HAUG PARTNERS

Haug Partners LLP
745 Fifth Avenue, 10th Floor
New York, NY 10151
+1.212.588.0800 Main
haugpartners.com

Porter F. Fleming
pfleming@haugpartners.com

April 23, 2020

Via ECF

Col. Peter R. Marksteiner, USAF, Ret.
Circuit Executive and Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W., Room 401
Washington, DC 20439

Re: *Takeda Pharm. U.S.A., Inc. v. Mylan Pharm. Inc.*, Nos. 2020-1407, -1417

Dear Colonel Marksteiner:

We write on behalf of Plaintiff-Appellant Takeda Pharmaceuticals U.S.A., Inc. ("Takeda") under Federal Rule of Appellate Procedure 28(j) to direct the Court to additional authority (attached hereto as Exhibit 1) that issued from this Court after Takeda filed its briefs: *O.F. Mossberg & Sons, Inc. v. Timney Triggers, LLC*, ---F.3d---, No. 2019-1134 (Fed. Cir. Apr. 13, 2020). *O.F. Mossberg* offers further support for Takeda's argument (D.I. 35 at 8-9, 11-12, 16-19, 22-24, 31-32; D.I. 56 at 5-6, 8-10, 19) that the *West-Ward* Litigation did not trigger Section 1.2(d) of the License Agreement, because five of the eight asserted patents were subject to a Rule 41 dismissal without an adjudication—one way or the other—on noninfringement, invalidity, or unenforceability.

In *O.F. Mossberg*, the patentee filed a notice of voluntary dismissal without prejudice under Rule 41, and the accused infringer moved for attorney fees, claiming "prevailing party" status. *O.F. Mossberg*, slip op. at 3. Rejecting the claim that a Rule 41 voluntary dismissal (and the district court's order memorializing it) rendered the accused infringer a "prevailing party," this Court concluded that such dismissal under Rule 41 does not constitute "a final decision at all." *Id.*, slip op. at 5-6. In so concluding, the Court recognized that "[a] properly filed Rule 41(a)(1)(A)(i) voluntary dismissal becomes effective immediately upon plaintiff's filing of the notice of dismissal[,]" and therefore does not constitute a "final court decision." *Id.*, slip op. at 5-6.

Similarly here, the Rule 41 dismissal of five patents in the *West-Ward* Litigation (Appx4011-4014) did not adjudicate—one way or the other—the issues of infringement, validity, or enforceability of those five patents. As in *O.F. Mossberg*, the Rule 41 dismissal was not "a court decision with the necessary judicial *imprimatur*." *O.F. Mossberg*, slip op. at 1. Accordingly, because not all of the "asserted" patents were "adjudicated" to be invalid, unenforceable, or not infringed, the *West-Ward* Litigation did not result in a Final Court Decision that would trigger Section 1.2(d) of the License Agreement.

HAUG PARTNERS

Respectfully submitted,

/s/ Porter F. Fleming
Porter F. Fleming

cc: All Counsel of Record (via CM/ECF)