IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BAXTER HEALTHCARE CORPORATION, Plaintiff, v. HOSPIRA, INC. and ORION CORP., Defendants.	C. A. No. 18-303-RGA

HOSPIRA'S RESPONSE TO BAXTER'S MOTION FOR REARGUMENT OF THE SCHEDULING ORDER

The parties submitted a proposed scheduling order with dueling proposed schedules: Hospira sought a slower schedule with a trial date of December 2019, while Baxter sought a more expedited schedule with a trial date of May 15, 2019. D.I. 18. The Court sided with Baxter and set a trial date even earlier than the date Baxter requested: May 3, 2019. D.I. 21. Baxter has now filed a motion to "reargue" the scheduling order, arguing that the schedule Baxter itself sought weeks ago is too slow and insisting that it will be irreparably harmed if this case is not resolved before the end of 2018. D.I. 25.[1] This request should be denied.

ARGUMENT

"District Courts have inherent power to manage their own docket," and "[m]atters of docket control … are committed to the sound discretion of the district court." *Greatbatch Ltd. v. AVX Corp.*, 179 F. Supp. 3d 370, 380 (D. Del. 2016) (citation and quotation marks omitted). Baxter contends that this Court abused that discretion by declining to entertain its motion for

[1] The day after filing its motion, Baxter submitted a Rule 7.1.1 certification stating that the parties had conferred as to the motion. D.I. 26. But contrary to Rule 7.1.1, there was no communication between the parties' Delaware counsel.

judgment on the pleadings and postponing its case-dispositive rulings until trial. Baxter is incorrect.

I. The Court Need Not Decide Baxter's Motion for Judgment on Uncontested Issues.

Hospira has conceded non-infringement with respect to three of the four patents-in-suit. Baxter's request that the Court decide its motion to dismiss with respect to those patents is unnecessary. As Baxter states, the "parties are discussing entry of a consent judgment on these patents, but no agreement has been reached." Mot. at 3.[2] Those negotiations should be permitted to run their course.

Baxter raises the prospect of being "force[d] to litigate" these patents "through trial, including serving non-infringement contentions, hiring experts, briefing claim construction, and preparing a Markman presentation." Mot. at 5. The Court can rest assured that Hospira will not litigate infringement of patents for which it has already conceded non-infringement.

II. The Court Reasonably Deferred Resolution of Case-Dispositive Issues Until Trial.

In its scheduling order, the Court elected to defer any decision on case-dispositive issues until trial, which will take place in less than a year. Thus, the Court denied Baxter's motion for judgment on the pleadings. This was an eminently reasonable exercise of discretion, particularly in light of the unorthodox nature of Baxter's motion. In a typical case, a Rule 12 motion assumes the truth of all allegations in the complaint, and argues that those allegations do not state a claim as a matter of law. If Baxter had filed such a motion in this case, it would have failed, because the case turns primarily on Baxter's intent to induce infringement—a question that requires factual development and cannot be resolved on the pleadings. To avoid this problem, Baxter filed an answer attaching witness declarations and other evidence, D.I. 14, and then filed

[2] "Mot." refers to Baxter's Motion for Reargument, D.I. 25.

a motion for judgment on the pleadings, asserting that this evidence—attached to its own responsive pleading—entitled it to judgment. *See, e.g.*, D.I. 17 at 18. This is not the way Rule 12 works—Rule 12 does not permit a party to append evidence to its own pleading and assert that this evidence entitles it to victory, without discovery. *See, e.g.*, *Execware, LLC v. BJ's Wholesale Club, Inc.*, 2015 WL 5734434, at *3 (D. Del. Sept. 30, 2015) (noting that extrinsic evidence "cannot be considered at the Rule 12 stage"). The Court did not abuse its discretion in declining to entertain this procedurally improper motion.

Baxter does not contend that a court generally is under an obligation to decide case-dispositive motions before trial. Instead, it argues that the Court should decide Baxter's early motion in this case because a failure to issue a "final non-appealable judgment by January 11, 2019" (prior to expiry of the '867 patent) would result in "irreparable harm and injustice." Mot. at 5-6. Baxter did not alert Hospira or the Court to this "irreparable harm and injustice" when it sought, and received, its requested May 2019 trial date. D.I. 18. Baxter identifies no reason for its change of heart.

Further, any harm arising from delay is of Baxter's own making. Baxter states that it filed this suit one month after FDA tentatively approved its ANDA. Mot. at 3. But Baxter could have filed this suit long before, in July 2016—and Baxter does not suggest otherwise. Baxter suggests that it delayed in filing this suit because it "expected to receive full FDA approval because the first applicant had apparently forfeited its exclusivity," which would have rendered the suit unnecessary. Mot. at 6. But Baxter's expectation was thwarted when "FDA only tentatively approved Baxter's ANDA," "apparently based on a decision in which FDA determined that the first filer did not forfeit its eligibility for exclusivity." *Id.* Baxter's incorrect predictions about the regulatory process are no basis to demand that the Court decide premature

dispositive motions, nor do they justify material prejudice to Hospira through accelerated proceedings.

III. The Trial Should Not Be Moved to 2018.

The Court should also decline Baxter's request to move the trial date to late 2018. Mot. at 7. As already noted, the Court has already granted Baxter's request for a May 2019 trial over Hospira's objection, and Baxter identifies no changed circumstances that would warrant reconsideration of that decision. Further, a late 2018 trial would be burdensome to Hospira. Hospira intends to argue both on-label and off-label indirect infringement, which will require discovery into Baxter's knowledge and intent on its product's usages. Thus, Hospira will seek document discovery of Baxter's sales documents, internal correspondence, and external correspondence. It will also seek to depose Baxter personnel (and potentially others). This discovery will take time, and a late 2018 trial would result in a highly expedited and burdensome discovery schedule. In light of Baxter's own delay in bringing this suit and raising this supposed urgency, it has no basis for insisting that Hospira and the Court be subjected to such a schedule.

CONCLUSION

The motion to reconsider should be denied.

Respectfully submitted,

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