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BY E-FILE

The Honorable Mary Pat Thynge
Magistrate Judge
United States District Court
844 N. King Street
Wilmington, DE 19801

Re: ZymoGenetics, Inc. v. Bristol-Myers Squibb Co., et al.,
D. Del., C.A. No. 06-500-***

Dear Magistrate Judge Thynge:

ZymoGenetics, Inc. has made every attempt to respond to Bristol-Myers' Interrogatory No. 4(a) in an acceptable manner. However, as has recently become clear, unless Bristol-Myers receives a response that represents Bristol-Myers' interpretation of the facts and law surrounding the reduction to practice issue, Bristol-Myers will not be satisfied. Clearly, additional deposition testimony obtained from ZymoGenetics will not change the fundamental dispute truly at issue: Bristol-Myers and ZymoGenetics disagree as to questions of fact and questions of law surrounding ZymoGenetics' contentions regarding its reduction to practice of the patents-in-suit.

The portion of Interrogatory No. 4 that is in issue between the parties states as follows: "State the date when and location where the subject matter was . . . (iv) first reduced to practice. . . and identify all supporting documents."[1] In its Fifth Supplemental Interrogatory Responses served October 16, 2007, ZymoGenetics stated that reduction to practice occurred on August 16, 1988. This response is a statement of fact in response to an interrogatory not only seeking

[1] In its December 18, 2006 response to Interrogatory No. 4, ZymoGenetics objected to the interrogatory as overly broad and unduly burdensome to the extent that it sought to require ZymoGenetics to identify "all" documents that supported ZymoGenetics' response to the Interrogatory. Further, ZymoGenetics' response pursuant to Fed. R. Civ. P 33(d) was intended merely to identify documents from which Bristol-Myers could derive or ascertain ZymoGenetics' response to the interrogatory and was by no means represented to be a full and complete listing of the documents supporting ZymoGenetics' factual representation made in response to Interrogatory No. 4.

factual information but also requiring a legal interpretation of what exactly constitutes and evidences reduction to practice in the present case. To the extent that Bristol-Myers does not agree that the August 16, 1988 events rose to the level of actual reduction to practice as defined by the relevant legal standard, that disagreement involves questions of law and fact to be resolved at trial; not issues to be resolved as part of a discovery dispute and certainly not issues that will be resolved through further fact discovery.

ZymoGenetics has provided a very specific response to Interrogatory 4(a) and Bristol-Myers' current attack of that response is either a thinly-veiled attempt to obtain deposition testimony after the close of discovery because Bristol-Myers neglected to obtain deposition testimony on this issue from the relevant witness during the course of fact discovery or an attempt by Bristol-Myers to have this Court offer an opinion as to whether or not the events that occurred on August 16, 1988 rose to the level of reduction to practice as a matter of fact and as a matter of law. Either way, Bristol-Myers' actions in bringing this issue before the Court are improper and unwarranted and their request for relief should be denied.

On July 24, 2007, before Bristol-Myers had taken a single deposition in the pending case, ZymoGenetics, in its First Supplemental Interrogatory Responses, identified nineteen (19) laboratory notebook pages pursuant to Fed. R. Civ. P. 33(d) from which ZymoGenetics' answer to Interrogatory No. 4(a) could be derived or ascertained. Included in this list was the laboratory notebook page dated August 16, 1988 and bearing Bates. No. ZG 040502 from the laboratory notebook of Lillian Anne Bell ("Bell Notebook Page").

Following ZymoGenetics' July 24, 2007 identification of the Bell Notebook Page, Bristol-Myers asked specific questions directed toward the Bell Notebook Page during the deposition of Andrzej Sledziewski on August 21, 2007, a deposition that also served as the ZymoGenetics' 30(b)(6) deposition regarding reduction to practice. Additionally, this page was identified prior to the August 24, 2007 deposition of the document's author, Lillian Anne Bell. Inexplicably, Bristol-Myers failed to question Ms. Bell regarding the document during the deposition. In fact, Bristol-Myers failed to introduce the relevant laboratory notebook of Ms. Bell even after specifically requesting and receiving from ZymoGenetics the exact Bates Nos. for Ms. Bell's notebooks prior to the deposition.

Following ZymoGenetics' July 24, 2007 identification of the laboratory notebook pages and the majority of Bristol-Myers' depositions of the ZymoGenetics' witnesses in this matter, Bristol-Myers asserted that the ZymoGenetics' response to Interrogatory No. 4 was inadequate because it did not purport to list "all" documents supporting its reduction to practice contention and for the first time asserted that ZymoGenetics would be precluded from relying on any documents not previously identified as part of its 33(d) response to Interrogatory No. 4(a) on July 24, 2007. As ZymoGenetics has repeatedly informed Bristol-Myers, the July 24, 2007 identification of documents pursuant to 33(d) merely identified documents from which ZymoGenetics' response could be ascertained and was not to be construed as an effort by ZymoGenetics to identify every document within the parties' millions of pages of production that ZymoGenetics believes may support its reduction to practice contention. ZymoGenetics

again stated that it believed that such an obligation would result in an undue burden to ZymoGenetics and unreasonably preclude ZymoGenetics from relying on documents produced during the course of the litigation.

However, in an effort to resolve the dispute and so as not to be precluded from relying on documents other than those identified in its 33(d) response, ZymoGenetics identified additional documents supporting its reduction to practice contention. Subsequently, in writing and during the October 4, 2007 telephone conference with the Court, Bristol-Myers argued that ZymoGenetics had over-identified documents and that it should be permitted to reopen fact discovery so that it can obtain additional deposition testimony from ZymoGenetics' witnesses regarding the documents. Therefore, as required by the Court, ZymoGenetics narrowed its list of documents in its Fourth Supplemental Interrogatory Response. Unfortunately, Bristol-Myers was not satisfied with ZymoGenetics' identification and demanded that ZymoGenetics either state a date specific for reduction to practice and identify supporting documents, withdraw the identification of documents made following the deposition of ZymoGenetics' witnesses or permit additional depositions.

In a final attempt to reach a compromise, ZymoGenetics served its Fifth Supplemental Response to Interrogatory No. 4(a) specifically stating as follows: "The subject matter of the patents-in-suit was first reduced to practice on or around August 16, 1988. The previously identified laboratory notebook notation of Lillian Anne Bell bearing that date (ZG 040502) supports ZymoGenetics' contention."

Unfortunately, Bristol-Myers still was not satisfied with ZymoGenetics' response despite the fact that the document identified had been known to Bristol-Myers during the depositions of the ZymoGenetics' witnesses. In an October 16, 2007 email from counsel for Bristol-Myers to counsel for ZymoGenetics, Bristol-Myers made clear to ZymoGenetics that no manner of response will satisfy Bristol-Myers. On one hand, Bristol-Myers has demanded a date specific for reduction to practice. On the other hand, Bristol-Myers' email asserts that "experiments are repeated numerous times, because once is not enough" implying that reduction to practice can only occur over a number of days and demanding the identification of laboratory notebook pages that necessarily cover numerous dates. Clearly, ZymoGenetics cannot respond in a manner that will satisfy Bristol-Myers because there is a question of fact as to what exactly constituted reduction to practice of the patents-in-suit. As is clearly evident, Bristol-Myers is not troubled by the adequacy of ZymoGenetics' response but rather the substance of ZymoGenetics' response.

ZymoGenetics believes that its response to Interrogatory No. 4 is sufficient and that Bristol-Myers has had ample opportunity to question ZymoGenetics' witnesses regarding the document it identified in support of the asserted date for first reduction to practice. Therefore, any attempt by Bristol-Myers to obtain additional deposition testimony regarding this issue is merely an attempt to obtain additional discovery in a manner contrary to the discovery rules and the scheduling order now in place in this matter or an attempt to have the Court pass judgment

regarding disputed questions of law and fact surrounding actual reduction to practice in this matter.

Should Your Honor have any questions, counsel is available at the Court's convenience.

Respectfully,

/s/ Philip A. Rovner

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