

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

TEVA PHARMACEUTICALS)	
INTERNATIONAL GMBH and)	
TEVA PHARMACEUTICALS USA, INC.,)	
)	
Plaintiffs,)	Case No. 1:18-cv-12029-ADB
)	
v.)	
)	
ELI LILLY AND COMPANY,)	
)	
Defendant.)	

LILLY’S BENCH MEMO ON TRIAL TIMING

Teva’s statements on the record on October 31, 2022, suggest that it believes the parties should present closing arguments and the jury should be charged on Monday, November 7, 2022, meaning that the presentation of all evidence would need to be complete by the end of the day on Friday, November 4, 2022. Lilly respectfully submits that this schedule would contravene the parties’ prior stipulations and would prejudice Lilly. Lilly is entitled to the same full and fair presentation of its case-in-chief that Teva has already enjoyed. Teva’s new attempt at the literal eleventh hour to frame a November 8, 2022 closing as a last-resort compromise position (ECF No. 565 at 1-2) is illusory, since Teva’s letter makes clear that this later timing is motivated by its own desire to present additional witnesses in a rebuttal case it started on the second day of trial.

A. Lilly Is Entitled To Present Its Case

Teva’s letter (ECF No. 565) is notably silent on how this trial has actually proceeded. Including its opening statement, Teva spent nearly 18 hours across six trial days presenting its case-in-chief on the issues where it has the burden of proof: patent ownership, indirect infringement, willful infringement, and damages. All of those were full trial days beginning at 10

AM and ending at 4 PM. Of Teva's 18-hour case-in-chief, *3 hours and 39 minutes* were spent on direct and redirect examinations of three inventors of the patents-in-suit, who offered little if any relevant evidence on the issues where Teva bears the burden: ownership, infringement, and damages. To the contrary, this testimony was unambiguously intended to proactively rebut Lilly's case-in-chief. Roughly ten more of Teva's eighteen hours over five trial days were devoted to Teva's damages case, presented through nine different witnesses.

Lilly has only just completed its second "full" day (a partial day from 9 AM to 1 PM) of its case-in-chief on the invalidity of the patents-in-suit, plus its rebuttal on the issues listed above. Teva now insists that Lilly complete its *entire* case within four more trial days (one of which is another partial day), while somehow Teva also shoehorns in its own "rebuttal" case. This is simply not possible. Lilly has yet to call *any* of its expert witnesses and expects to call six of them. Lilly also still plans to call nine fact witnesses, either live or by deposition. Teva's hour-long cross examination of Lilly's fact witness Dr. Ryan Darling on the morning of October 31—which exceeded the length of the direct by more than twenty minutes—does not provide comfort that Teva will collaborate in streamlining the case. It is unclear how Lilly could be accused of consuming more than its equal share of trial time (ECF No. 565 at 2) when it is Teva, not Lilly, who has used more hours of trial time (currently Teva's 20 hours, 56 minutes versus Lilly's 17 hours 52 minutes). Lilly requests the Court's assistance to prevent further inequities.

In a good faith attempt to compromise and to meet the needs of the Court and the jury, Lilly has been streamlining its forthcoming presentations wherever possible. As set forth by Lilly in court on October 31, however, those efforts have been hampered by extensive evidentiary objections from Teva, many in conflict with prior rulings from this Court. Since Lilly arrives at

the courthouse each morning unsure of what its witness presentations will look like due to these actions, it makes it all the more difficult to commit to precise witness timings.

B. Closings and Charge Should Occur on November 8th

Assuming that the remaining trial days of November 1, 2, 3, 4, and 7 proceed on schedule, Lilly currently believes that it could complete the presentation of its case by the end of the trial day on **Monday, November 7, 2022**. As a hypothetical, a 60/40 split of that remaining time between Lilly and Teva (not unreasonable with Lilly presenting a streamlined version of both its case-in-chief and rebuttal case simultaneously) would result in a near-even total division of the jury trial time of approximately 30 hours apiece. *But that even split is only possible if Monday, November 7 is a full trial day.* Otherwise, any truncation of available time will be at Lilly's expense. Closings and charge of the jury could take place on the partial day of Tuesday, November 8, 2022, leaving two full days for the jury to deliberate before the end of the colloquy period. Lilly takes no position on whether Teva will have any time remaining or available to present a rebuttal case.

In contrast, Teva's concept of the trial has been a moving target. Teva told the Court in the Joint Pretrial Memorandum that it expected the jury trial to be complete by November 2, 2022. (ECF No. 512 at 24.) In practice, if the trial had actually unfolded on this schedule, Lilly would have had less than four days to present its case. On the evening of October 5, 2022, the eve of the final pretrial conference, Teva told Lilly that "Teva expects to propose to the court tomorrow that the parties' presentations to the jury should not require more than 50 hours of total trial time, and that the inequitable conduct bench trial can be conducted in two days." Ex. A at 1. Holding them to that promise, Teva, which has used 20 hours, 56 minutes of trial time to date, would have a mere

4 hours, 4 minutes remaining. Lilly’s proposal above is more equitable *to both parties* while still aligning to the time constraints of the jury.

C. The Bench Trial Should Not Rush the Jury

Lilly’s position on trial timing in this case has been consistent from the outset and aligns with that expressed by the Court on the record on October 28 and October 31, 2022: the “trial” time in this case for the jury trial should be measured within the trial window of October 18, 2022, through and including November 10, 2022. Lilly is open to scheduling the bench trial at a time convenient for the Court and for the parties, but notes that the Court has already stated with regards to the bench trial in this case that “**we don’t need to do it in those same three days**”—meaning the three days of November 8-10, 2022—and that “[y]ou can do those three days for this jury.” Day 9 Trial Tr. (October 28, 2022) at 157:24-25. Regardless, neither the bench trial, nor any potential additional rebuttal case from Teva, should result in a compression or reduction of Lilly’s share of its trial time for its case. Teva’s mismanagement of its trial time should not come at Lilly’s expense.

Lilly requests that the remainder of the jury trial be scheduled and conducted consistent with the above proposal.

Dated: November 1, 2022

/s/Andrea L. Martin

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CERTIFICATE OF SERVICE

I, Andrea L. Martin, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 1, 2022.

/s/Andrea L. Martin
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