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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
Tuesday, June 10, 2008
8:45 a.m.
SEVENTH 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.,
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
MICHELLE SHERETTA BUDICAK, ESQ.
Young Conaway Stargatt & Taylor, LLP

3

-and-

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MICHAEL A. JACOBS, ESQ.,
EMILY A. EVANS, ESQ.,
ERIC S. WALTERS, ESQ.,

5

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LISA CHIARINI, ESQ.,
DIANA KRUZE, ESQ., and
ERIK J. OLSON, ESQ.

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Morrison & Foerster
(San Francisco, CA)

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Counsel for Defendant

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THE COURT: Good morning.

12

(Counsel respond "Good morning.")

13

THE COURT: I understand we have an issue.

14

MR. JACOBS: A couple of things, Your Honor.

15

THE COURT: I hope they are short.

16

MR. JACOBS: Two are short and one may take a

17

few minutes. No. 1, we have reached a stipulation on a

18

person of ordinary skill in the art.

19

THE COURT: Good. I was wondering whether we
were going to hear about that mystic person.

20

21

MR. JACOBS: Procedurally, Your Honor, would you

22

like Ms. Kruze to read it? It would have come up in

23

Dr. Amiji's testimony. Ms. Kruze could just read the

24

stipulation into the record, if that would be appropriate.

25

MR. SCHEVE: Fine.

1 MR. JACOBS: No. 2, documents in evidence. How
2 do we work? I am still a little confused. I know we have
3 heard several times how this is supposed to work but we are
4 at the level of mechanics, understanding what is in and what
5 isn't, especially documents that are --

6 THE COURT: All objections were overruled to
7 documentary exhibits, unless raised again. I have not
8 entertained any additional objections. So it's in.

9 MR. JACOBS: On the original exhibits list, all
10 those exhibits are in evidence.

11 THE COURT: Are in. What you want the jury to
12 consider is another matter. Is that where we are going with
13 this?

14 MR. JACOBS: No. I think there are documents --

15 THE COURT: For your record, they are in.

16 MR. JACOBS: For closing --

17 THE COURT: That's evidence.

18 MR. JACOBS: Terrific.

19 THE COURT: Mr. Scheve, do you have any
20 questions?

21 MR. SCHEVE: That's exactly what I have
22 understood, Your Honor.

23 MR. JACOBS: Dr. Brittain, two alternative
24 paths, from our standpoint.

25 No. 1, we put him on the stand, he is here in

1 the courtroom, by the way. We put him on the stand, and we
2 examine him pursuant to the second Bench memo we filed
3 yesterday, in which we elicit only -- I can hand Your Honor
4 a copy.

5 THE COURT: I got it yesterday, you say?

6 MR. JACOBS: Yes. We didn't focus on it
7 yesterday.

8 THE COURT: Have you seen the Bench memo,
9 Mr. Scheve?

10 MR. SCHEVE: Yes.

11 MR. JACOBS: We gave it to them yesterday, Your
12 Honor.

13 The main point of this Bench memo, Your Honor,
14 is that when we ask him questions, we do not want him
15 volunteering, we do not want counsel for Elan eliciting
16 testimony beyond the specific and narrow facts that are
17 already in the record from his deposition or from the
18 documents.

19 THE COURT: You know, counsel and those in the
20 well, you can sit. It seems like this is going to take a
21 few minutes. There is no reason for you to have to stand.

22 Mr. Jacobs.

23 MR. JACOBS: There is only one question from the
24 deposition that I need to ask him, which is, Did you perform
25 studies on Abraxane? Beyond that, I don't believe counsel

1 for Elan should be allowed to elicit additional testimony
2 about what he did because he was instructed not to answer a
3 whole range of questions about what he actually did at his
4 deposition.

5 Actually, the second path is that we do not put
6 Dr. Brittain on the stand, and the Court explains to the
7 jury what happened with the privilege log and why we are
8 where we are. I prepared and gave to counsel for Elan
9 yesterday a proposed statement from the Bench that would
10 just lay out, very briefly, lay out exactly what happened.
11 That way, we don't have to deal with uncertainties about
12 what Dr. Brittain might say when he testifies on this issue.

13 THE COURT: I got to believe that Mr. Scheve
14 probably doesn't want the jury hearing about that from me.
15 Maybe I am wrong about that.

16 MR. SCHEVE: Well, after all day yesterday
17 asking witnesses, What did you have for breakfast?, and
18 hearing, Well, I had eggs right next to an order of
19 amorphous paclitaxel contained in Abraxis, all day, and now
20 to have counsel say, We really don't want any gratuitous
21 answers, or to go beyond -- they are now the sponsoring
22 witness, Your Honor. There is no expert report from him.
23 If they are going to ask fact questions, you know, it's my
24 decision, I would think, whether or not I wade into
25 something. I will be very cautious about that. The idea

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