

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JANSSEN BIOTECH, INC., and)	
NEW YORK UNIVERSITY)	
Plaintiffs,)	
)	Case No. 1:15-cv-10698-MLW
)	Case No. 1:16-cv-11117-MLW
v.)	
)	
CELLTRION HEALTHCARE CO., LTD.,)	
CELLTRION, INC., and)	
HOSPIRA, INC.)	
Defendants.)	
)	

JOINT REPORT FOLLOWING JUNE 1, 2017 COURT TELECONFERENCE

Pursuant to the Court’s oral Order during the June 1, 2017 teleconference, and the Court’s written Order dated June 12, 2017 (Doc. 570), the parties have met and conferred and jointly submit this report.

I. Dismissal of the Instant Actions

Janssen requested that Defendants agree to dismissal of Janssen’s claim for infringement of the ’083 patent in Case No. 1:15-cv-10698 (the “2015 Action”) and to dismiss Case No. 1:16-cv-11117 (the “2016 Action”) in its entirety, both without prejudice. Defendants stated that they would agree to the requested dismissals. Janssen has agreed to provide a proposed stipulation of dismissal, which the parties will review and discuss, and plan to submit separately. Janssen’s position is that all proceedings in the 2015 Action and 2016 Action should be made part of Case No. 1:17-cv-11008 (the “2017 Action”). Defendants will review and consider the proposed stipulation of dismissal, including proposed provisions regarding proceedings from the 2015 Action and the 2016 Action, once Janssen provides it.

II. Motion to Dismiss the 2017 Action

Defendants have accepted service of the complaint in the 2017 Action and intend to move to dismiss the 2017 Action. The parties hereby stipulate and agree that Defendants' time to respond to the complaint (*i.e.*, move to dismiss) shall be governed by the schedule set by the Court for the motion to dismiss, rather than by the Federal Rules of Civil Procedure. The parties have reached a compromise in order to resolve Defendants' motion to compel (Dkt. 550, *et seq.*) and have agreed that, subject to certain exceptions noted below with an asterisk, no further discovery will be taken by either party with respect to the anticipated motion to dismiss. The parties therefore respectfully request that the Court set a briefing schedule for the anticipated motion to dismiss at the upcoming June 21, 2017 conference. The parties propose the following schedule (set to accommodate scheduling conflicts of counsel):

Event	Date
Defendants file motion to dismiss	July 7, 2017
Janssen files response to motion to dismiss	August 2, 2017*
Defendants file reply brief	August 25, 2017*
Janssen files sur-reply brief	September 8, 2017*
Proposed hearing date	October 11, 12, or 13, 2017*

* These dates assume that neither party relies on evidence that was not part of the record in connection with Defendants' motion to dismiss the 2015 and 2016 Actions; if so, the other party reserves the right to seek additional discovery and an adjustment to the briefing schedule.

III. Remedies Regarding Privilege Assertions and June 1, 2017 Ruling

On June 2, 2017, Janssen produced the documents from the privilege log that the Court determined were not privileged. Per the Court's request (6/1/17 Tr. 28), Janssen notes that it

inadvertently did not produce the correspondence between Joseph Horwitz and Andrew Cohen reproduced in Tab 40 of the privilege log during document discovery. The document was produced on June 2, 2017.

In order to resolve the remaining issues raised by Defendants' motion to compel, the parties have agreed that:

1. In response to Defendants' motion to dismiss the 2017 Action, Janssen will file a revised declaration of Kenneth Dow omitting certain statements as already agreed upon by the parties. Janssen will not rely upon the portions of the declaration of Kenneth Dow that the parties have agreed will be omitted.

2. In its submissions in connection with Defendants' motion to dismiss the 2017 Action, Janssen will not cite or rely upon pages 182:13-24 and 189:20-190:2 of the transcript of Anne Martinson's deposition, unless necessary to correct an incorrect description of that testimony by Defendants.

3. Defendants will not seek further discovery in connection with their motion to compel or their motion to dismiss in the 2017 Action, unless Janssen submits evidence that was not part of the record in connection with Defendants' motion to dismiss the 2015 and 2016 Actions. If Janssen submits or relies upon evidence that was not part of the record in connection with Defendants' motion to dismiss the 2015 and 2016 Actions, Defendants reserve the right to seek additional discovery and request adjustment of the briefing schedule.

4. Janssen continues to deny that it has waived privilege, and its agreement with respect to the Dow declaration and Anne Martinson's testimony does not concede that there has been a waiver.

5. Likewise, Defendants make no concessions or admissions regarding the positions advanced in their motion to compel. Specifically, their agreement with respect to the Dow declaration and Anne Martinson's testimony is not a concession that Janssen did not waive privilege.

6. In agreeing to the above provisions, neither party makes any concessions or representations about any other portions of the Dow declaration or the Martinson deposition transcript. In particular, Defendants reserve the right to challenge or object to the remaining portions of the Dow declaration or Martinson transcript as not supporting Janssen's standing arguments and to make any arguments concerning them. Janssen reserves the right to cite or rely upon the remaining portions of the Dow declaration or Martinson transcript in any way and to make any arguments concerning them.

IV. Further Proceedings

Janssen's position is that further proceedings in the 2017 Action should not be stayed pending resolution of Defendants' motion to dismiss, and that damages discovery should begin immediately. Janssen believes that the proceedings to be conducted while the motion to dismiss is pending, primarily document discovery related to damages, will not be unduly burdensome to the parties, but will be relatively time-consuming. As such, Janssen believes that permitting the parties to begin damages discovery immediately would be efficient and appropriate. Janssen submits that the Court should instruct the parties to meet and confer about an appropriate schedule for further proceedings related to damages, with the goal of holding trial on liability, to be followed immediately by trial on damages if necessary, beginning in mid to late March 2018. Janssen will be prepared to discuss these issues at the June 21 conference.

Defendants' position is that the parties should not engage in fact discovery (or other aspects of the litigation) while the motion to dismiss the 2017 Action remains pending. It is not an appropriate or worthwhile use of the parties' or the Court's resources to litigate the action that is subject to dismissal based on a pending motion, for a number of reasons, including, for example, the substantial resources expended litigating the '083 patent claims in the 2015 Action and the 2016 Action culminating in Janssen seeking to dismiss those claims, and the fact that the amount of time devoted thus far to litigating the standing dispute was largely a function of choices made by Janssen. Defendants are prepared to more fully explain the bases for their position during the conference scheduled for June 21, and respectfully request the opportunity to do so.

Regarding trial, Defendants do not believe that trial beginning in March 2018, as Janssen has proposed, is feasible, at least in part because any schedule will need to take into account the time necessary for the resolution of the pending summary judgment and *Daubert* motions along

with any additional summary judgment or *Daubert* motions. If and when the Court believes it is an appropriate time to set a schedule for the case, Defendants believe that the parties will need to meet and confer about an appropriate trial date and schedule for further proceedings related to damages. Further, it is Defendants' position that trial should not be bifurcated or phased, but rather the parties and the Court should conduct a single trial regarding liability and damages, although Defendants do not believe it is necessary for the Court to resolve this issue now. Defendants are prepared to more fully explain the bases for their positions during the conference scheduled for June 21, and respectfully request the opportunity to do so.

V. Proposed Agenda for the June 21, 2017 Conference

The parties propose the following agenda for the June 21, 2017 conference:

- A. Status update on resolution of discovery disputes
- B. Motion to dismiss briefing schedule
- C. Schedule for further proceedings (damages discovery and trial)

In view of the limited scope of the June 21, 2017 hearing, the parties respectfully request the Court's permission to participate by telephone.

Dated: June 16, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed through the electronic filing system and served electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Alison C. Casey