMS lacks intellectual property

protection. Mylan knew that and did it anyway, undermining not only BMS's profits but the charitable purposes of its project. BMS should be compensated.

CONCLUSION

The Court should reverse the judgment entered in Mylan's favor, reinstate BMS's claims, and remand for further proceedings.

Dated: New York, N.Y.
April 30, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 3,769 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6) because it has prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14-point type for text and footnotes.

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