IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ELAN PHARMA INTERNATIONAL LIMITED, Plaintiff, v. ABRAXIS BIOSCIENCE, INC., Defendant.	)	Civil Action No. 06-438-GMS

DEFENDANT'S OPENING BRIEF IN SUPPORT OF ITS UNOPPOSED MOTION FOR LEAVE TO FILE AMENDED ANSWER TO COMPLAINT AND COUNTERCLAIMS

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Dated: March 30, 2007

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NATURE AND STAGE OF PROCEEDINGS

On July 19, 2006, Elan filed suit against Abraxis in this Court, alleging infringement of U.S. Patent Nos. 5,399,363 and 5,834,025. Abraxis answered the Complaint on August 22, 2006, denying the allegations of patent infringement and pleading affirmative defenses and counterclaims against Elan. (D.I. 7) The parties are currently engaged in fact discovery, during which Abraxis has recently learned additional information relating to its answer and the grounds for its defenses and counterclaims.

SUMMARY OF ARGUMENT

As interpreted by Third Circuit and Supreme Court case law, Federal Rule of Civil Procedure 15(a) strongly favors the granting of leave to amend pleadings. In the absence of equitable considerations such as undue delay, bad faith, or undue prejudice to the non-moving party, leave to amend should be freely given. Because none of these factors applies to this case, Abraxis should be granted leave to amend its answer and counterclaims.

STATEMENT OF FACTS

Abraxis has not previously amended or sought to amend its answer and counterclaims in this action. The Scheduling Order entered by this Court on November 15, 2006 allows the parties to file motions to amend the pleadings on or before March 30, 2007. (D.I. 20) Abraxis has complied with this deadline in filing its motion to amend. Pursuant to Local Rule 7.1.1, counsel for Abraxis asked counsel for Elan to stipulate to the amendment of its answer and counterclaims prior to the filing of this motion, and

counsel for Elan confirmed that it does not oppose the filing of the proposed Amended Answer and Counterclaims.

ARGUMENT

Rule 15(a) of the Federal Rules of Civil Procedure strongly favors granting leave to amend pleadings. Under Rule 15(a), after the time for amendment as a matter of course has passed, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). In interpreting this standard, the Third Circuit has followed the lead of the U.S. Supreme Court in holding that "[l]eave to amend must generally be granted unless equitable considerations render it otherwise unjust." *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). In the absence of such considerations, the denial of leave to amend "is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman*, 371 U.S. at 182.

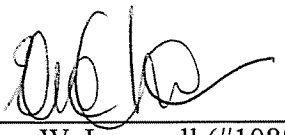
As identified by *Arthur* and *Foman*, the factors that may justify denying leave to amend are undue delay, bad faith, futility, and prejudice to the non-moving party, *Arthur*, 434 F.3d at 204, none of which exists here. Upon learning of and developing the facts that would be sufficient to support the amendment of its answer and counterclaims, Abraxis promptly filed this motion to amend. Nothing in Abraxis's amended answer and counterclaims prejudices Elan. To the contrary, by filing a timely motion to amend, Abraxis seeks to ensure that Elan has full and fair notice of Abraxis's current stance in the lawsuit, including its defenses and counterclaims. Therefore, leave to amend should be freely given to Abraxis.

CONCLUSION

For the foregoing reasons, Abraxis respectfully requests that the Court grant its Motion for Leave to File Amended Answer to Complaint and Counterclaims.

Dated: March 30, 2007

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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CERTIFICATE OF SERVICE

I, Elena C. Norman, Esquire, hereby certify that on March 30, 2007, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on March 30, 2007, I caused a copy of the foregoing document to be served by hand delivery on the above-listed counsel of record and on the following non-registered participants in the manner indicated:

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