

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT CLARKSBURG**

REGENERON PHARMACEUTICALS, INC.,

Plaintiff,

v.

MYLAN PHARMACEUTICALS INC.,

Defendant.

Civil Action No. 1:22-cv-00061-TSK

**DEFENDANT MYLAN PHARMACEUTICALS INC.’S MOTION TO STRIKE
PORTIONS OF REGENERON PHARMACEUTICAL’S, INC.’S MARKMAN
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendant Mylan Pharmaceuticals Inc. (“Mylan”), by its undersigned counsel, hereby respectfully moves this Court to strike portions of the proposed findings of fact and conclusions of law of claim construction submitted by Plaintiff Regeneron Pharmaceuticals, Inc. (“Regeneron” or “Plaintiff”) on February 10, 2023.¹ (*See* Ex. A hereto, Proposed Order). The basis for this motion is that in its proposed *Markman* findings of fact and conclusions of law submission, Regeneron improperly cites to, and relies upon, (1) evidence that was already stricken by the Court on February 6, 2023, (Dkt. No. 298),² and (2) untimely expert opinions of Dr. Karl Csaky purportedly relating to claim construction.

¹ Regeneron filed its Findings of Fact and Conclusions and Law of Claim Construction, including the contested Exhibit A, with a motion for leave to file under seal on February 10, 2023 (Dkt. No. 305). Mylan has no objection to the sealing of the document, given its reference to protected materials.

² On January 11, 2023, Regeneron filed an unauthorized “Observations Concerning Post-Briefing Depositions of Mylan’s Claim Construction Experts.” (Dkt. No. 226). On January 20, 2023, Mylan moved to strike Regeneron’s submission, or in the alternative, for leave to file a response. (Dkt. No. 261). Regeneron replied to Mylan’s response on January 23, 2023. (Dkt. No. 262). On February 6, 2023, the Court rightfully struck Regeneron’s submission, along with all evidence included therein not otherwise in the record. (Dkt. No. 298).

During the January 24, 2023 *Markman* hearing, the Court verbally ordered each party to file findings of fact and conclusions of law of claim construction by February 10, 2023. The Court did not authorize, however, either side to submit evidence not already in the record. In its proposed *Markman* findings of fact and conclusions of law submission, Regeneron included both evidence that had been explicitly stricken by the Court, as well as new expert opinion never part of the claim construction record whatsoever.

Consideration of either of Regeneron's improper inclusions in its proposed *Markman* findings of fact and conclusions of law of claim construction submission would severely prejudice Mylan. Specifically, should the Court permit Regeneron to include evidence that the Court specifically struck, and overturning a substantial implication of its own February 6, 2023 Order granting Mylan's motion to strike Regeneron's "Observations Concerning Post-Briefing Depositions of Mylan's Claim Construction Experts." (Dkt. No. 262). Furthermore, it would grant Regeneron an unfair advantage of having the opportunity to cite evidence that was previously stricken, without permitting Mylan to do the same.

Next, Regeneron's inclusion of several pages of Dr. Csaky's expert report (served weeks after the *Markman* hearing) in its proposed *Markman* findings of fact and conclusions of law submission is entirely improper because it provides Regeneron an opportunity to submit rebuttal expert opinions *57 days after* the deadline to do so. (*Compare* Dkt. No. 87 at 2 (responsive claim construction submission due December 15, 2022), *with* Dkt. No. 305, dated February 10, 2023). Regeneron made the strategic decision to not provide expert declarations in support of its claim construction arguments. Yet, now, almost two months after responsive claim construction briefs have been submitted, Regeneron attempts to insert rebuttal expert opinion into the claim construction record. This extremely late submission prejudices Mylan because it stripped Mylan

the opportunity to address the opinions in the claim construction context through either cross-examination or rebuttal. By comparison, Mylan presented its claim construction experts in full compliance with the Scheduling Order in this case, also making them available for deposition before the *Markman* hearing. Regeneron did not provide its expert opinion in a timely manner and should not be allowed to circumvent the schedule that it demanded for this case by forcing new evidence into the claim construction record now.

For the reasons set forth in Mylan's corresponding memorandum in support of this motion, Mylan respectfully requests that the Court strike both the improper proposed findings of fact and conclusions of law, as well as the improper and untimely evidence cited in Regeneron's *Markman* Findings of Fact and Conclusions of Law. (*See* Ex. A hereto, Proposed Order).

Respectfully submitted this 17th day of February, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February 2023, I served the foregoing “Defendant Mylan Pharmaceuticals Inc.’s Motion to Strike Portions of Regeneron Pharmaceutical’s, Inc.’s Markman Findings of Fact and Conclusions of Law” by filing a true copy of the same with the Clerk of the Court using the CM/ECF system, which will send notice thereof to all counsel of record.

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