

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BAYER HEALTHCARE LLC and BAYER)	
HEALTHCARE PHARMACEUTICALS)	
INC.,)	
)	
Plaintiffs,)	
)	C.A. No. 16-1221 (LPS)
v.)	CONSOLIDATED
)	
APOTEX INC. and APOTEX CORP.,)	REDACTED -- PUBLIC VERSION
)	Original Filing Date: June 8, 2020
Defendants.)	Redacted Filing Date: June 16, 2020

JOINT STATUS REPORT

Pursuant to the discussion between the Court and the parties during the June 4, 2020 teleconference, the parties provide the following:

Plaintiffs' Position

Following the Court's direction during the June 4, 2020 Status Conference, the parties have discussed proposed discovery from Bayer in response to Apotex's new non-enablement defense regarding U.S. Patent No. 9,458,107 ("the '107 patent"), which was first raised by Apotex at the close of expert discovery. Bayer had proposed providing discovery now, subject to its motion in limine, in order to avoid having to address any additional discovery during a compressed timeframe, *i.e.*, in between resolution of the motion in limine in connection with the pre-trial conference and the commencement of trial. However, the parties have been unable to reach agreement regarding the discovery. For example, Apotex is unwilling to agree to reasonable limits on the scope and nature of depositions of fact witnesses, and instead would like to leave deposition discovery open-ended. Consequently, and in accordance with the Court's guidance during the Status Conference, Bayer respectfully requests that the Court allow Bayer to move to strike Apotex's defense as untimely.

Consistent with the Scheduling Order (D.I. 106 ¶ 10), Bayer proposes the following briefing schedule, subject to the Court's approval:

Date	Event
06/15/2020	Bayer's Motion and Opening Letter (Not to exceed three pages)
06/22/2020	Apotex's Responsive Letter (Not to exceed five pages)
06/25/2020	Bayer's Reply Letter (Not to exceed three pages)

Should the Court deny Bayer's motion, Bayer respectfully requests that it be permitted to provide additional discovery in response to Apotex's defense, as appropriate, since it was not given the opportunity to develop a substantive response to the defense during fact or expert discovery.

Finally, with regard to Apotex's discussion below, Bayer notes that it is proposing a motion to strike (as opposed to a motion in limine) because that was the guidance provided by the Court during the June 4 Status Conference for the form of motion. Moreover, allowing updated briefing on the issue in the context of a motion to strike will afford Bayer the opportunity to address additional prejudice to Bayer from Apotex's untimely defense that has arisen since the parties originally briefed the motion in limine in pretrial papers last fall (which have not yet been filed).

Defendants' Position

Apotex's non-enablement defense under 35 U.S.C. § 112 is borne directly from, and because of, testimony obtained from Bayer's expert witness, Dr. Allan S. Myerson, during his deposition. In response, Plaintiffs drafted a Motion *in Limine* to exclude Apotex's 112 defense and, pursuant to the schedule at the time, served that motion on October 29, 2019. Defendants provided their opposition to the Motion on December 3, 2019 and Plaintiffs served their Reply

on December 5, 2019. As such, that Motion by the Plaintiffs is fully briefed. *See* Exhibit A attached hereto. While Apotex does not acquiesce to the propriety of the Motion, it respectfully submits that, should the Court deem appropriate, the Motion may be adjudicated at the Court's convenience and there is no need to wait until the Pretrial Order is submitted on August 19, 2020. Such an adjudication would impact the scope of any discovery contemplated by Plaintiffs.

As noted by Plaintiffs during the June 4, 2020 teleconference with the Court, the parties have repeatedly discussed how to approach Plaintiffs' Motion *in Limine*, both from a timing perspective and in regards to any additional discovery from Plaintiffs. *See* Exhibit B (Soderstrom 6/8/2020 Email). Plaintiffs seem to take the position now that instead of their Motion *in Limine*, they would prefer briefing to be set in regards to a Motion to Strike. Apotex can only surmise that part of the reason for this is likely because the procedure for a Motion to Strike allows for additional pages of briefing, which could allow Bayer to add new arguments, as well as expound on existing ones. Though Bayer claims there is some amorphous "additional prejudice" that has arisen since the motion *in limine* briefing, Apotex has not been advised of what that is. In any event, the Court's ruling on Plaintiffs' Motion *in Limine* will have the same effective result as a decision on Plaintiffs' proposed Motion to Strike—the disposition of Apotex's non-enablement defense. As such, Apotex does not believe a briefing schedule is necessary given that the parties have already exchanged their respective positions pursuant to previously agreed upon schedules. In fact, had trial not been extended, the aforementioned briefing would have already been filed with the Court. D.I. 141.

To the extent Plaintiffs intend to provide additional discovery, Apotex is willing to meet and confer after such production to discuss logistics and any restrictions on depositions and the like.

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June 8, 2020

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