

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

BAYER INTELLECTUAL PROPERTY)	
GMBH, BAYER AG, and JANSSEN)	
PHARMACEUTICALS, INC.,)	
)	C.A. No. 17-462-RGA
Plaintiffs,)	(consolidated)
)	
v.)	HIGHLY CONFIDENTIAL –
)	FILED UNDER SEAL
MYLAN PHARMACEUTICALS INC.,)	
)	
Defendants.)	

**LETTER TO THE HONORABLE RICHARD G. ANDREWS
FROM BINDU A. PALAPURA**

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Dated: September 21, 2018
5936096 / 44258

MYLAN - EXHIBIT 1067

Mylan Pharmaceuticals Inc. v. Bayer Intellectual Property GmbH



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September 21, 2018

VIA ELECTRONIC FILING

The Honorable Richard G. Andrews
United States District Court for the
District of Delaware
844 North King Street
Wilmington, DE 19801

**HIGHLY CONFIDENTIAL –
FILED UNDER SEAL**

Re: *Bayer Intellectual Property GmbH v. Taro Pharmaceutical Industries, Ltd.*
C.A. No. 17-462 (RGA)

Dear Judge Andrews:

Our firm, along with the firm of Wilson Sonsini Goodrich & Rosati, represents defendant Mylan Pharmaceuticals Inc. (“Mylan”) in the above matter. We write in response to Plaintiffs Bayer Intellectual Property GmbH, Bayer AG, and Janssen Pharmaceuticals Inc.’s (“collectively, Plaintiffs”) September 18, 2018 letter to the Court. Plaintiffs’ request for additional briefing on a claim term that has already been construed by this Court has no support in the law and is a waste of the parties’ and the Court’s time and resources. In short, Plaintiffs’ request amounts to an improper reconsideration motion and should be denied.

Pursuant to the Court’s Scheduling Order (D.I. 20), the parties submitted a Joint Claim Construction Brief on June 22, 2018. Plaintiffs set forth detailed arguments in support of their proposed construction, [REDACTED]

[REDACTED] Plaintiffs argued that this construction was the express definition of “rapid-release tablet” contained in the specification. Indeed, Plaintiffs argued *no less than 25 separate times* in their briefs that their proposed construction was the express definition of “rapid-release tablet.” Plaintiffs had a full and fair opportunity to present their construction. [REDACTED]

On July 3, 2018, this Court issued its *Markman* Order. The Court considered the parties’ arguments, reviewed the intrinsic evidence, and adopted Plaintiffs’ own lexicography, construing the term “rapid-release tablet” in U.S. Patent No. 9,539,218 (“the ’218 patent”) to mean “a tablet which, according to the USP release method using apparatus 2 (paddle), has a Q value (30 minutes) of 75%.” See D.I. 91 at 1. [REDACTED]

[REDACTED] Plaintiffs

unequivocally stated that the “express definition governs the claim construction inquiry, and there is no need for the Court to search further for the meaning of the phrase.” D.I. 82 at 4. Thus, Plaintiffs’ argument that the Court’s adoption of Plaintiffs’ construction is somehow unclear or vague is disingenuous.

Moreover, despite Plaintiffs’ assertions to the contrary, Mylan’s claim construction position regarding “rapid-release tablet” is irrelevant as it was rejected by Plaintiffs and the Court. Notwithstanding, Mylan’s claim construction position is entirely consistent with its position in the pending *inter partes* review. Plaintiffs may not now seek a do-over of the very construction they argued for and obtained [REDACTED]

Plaintiffs made a strategic choice [REDACTED] to avoid the unfavorable outcome that they faced in proceedings which invalidated the European counterpart to the ’218 patent. They must now live with the consequence of that choice— [REDACTED]

Plaintiffs should not receive a second bite at the apple simply because they did not fully consider the repercussions of their proposed construction. Plaintiffs “should be bound by the litigation decisions they ma[d]e.” *Reckitt Benckiser Pharms. Inc., et al. v. Watson Labs., Inc., et al.*, C.A. No. 13-1674-RGA (consolidated), D.I. 479 at 5 (D. Del., August 31, 2017).

Re-opening claim construction at this time would not only be improper and highly prejudicial to Mylan but also a waste of the Court’s and the parties’ resources. Plaintiffs’ request amounts to a belated request for reconsideration. However, such requests are meant to “correct manifest errors of law or fact or to present newly discovered evidence.” *Celebrate Int’l LLC v. Leapfrog Enterprises Inc., et al.*, C.A. No. 14-261-RGA (D. Del. June 16, 2016) (citing *Max’s Seafood Café ex re. Lou-Ann, Inc. v. Quinteros*, 176 F. 3d 669, 677 (3d. Cir. 1999)). Neither of these considerations is present here. [REDACTED]

[REDACTED] Plaintiffs’ request for additional briefing on a claim term that has already been fully briefed and construed by the Court is unsupported and should be denied.

Respectfully,

/s/ Bindu A. Palapura

Bindu A. Palapura

BAP/msb/5936096/44258

cc: Clerk of the Court (via hand delivery)
Counsel of Record (via electronic mail)

¹ Plaintiffs incorrectly assume the parties are in agreement regarding the meaning of a “Q value.” Rather than prematurely address Plaintiffs’ assertion here, Mylan will address this issue during expert discovery.