IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TEVA PHARMACEUTICALS INTERNATIONAL GMBH and TEVA PHARMACEUTICALS USA, INC.,

Plaintiffs,

v.

ELI LILLY AND COMPANY,

Defendant.

Case No. 1:18-cv-12029-ADB

FILED UNDER SEAL
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9/18/2021 (ECF NO. 160)

DEFENDANT ELI LILLY AND COMPANY'S SUR-REPLY TO PLAINTIFFS' MOTION FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 37(B)

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TABLE OF CONTENTS

I. Introduction 1

II. The Requirement That Lilly Violated a Court Order Is Not Met 1

A. The Court Ordered Lilly to Search "Code Names *Used* By Lilly" 1

B. Teva Cannot Rewrite the Court's Order, or the Underlying Facts 2

1. "Teva's Interpretation" of the Court's Order Is Irrelevant 2

2. Teva's Attempts to Muddy the Record Do Not Change That Lilly Acted in Good Faith 3

III. Teva's Sanctions Analysis Is Contrary to Law and Fact 4

A. Teva Has No Answer to Governing Case Law 4

B. The Facts Do Not Warrant Any of Teva's Proposed Sanctions 4

IV. Conclusion 5

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TABLE OF AUTHORITIES

Federal Cases

Ins. Recovery Grp., Inc. v. Connolly,
977 F. Supp. 2d 16 (D. Mass. 2013) 2

Lawes v. CSA Architects and Eng'rs LLP,
963 F.3d 72 (1st Cir. 2020) 5

Pascale v. G.D. Searle & Co.,
90 F.R.D. 55 (D.R.I. 1981) 2

R.W. Int'l Corp. v. Welch Foods, Inc.,
937 F.2d 11 (1st Cir. 1991) 4

Syntel Sterling Best Shores Mauritius Ltd. v. TriZetto Grp.,
328 F.R.D. 100 (S.D.N.Y. 2018) 4

Federal Statutes

35 U.S.C. § 112 4

Rules

Fed. R. Civ. P. 37(b) 1, 4

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I. Introduction

At best, Teva's sanctions motion reflects a good faith dispute between the parties over the scope of the Court's March 8th Order. That dispute is not sanctionable. At worst, Teva's sanctions motion is an attempt to circumvent this Court and a Massachusetts jury by removing causes of action from the case without ever addressing substance. Regardless, Teva's reply (ECF No. 161)—rife with vitriol and speculation—comes no closer than its opening brief to carrying its heavy burden to prove that its requested Rule 37(b) sanctions are warranted. Instead, Teva's reply tries to muddy the waters while ignoring the case law in Lilly's opposition (ECF No. 151) that is solidly in Lilly's favor. Teva's motion should be denied.

II. The Requirement That Lilly Violated a Court Order Is Not Met

Lilly believes that the March 8th Order was clear: "[P]erform a search using the phrase "galca," as described in Teva's letter/request." ECF No. 104. Lilly ran a search "as described in Teva's letter/request," namely, Search Term 1 on page 1 of Teva's letter, right below the phrase "Teva seeks an order compelling Lilly to use the following two search terms[.]" ECF No. 99 ("Teva's letter") at 1. Search Term 1 required Lilly to search for "any internal project of [sic] code names used by Lilly." *Id*. The Court did not order Lilly to run a search containing the terms [redacted] which are not internal project or code names used by Lilly, and Teva did not seek such an order in February 2021. That Teva sought to recast the March 8th Order to manufacture the present dispute in late July, five months later, has no bearing on Lilly's compliance with the Court's March 8th Order.

A. The Court Ordered Lilly to Search "Code Names *Used* By Lilly"

There is no dispute that Lilly promptly produced more than 14,000 documents responsive to "Search Term 1" that the Court ordered. Lilly ran *thirteen* code names for the project that later led to galcanezumab, comprising "galca*," the seven terms expressly listed in the search string

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from Teva's letter, and five additional project or code names *not* identified by [redacted] [redacted] Teva's reply again insists that other code names were "used by Lilly" and thus Lilly was bound by the Court's Order to run those names. But this self-serving and unsupported speculation is inconsistent with the deposition testimony elicited by Teva. Indeed, Lilly's scientists repeatedly testified what the project code name actually was: [redacted] *See* ECF No. 151 at 9. Generic terms like "drug," "CGRP," "antibody," or even [redacted] that might appear as nouns in some text relating to the project are not specific to the project and were entirely unsuited for use as a confidential code name. Acknowledging the *possibility* of "colloquial" use of such terms does not convert those words into project or code names. In the face of this clear testimony, Teva alternately claims that Lilly "agreed" to run the disputed [redacted] and [redacted] terms (Lilly did not), that Lilly "did not object" to running them (again, false), or that Lilly has "waived" arguments against imposing sanctions because it should have known Teva's position "in February." Lilly could not have waived in February an argument Teva did not raise until July 30, 2021.

B. Teva Cannot Rewrite the Court's Order, or the Underlying Facts

1. "Teva's Interpretation" of the Court's Order Is Irrelevant

Teva's briefs rest on the premise that Teva can redefine the scope of a Court order. But if there is ambiguity in the scope of the order Teva secured, that ambiguity should be construed against Teva, not Lilly. *See, e.g.*, *Ins. Recovery Grp., Inc. v. Connolly*, 977 F. Supp. 2d 16, 26 (D. Mass. 2013) ("Courts have found unjust the imposition of sanctions on the basis of the violation of a discovery order that is subject to more than one reasonable interpretation.") (citing *Pascale v. G.D. Searle & Co.*, 90 F.R.D. 55, 59 (D.R.I. 1981)). If Teva wanted the specific terms [redacted] [redacted] to be run in a search term ordered by the Court, all it had to do was expressly list them in the requested search string, as Teva did with eight other names for Lilly's

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