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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

- - -

ELAN PHARMA INTERNATIONAL : Civil Action
LIMITED, :
 :
 Plaintiff, :
 :
 v. :
 :
 ABRAXIS BIOSCIENCE INC., :
 :
 Defendant. : No. 06-438-GMS

- - -

Wilmington, Delaware
Monday, June 9, 2008
8:30 a.m.
SIXTH DAY OF TRIAL
- - -

BEFORE: HONORABLE GREGORY M. SLEET, Chief Judge,
and a Jury

APPEARANCES:

JOHN G. DAY, ESQ.
Ashby & Geddes
-and-
STEPHEN SCHEVE, ESQ.,
LINDA M. GLOVER, ESQ.,
JEFFREY SULLIVAN, ESQ.,
LISA A. CHIARINI, ESQ.
ROBERT RIDDLE, ESQ., and
PAUL FEHLNER, ESQ.
Baker Botts LLP
(Houston, TX)
-and-
GREGORY BOKAR, ESQ.
Counsel - Elan Drug Delivery

Counsel for Plaintiff



1 APPEARANCES CONTINUED:

2 ELENA C. NORMAN, ESQ., and
3 MICHELLE SHERETTA BUDICAK, ESQ.
4 Young Conaway Stargatt & Taylor, LLP
5 -and-
6 MICHAEL A. JACOBS, ESQ.,
7 EMILY A. EVANS, ESQ.,
8 ERIC S. WALTERS, ESQ.,
9 DIANA KRUZE, ESQ., and
10 ERIK J. OLSON, ESQ.
11 Morrison & Foerster
12 (San Francisco, CA)

13 Counsel for Defendant

14 - - - - -

15 THE COURT: Good morning, counsel. Please be
16 seated for a moment.

17 (Counsel respond "Good morning.")

18 THE COURT: Mr. Jacobs.

19 MR. JACOBS: Thank you, Your Honor. Mr. Scheve
20 has signaled an intent to examine Dr. Desai, our first
21 witness this morning, about privilege log entries in
22 Dr. Desai's notebook.

23 We have seen a graphic displayed on the screen
24 in which Mr. Scheve would display those privilege log
25 entries or notebook pages with privilege redactions on them.

Mr. Scheve's contention is because the Court has
decreed that an adverse inference will be drawn from
Dr. Brittain's related privilege assertions, Elan should be
able to develop a record that Abraxis asserted the privilege
over, in this case, Dr. Desai's notebook entries.

1 The two are not parallel. The Court made
2 findings with respect to Dr. Brittain in order to even get
3 into examining a witness on the stand about topics that bear
4 on attorney-client privilege. Our position is the Court
5 would have to make similar findings.

6 We think Mr. Scheve, Elan, should be directed
7 not to raise any such issues or any such implication to
8 examine Dr. Desai on any topics that bear on attorney-client
9 privilege issues during the cross-examination of Dr. Desai.

10 THE COURT: Okay. Mr. Scheve.

11 MR. SCHEVE: Thank you, Your Honor.

12 If I could, beforehand, Mr. Day couldn't be here
13 today. He says there is a small event going on this
14 evening.

15 THE COURT: He took the day off. Huh?

16 MR. SCHEVE: Or at least half the day. He is
17 dealing with some issues Your Honor may be familiar with.

18 THE COURT: Indeed. Our children's graduation
19 from high school.

20 MR. SCHEVE: Yes.

21 Your Honor, if I may put up a slide, what this
22 is about, and there has been a Bench brief filed by Abraxis
23 that cites the case authority.

24 MR. JACOBS: May we provide that to Your Honor?

25 THE COURT: Yes.

1 MR. SCHEVE: And that case authority on Page 2,
2 Your Honor, if I may quote from, in the first instance, from
3 Weinstein's federal evidence, saying, The claim of a
4 privilege is not a proper subject of comment by judge or
5 counsel. No inferences may be drawn therefrom.

6 Then, later on in the Ninth Circuit, they cite
7 another case, that there could be no negative inference from
8 a defendant witness' claims of attorney-client privilege.

9 I raise that because what we did with
10 Dr. Brittain is create a privilege log. You will recall, he
11 signed an agreement with an attorney named Sipio and was
12 providing consultation with Mr. Sipio. Every one of those
13 was placed on a privilege log.

14 I think the record, and Your Honor will recall,
15 the position we urged upon the Court is it would be
16 inappropriate for an inference to be drawn from the fact
17 that we claimed those are privileged.

18 Your Honor has, to this date, said that you will
19 allow that inference to be drawn. This is what has occurred
20 during discovery, which is the image up here.

21 What Abraxis has done, Your Honor, has claimed
22 privilege over, quote, results from experiments that they,
23 "to" communicate to the counsel. Not reflecting anything
24 that was communicated to counsel, or Desai lab notebook
25 reflecting information to communicate to patent counsel

1 regarding product composition.

2 They have, I don't remember what the number is
3 there, it is page after page after page of testimony results
4 from the lab notebook that I can't see because they are
5 claiming it's privileged.

6 I don't understand how they are now going to
7 call Dr. Desai, who is going to testify, and be able to
8 claim that a lab notebook is privileged when it clearly
9 doesn't say, Reflects communication with attorney. This is
10 lab results.

11 My view, Your Honor, is while we think the
12 proper ruling, and I say this, Your Honor, because none of
13 us want to come back and try this case again, we think it is
14 legal error for an inference to be drawn when counsel, when
15 Mr. Brittain's gave us those documents, that he consulted
16 with Mr. Sipio on, we put them on a privilege log. There
17 was never a motion brought to compel. Never a request that
18 Your Honor look at it to determine whether, in fact, it was
19 privileged.

20 And now they have asked you, they want a
21 negative inference to be drawn from the fact we put it up
22 there. If you look at the cases cited in their brief, it's
23 error.

24 But they want to be able to pull Dr. Brittain in
25 here tomorrow and go through that. I am saying, If that's

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