

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

JANSSEN BIOTECH, INC. and
NEW YORK UNIVERSITY

Plaintiffs,

v.

CELLTRION HEALTHCARE CO., LTD.,
CELLTRION, INC., and
HOSPIRA, INC.

Defendants.

Civil Action No. 1:15-cv-10698

Civil Action No. 1:16-cv-11117

CONFIDENTIAL - FILED UNDER SEAL

REQUEST FOR ORAL ARGUMENT

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION *IN LIMINE* NO. 3: TO PRECLUDE EVIDENCE AND ARGUMENT
REGARDING DISCOVERY COMMUNICATIONS**

I. INTRODUCTION

The Court should exclude all evidence related to discovery communications among outside counsel as irrelevant and unduly prejudicial under Federal Rules of Evidence 401-403. After discovery closed, Defendants pointed out an obvious flaw in Janssen's inducement theory: Defendants could not have acted with the requisite specific intent to induce known infringement, because Janssen concedes at least a dozen claim limitations are not literally satisfied. *See* Dkt. 265 at 14-20. Only then, in response to Defendants' summary judgment motion, did Janssen contend for the first time that certain emails addressing *informal* discovery requests purportedly show intent to infringe—requests made before discovery even opened, which Defendants therefore had no obligation to even answer, but nevertheless provided the requested information. *See* Dkt. 281 at 13-14. Janssen never even filed a single motion to compel in this case, much less obtained a ruling that discovery had been abused. There is thus no principled reason for Janssen to now seek to try a *discovery* issue before a lay jury, particularly considering that the exchanges involve

outside trial counsel, who would then be required to testify about these routine discovery exchanges.

Janssen's theory obviously represents a last-ditch attempt to keep the inducement theory alive. But courts routinely reject efforts to rely on alleged discovery abuses in the hope of tainting the jury. As one court aptly put it: "To seek to adduce evidence at trial about claimed improprieties during discovery, without having sought and obtained discovery sanctions, would permit [parties] to circumvent the deadlines for discovery motions and would inject extrinsic issues about discovery compliance into the trial." *In re Gabapentin Patent Litig.*, No. MDL-1384, 2011 WL 1807448, at *12 (D.N.J. May 12, 2011). Allowing Janssen's discovery sideshow here would be even more inappropriate, because the allegations of discovery improprieties are baseless—as shown by the three declarations filed with this motion.¹

During summary judgment briefing, Janssen relied on attorney correspondence to support three arguments. First, Janssen argued that "Defendants misleadingly asserted that the '083 patent was not infringed because Celltrion did not conduct any infringing activities in the United States." Dkt. 281 at 13. But Defendants' contention is absolutely true. Among many other reasons, one reason that Celltrion does not infringe is because it conducts no allegedly infringing activities in the United States. That's why Janssen has been forced to rely on legally-flawed direct infringement and inducement theories. In any event, before the alleged misleading assertions, Celltrion had produced documents showing the accused media were made in Utah by GE Healthcare Life Science HyClone Laboratories, Inc. ("GE HyClone")—not Celltrion. Defendants cannot be held accountable if Janssen misread those documents.

¹ References to the "Klein Decl.," "Kim Decl.," and "Cho Decl.," refer respectively to the declarations of Charles B. Klein, Sehoon Kim, and JongMoon Cho in support of Defendants' motion *in limine* no. 3, filed concurrently herewith.

Second, Janssen argued that “Defendants also attempted to conceal the fact that they knew the formulations of the Celltrion Media and how similar they are to the claims of the ’083 patent,” because “Defendants insisted that Janssen would have to obtain that information from third-party HyClone.” *Id.* at 13-14. There was no such “concealment.” During these informal exchanges, Defendants never once stated that they did not know GE HyClone’s recipe. [REDACTED]

[REDACTED] Then, without any obligation to do so, Defendants voluntarily helped Janssen get the recipes from GE HyClone directly, under suitable confidentiality restrictions, within just one month of Janssen’s request and three months of Janssen’s original complaint—before formal discovery even began.

Third, according to Janssen, “[o]nly after eleven months of discovery—and only after Janssen challenged Celltrion’s production—did Defendants finally admit that Celltrion had the formulations all along.” *Id.* at 14. This is plainly false. A fair reading of Celltrion’s detailed statement told Janssen at the outset of this dispute that it had access to the GE HyClone formulations, and they do not infringe. As confirmed by the three declarations filed with this motion, Janssen is referring to a completely inadvertent and non-prejudicial oversight. Almost no large document production is perfect, despite everyone’s best efforts. [REDACTED]

[REDACTED] The notion that counsel, much less Celltrion, intentionally hid these particular documents is transparently meritless. Celltrion’s knowledge of the formula was never in dispute and, in fact, had *already* been revealed by other documents—including pre-litigation patent contentions and documents produced in discovery [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]² Celltrion then produced the three documents at issue just seven days after Janssen’s request and *before* any Celltrion depositions, thus causing Janssen no prejudice. As Janssen’s lead counsel acknowledged at the last hearing: “I’m not accusing them of, you know, intentionally not finding the material in the locked box.” Ex. 34 (December 22, 2016 Hearing Tr.) at 5:5-20.

For these and other reasons discussed below, Janssen’s arguments based on discovery communications are irrelevant and should be excluded under Rules 401 and 402. Routine discovery exchanges between *trial counsel* have nothing to do with any Defendants’ *decision maker’s* alleged guilty “knowledge” of infringement through a media that misses a dozen claim limitations. At the very least, the Court should exclude the evidence under Rule 403, because any purported probative value would be far outweighed by the danger of unfair prejudice and jury confusion resulting from the spectacle of trial counsel testifying and from Janssen’s trial counsel hurling baseless and inflammatory misconduct charges against Defendant’s trial counsel—charges Janssen never saw fit to bring before this Court in the form of a discovery, let alone sanctions, motion. If this Court were inclined to nevertheless allow the evidence, Defendants respectfully seek the right to depose any relevant witnesses, including Janssen’s trial counsel, before the trial begins.

² References to “Ex. ___” refer to the exhibits attached to the declaration of Charles B. Klein in support of Defendants’ motion *in limine* no. 3, filed concurrently herewith.

II. THE COURT SHOULD BAR JANSSEN FROM RELYING ON ATTORNEY COMMUNICATIONS TO SUPPORT ITS THEORY THAT DEFENDANTS SPECIFICALLY INTENDED TO INDUCE INFRINGEMENT.

A. All Attorney Correspondence Relied On By Janssen Should Be Excluded As Irrelevant Under FRE 401 And 402.

The Court should exclude all attorney correspondence as irrelevant. Evidence is admissible only if it is relevant. Fed. R. Evid. 402; *United States v. Lamberty*, 778 F.2d 59, 60 (1st Cir. 1985). And evidence is relevant only “if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401. The attorney communications at issue, some of which have been addressed in the declaration of Ms. Irena Royzman (Dkt. 283) and submissions by the parties (Dkts. 281, 293 and 305), do not even come close to meeting this standard.

1. Courts Routinely Exclude Discovery Disputes From Evidence.

Under Rules 401 and 402, courts routinely exclude references to discovery disputes or delayed productions as purported infringement evidence. “Evidence of the parties’ discovery disputes are not relevant to the questions of patent validity or infringement, and thus should not be presented to the [factfinder].” *E.g., Mformation Techs., Inc. v. Research in Motion Ltd.*, No. C-08-04990-JW, 2012 WL 2339762, at *2 (N.D. Cal. June 7, 2012); *see also ContentGuard Holdings, Inc. v. Amazon.com, Inc.*, No. 2:13-cv-01112-JRG, 2015 WL 11089489, at *3 (E.D. Tex. Aug. 24, 2015) (“The parties shall not introduce any evidence or testimony, or make attorney argument, comments, insinuation, reference, or assertions concerning alleged deficiencies or failures in the parties’ production of documents or other discovery (pursuant to any Federal or Local Rules concerning discovery) or litigation misconduct.”); *Multimedia Patent Trust v. Apple Inc.*, No. 10-cv-2618-H, 2012 WL 12868264, at *5 (S.D. Cal. Nov. 20, 2012) (“The Court precludes the parties from making any references to pretrial discovery disputes, discovery

negotiations, and/or claims of privilege without leave of Court.”); *In re Gabapentin*, 2011 WL 1807448, at *12 (barring Plaintiffs from introducing evidence of Defendants’ alleged failures to comply with discovery obligations, because “[t]o seek to adduce evidence at trial about claimed improprieties during discovery, without having sought and obtained discovery sanctions, would permit Plaintiffs to circumvent the deadlines for discovery motions and would inject extrinsic issues about discovery compliance into the trial”). This principle “includes evidence,” for example, that a party produced evidence “later than it should have under the discovery rules,” and thus applies with even greater force to voluntary, informal discovery. *Mformation*, 2012 WL 2339762, at *2.

2. As A Factual Matter, Janssen Has Badly Mischaracterized The Discovery Communications.

Here, excluding the attorney communications is even more compelling because Janssen never moved to compel production of any discovery and, in fact, it got every scrap of information it sought from Defendants during the fact-discovery period—much of it before discovery even began, through voluntary and informal productions. Under the case law described above, the mere fact that Janssen’s counsel did not get immediate responses to *informal* discovery requests is not a basis to now try discovery disputes before a jury. Indeed, contrary to Janssen’s assertions, the communications at issue in no way suggest that Defendants misled, or hid information from, Janssen.

a. Defendants Never Represented That GE HyClone Made The Accused Products Outside Of The United States.

Janssen initially suggested that Defendants somehow misled Janssen into believing the accused GE HyClone products were made outside of the United States. But Defendants made no such representation—ever. *See* Klein Decl. ¶¶ 33-43.

First, Celltrion’s application for its infliximab biosimilar (“aBLA”), produced at the very outset of the parties’ dispute, clearly states that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Defendants obviously did not hide information that was produced to Janssen at the very beginning of the dispute—before the original complaint was even filed.

Second, Defendants never told Janssen otherwise. Instead, as their pre-litigation (February 2015) “detailed statement” under the Biologics Price Competition and Innovation Act (“BPCIA”) confirms, they contended that *Celltrion* did not conduct any activities that could be deemed

infringing in the United States. Below is the entire relevant portion of that detailed statement, which does not address where GE HyClone makes the accused products:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Janssen has never contended that Celltrion itself conducts any infringing activity in the United States.

Critically, Celltrion absolutely never said that GE HyClone produced the accused products outside of the United States. Klein Decl. ¶ 42. Had that been true, there would have been no need for Defendants to discuss the formulas for those products in their detailed statement. *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Third, Celltrion’s willingness to voluntarily provide informal discovery contradicts Janssen’s accusations of concealing information. [REDACTED]

[REDACTED] Nevertheless, defense counsel voluntarily worked with both Celltrion and GE HyClone to get this requested information to Janssen before formal discovery in the case even started—within one month of the request and three months of the filing of Janssen’s first complaint. Klein Decl. ¶¶ 14-22, 31-32, 47.

[REDACTED]

Fourth, although Janssen makes much of Ms. Royzman’s argument that defense counsel refused to *further confirm* what the aBLA said— [REDACTED] —these discussions were all in the context of voluntary exchanges before formal discovery even began. Klein Decl. ¶¶ 15-22, 33-43. Defendants thus had no obligation under the Federal Rules of Civil Procedure to answer any of Ms. Royzman’s questions. Nor did Defendants breach the terms of any BPCIA provision. In fact, according to the Federal Circuit, the BPCIA patent provisions are not even mandatory. *See Amgen Inc. v. Sandoz Inc.*, 794 F.3d 1347, 1354-

57 (Fed. Cir. 2015) (holding that the defendant “did not violate the BPCIA by not disclosing its aBLA and the manufacturing information by the statutory deadline”) (petition for writ of *certiorari* pending).

Nevertheless, GE HyClone’s counsel confirmed that the accused products are made in Utah just 10 days after Ms. Royzman asked her question. Klein Decl. ¶¶ 33, 43. Despite receiving this answer promptly, before formal discovery even began, Janssen argues that this mere *10-day delay* in getting an answer to her question—a question that itself went beyond the scope of the informal discovery related to the GE HyClone formulas—somehow provides circumstantial evidence that Defendants specifically intended to induce GE HyClone to make products they know infringed. This argument is not credible.

b. Defendants Did Not Hide The Formulas From Janssen But Rather Facilitated Janssen To Get Those Formulas From GE HyClone.

Janssen’s second argument is even more of a stretch. According to Janssen, the fact that “Defendants insisted that Janssen would have to obtain [the GE HyClone formulations at issue] from third-party HyClone” suggests that Defendants specifically intended to induce GE HyClone to make products Defendants knew infringed. Dkt. 281 (Janssen’s MSJ Opposition Br.) at 13-14. Nonsense. Janssen received GE HyClone’s trade-secret formulas before fact discovery even began, because Defendants facilitated that production from GE HyClone directly—the precise opposite of hiding those formulas.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Janssen cites no authority holding that Celltrion was required to breach its confidentiality obligations to GE HyClone to disclose its proprietary formulas, let alone in informal discovery. The BPCIA does not require such action. In fact, it refers to “confidential information disclosed” under the BPCIA as “the property of the [biosimilar] applicant.” 42 U.S.C. § 262(l)(1)(E). [REDACTED]

[REDACTED]

Contrary to Janssen’s suggestion, Defendants’ counsel repeatedly informed Janssen’s counsel of Celltrion’s confidentiality obligations to GE HyClone (Klein Decl. ¶¶ 11-13, 23-30), yet worked with counsel for both Janssen and GE HyClone to get Janssen access to the formulas. *Id.* ¶¶ 14-32. Without Defendants’ assistance, Janssen would not have been able to seek formal discovery from GE HyClone until after the parties’ Rule 26(f) conference, which was held on June 11, 2015. Fed. R. Civ. P. 26(d)(1) (“A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).”); *see* Klein Decl. ¶ 47. Even then, GE HyClone

[REDACTED]

could have objected—just as GE HyClone did in opposing Janssen’s deposition subpoenas—potentially postponing discovery for several months. Ex. 35 (GE HyClone’s Mtn. to Quash); Ex. 36 (GE HyClone Opposition to Mtn. to Compel).

In short, it was Defendants’ efforts that enabled Janssen to obtain access to this information from GE HyClone much sooner than it otherwise would have—before formal discovery even began. Again, this is the opposite of hiding information.

c. Defendants Did Not Hide From Janssen Celltrion’s Knowledge Of The GE HyClone Formulas.

Citing Celltrion’s inadvertent oversight [REDACTED]

[REDACTED] Janssen’s third argument is that Defendants hid from Janssen their knowledge of the formulas. According to Janssen, this supports a finding that Celltrion (but not Hospira) specifically intended to induce infringement. But that argument too is factually and legally unsupportable.

First, at the very outset of this dispute, Celltrion disclosed that it had access to the formulas at issue, reviewed them, and concluded that there was no infringement. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Celltrion obviously was not trying to hide this fact, which would have been useless anyway since *both* GE HyClone’s *and* Celltrion’s witness would have been discussing (and never hid) that indisputable fact in depositions.

Third, as of the 2015 counsel correspondence cited by Janssen, Janssen had not yet even asserted an induced infringement theory. *See* Klein Decl. ¶¶ 44, 46. Thus, Celltrion’s knowledge of the formulas was not even relevant. Again, the informal discovery efforts at that time focused on getting Janssen access to the confidential formulas for the GE HyClone products to assess *direct* infringement. Klein Dec. ¶¶ 15-22. In fact, even in June 2015, when Janssen first articulated its theory of infringement to Defendants, it asserted just a direct infringement theory based on principles of vicarious liability. Ex. 22 (June 23, 2015 Email from Royzman to Klein) at 1-3.

Fourth, although Janssen eventually asserted a theory of induced infringement—nearly a year later, when it served its March 31, 2016, contentions—Janssen has never served any interrogatory or request for admission related to when Celltrion first learned of the GE HyClone formulas. *See* Klein Decl. ¶¶ 47, 50. Thus, Celltrion made no formal representations (much less misrepresentations) as to that issue.

Finally, in May 2016, after Janssen’s counsel pointed out that additional formulation documents appeared to be missing from Celltrion’s production, defense counsel promptly investigated that issue. *See* Klein Decl. ¶¶ 51-59; Kim Decl. ¶¶ 10-11; Cho Decl. ¶¶ 8-9. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Upon learning this fact and coordinating collection with Celltrion, defense counsel quickly produced these documents—just seven days after counsel’s request, and before the deposition of Celltrion employees. *Id.*

As Janssen’s lead counsel acknowledged at the last hearing: [REDACTED]

[REDACTED] Ex. 34 (December 22, 2016 Hearing Tr.) at 5:5-20. There was no intentional conduct designed to hide these hard copies from Janssen. *See* Klein Decl. ¶ 61; Kim Decl. ¶ 11; Cho Decl. ¶ 8. Thus, Celltrion’s production of the documents at issue—*before* its witnesses were deposed—sheds no light on whether Celltrion specifically intended to induce infringement.

3. The Parties’ Discovery Correspondence Is Otherwise Irrelevant To The Infringement Inquiry.

Janssen’s baseless and inflammatory accusations based on attorney communications are not only factually unsupportable, but irrelevant to the merits of this case. This Court should follow the many cases cited above excluding discovery disputes from evidence under Rules 401 and 402.

In support of its contrary view, Janssen cites just one case—*Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 770-71 (2011)—which according to Janssen holds that “obfuscation supports an inference of intent to infringe.” Dkt. 281 (Janssen’s MSJ Opposition Br.) at 13-14. But *Global-Tech* does not support that proposition, and is inapposite. There, the Supreme Court found sufficient evidence to support a jury finding that “Pentalpha willfully blinded itself to the infringing nature of the sales it encouraged Sunbeam to make.” 563 U.S. at 770. The Court relied on evidence that Pentalpha intentionally copied its competitor’s product, but failed to inform its own counsel, who was preparing a right-to-use opinion, that its product was simply a knockoff:

Also revealing is *Pentalpha’s decision to copy an overseas model of SEB’s fryer*. Pentalpha knew that the product it was designing was for the U.S.

market, and Sham—himself a named inventor on numerous U.S. patents, see *id.*, at 78a–86a—was *well aware that products made for overseas markets usually do not bear U.S. patent markings*, App. in No.2009–1099 etc. (CA Fed.), pp. A–1904 to A–1906. *Even more telling is Sham’s decision not to inform the attorney from whom Pentalpha sought a right-to-use opinion that the product to be evaluated was simply a knockoff of SEB’s deep fryer.* On the facts of this case, we cannot fathom what motive Sham could have had for withholding this information other than to manufacture a claim of plausible deniability in the event that his company was later accused of patent infringement.

Id. at 771 (emphasis added). In addition to this intentional misconduct, the Court also relied on a decision by Pentalpha’s CEO and president to withhold evidence from its own counsel for a right-to-use opinion. *Global-Tech* did not involve a dispute between adverse parties over what should be produced in informal discovery, much less communications between trial counsel. It does not support Janssen’s argument that evidence of a late production (due to an oversight) before depositions were taken is relevant to an inference of intent to infringe.

Janssen’s own expert, Dr. Michael Butler, has conceded that it is impossible to assess infringement here without conducting testing given that at least a dozen claim elements are not met literally. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Thus, even Janssen’s expert could not find infringement based on his expectation alone, without Dr. Wurm’s testing. *Id.*

Defendants did not receive the results of Dr. Wurm’s testing until April 13, 2016. Ex. 38 (Wurm Testing) at 1. If Janssen’s own expert could not come to a conclusion of infringement until after he reviewed Dr. Wurm’s testing, Defendants could not have possibly had actual knowledge of infringement by GE HyClone, or specifically intend for GE HyClone to infringe, without such

testing. (Of course, Defendants also dispute that Dr. Wurm’s testing supports infringement.) Thus, attorney correspondence at issue here that predated Janssen’s disclosure of such testing to Defendants obviously cannot support any inference of specific intent to infringe, and has no relevance for this reason alone. *See also* Defendants’ motion *in limine* no. 5: to preclude argument regarding active inducement prior to April 13, 2016 (filed concurrently).

B. Any Probative Value Of Evidence Of The Parties’ Discovery Dispute Is Substantially Outweighed By Its Prejudicial Effect.

As explained above, the attorney correspondence at issue has no probative value. But even if it did, that modest value would be far outweighed by the danger of “unfair prejudice, confusing the issues, misleading the jury, undue delay [or] wasting time[.]” Fed. R. Evid. 403; *see In re Gabapentin Patent Litig.*, 2011 WL 1807448, at *12 (excluding evidence of alleged failures to comply with discovery obligations under Fed. R. Evid. 402, 403).

First, admission of such correspondence would be unduly prejudicial—e.g., injecting into the trial a sideshow designed to paint Defendants in a bad light despite no relevance to the merits. This correspondence relates to informal discovery communications from *outside counsel*. It would be a serious stretch, to say the least, to infer from such communications that Defendants themselves somehow specifically intended—even without access to the testing relied on by Janssen—to induce infringement.

[REDACTED]

[REDACTED]

[REDACTED]

Finally, Janssen's proposal would result in undue delay and wasted time. The parties contemplate a two-week jury trial, which will be burdensome enough for the jurors. Having multiple witnesses detail 18 months of discovery communications would serve no purpose other than to waste the jury's and the Court's time.

III. ALTERNATIVELY, DEFENDANTS SHOULD BE ALLOWED TO DEPOSE AND CALL AS A WITNESS AT TRIAL JANSSEN'S OUTSIDE COUNSEL WHO WAS PERSONALLY INVOLVED WITH THESE DISCOVERY DISPUTES.

Alternatively, to the extent the Court permits Janssen to rely on attorney communications at trial, Defendants request an opportunity to depose and call as a witness at trial Janssen's outside counsel, Ms. Irena Royzman, relating to these issues. As the attorney communications reveal, Ms. Royzman had a prior understanding of specific facts that Janssen now asserts had been hidden or concealed. Ms. Royzman's knowledge and the bases for that knowledge are relevant to rebutting Janssen's accusations that Defendants' correspondence were misleading and to proving that Janssen was not actually misled.

Ms. Royzman submitted a declaration on behalf of Janssen in opposition to Defendants' motion for summary judgment. Dkt. 283. Specifically, Janssen relied upon Ms. Royzman's declaration to support its argument that Defendants allegedly concealed facts and hid their knowledge of the accused GE HyClone products based on the attorney discovery correspondence. Dkt. 281 (Janssen's MSJ Opposition Br.) at 13-14. Ms. Royzman authored or was a recipient on nearly all (if not all) of the attorney correspondence that Janssen cited.

On several occasions, Ms. Royzman expressed her understanding of certain facts that Janssen now alleges to have been hidden or concealed from Janssen. For example:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Ms. Royzman’s understanding of the facts, including the bases for her understanding, is relevant to rebutting Janssen’s accusations that Defendants’ attorney correspondence were misleading. For example, to the extent that Ms. Royzman relied on the portions of Celltrion’s aBLA [REDACTED], her knowledge of this fact contradicts Janssen’s argument that Defendants withheld such information.

Following the submission of Ms. Royzman’s declaration in opposition to Defendants’ motion for summary judgment, Defendants requested that she be made available for a deposition. Ex. 39 (November 21, 2016 Email From Cutri to Fischer). Janssen denied Defendants’ request and, instead, offered to present Janssen’s in-house counsel, Mr. Eric Harris.⁴ But Mr. Harris

⁴ Janssen’s counsel has since agreed to make Ms. Royzman available for a deposition if deemed appropriate.

cannot stand in the place of Ms. Royzman. She wrote and received the letters in question, so Defendants are entitled to cross-examine her. Mr. Harris was not even copied on any of the attorney discovery correspondence, so he has no personal knowledge of the discovery disputes. Fed. R. Evid. 602 (“A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”). More fundamentally, Ms. Royzman made representations based on *her* understanding of the information provided by Defendants, and Defendants are entitled to challenge those assertions through cross examination.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Further, to the extent Janssen introduces evidence of correspondence to or from Ms. Royzman at trial, it would be unfairly prejudicial if Janssen stymied Defendants’ ability to take discovery and present rebuttal evidence from Ms. Royzman. Specifically, Ms. Royzman’s knowledge of facts represented in the attorney discovery correspondence, including the extent to which she relied on information provided by Defendants to form this knowledge, directly contradicts Janssen’s assertion that the information was allegedly hidden or concealed from Janssen. To the extent the Court allows any discovery communications into evidence, Defendants should be permitted to cross examine Ms. Royzman on these issues at trial.

IV. CONCLUSION

Defendants respectfully request that the Court enter an order *in limine* to exclude from trial all testimony, argument, and references to discovery communications between the parties. Alternatively, Defendants request the right to depose before trial outside counsel for Janssen, Ms. Irena Royzman.

Dated: January 12, 2017

Defendants Celltrion Healthcare Co., Ltd.,
Celltrion, Inc., and Hospira, Inc.

By: /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 January 12, 2017.

/s/Andrea L. Martin, Esq.
Andrea L. Martin, Esq.