

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**SUPERIOR COURT
CIVIL ACTION
NO. 11-1010-BLS2**

**TEKMIRA PHARMACEUTICALS CORPORATION
and PROTIVA BIOTHERAPEUTICS, INC.,**

Plaintiffs

vs.

**ALNYLAM PHARMACEUTICALS, INC.
and ALCANA TECHNOLOGIES, INC.**

Defendants

**MEMORANDUM OF DECISION
RELATIVE TO PARTIAL SUMMARY JUDGMENT**

This is an action alleging misappropriation of trade secrets. As such, the plaintiffs from the inception of this case have pushed for “fast track” discovery and a firm trial date. Plaintiffs’ desire for a relatively speedy disposition makes sense: if they are correct on the merits, then their damages continue to accrue on a daily basis; moreover, without prompt resolution, their future as viable businesses remains clouded. Without prejudging the case, this Court has attempted to address the plaintiffs’ concerns by setting an expedited discovery schedule and setting trial for October 30, 2012, just over one year after the Second Amended Complaint in this case was filed. Moreover, this Court agreed with plaintiffs’ position that any summary judgment motion that did not fully dispose of the case would be essentially “pre-screened.” That is, a motion for partial summary judgment would be permitted to be filed only if defendants could convince the Court that there was some likelihood that the motion would substantially limit the issues at trial.

without unduly delaying it.

On June 29, 2012, defendants were given that opportunity to persuade this Court that a partial summary judgment motion was a wise use of resources. Although the parties were barred from making written submissions, the defendants were allowed 45 minutes to present their positions. They also submitted to the Court printouts of a "power point" presentation that tracked their arguments. Plaintiffs were given equal time to respond. As a result, this Court got a full preview of the contours of defendants' proposed summary judgment motions (there being a total of six that were suggested). I conclude that the proposed motions are not only unlikely to eliminate any issues but they would at the same time be extremely costly for the parties to litigate and distract them from preparing for and focusing the issues for trial.

The defendant Alcana points out that its proposed summary judgment motion would completely eliminate it from the case, so this Court turns first to the arguments it advanced as to why such a motion would be a wise use of resources. The centerpiece of its argument is a provision in an agreement negotiated between the parties in 2009 (the Supplemental Agreement), after certain Tekmira employees left that company and were recruited to work first as consultants for the defendant Alnylam and then for Alcana. Alcana argues that a covenant not to sue, set forth in Section 12 of the Supplemental Agreement, completely bar all of plaintiffs' claims against it (as well as many of the claims against Alnylam) and that the interpretation of that provision involves a straightforward question of law for the Court to decide. This Court need only read the provision to conclude that that is not the case.

Section 12 states that Tekmira waives any restrictions imposed by virtue of its employment agreements with its former employees (who ultimately became part of Alcana) so

long as their activities were “carried out pursuant to the Research Program [or] the Consulting Agreement” they had at that time with Alnylam. Tekmira further covenanted not to sue either Alnylam or Alkana “for any cause of action relating to such activities...” “Research Program” is a defined term under the Supplemental Agreement: it encompasses a “Work Plan” set forth in a chart five pages long which describes in highly technical terms what Alnylam and Alkana proposed to accomplish over the next two years in connection with liposomal research. At the same time that Tekmira gave its promise not to sue concerning certain activities, Alnylam and Alkana pledged not to attempt to obtain any of plaintiffs’ “confidential information from any of such Tekmira employees except to the extent the same is necessary for Alkana’s conduct of its activities under the Research Program.” The question of whether the claims asserted by the plaintiffs fall under Section 12 or instead amount to misappropriation of confidential information protected under Section 13 is therefore fact intensive: its resolution would appear to turn on whether the technology at issue was a result of activities conducted under the defendants’ “Research Program” or developed based on Tekmira’s separate and earlier research activities.

The fact intensive nature of the dispute among the parties is reflected in the extent of discovery that has already been conducted to date. Literally millions of documents have been exchanged and well over forty fact depositions taken. Each side has hired at least three experts to analyze and explain the science implicated in the trade secrets Tekmira alleges were misappropriated, the research activities of the defendants after certain Tekmira employees left the plaintiffs’ employ, and the connection (or lack thereof) between the two. Given that extensive discovery, it seems likely that any summary judgment motion would require the filing of

literally boxes of documents together with slews of competing affidavits of a highly technical nature. Thus, although the defendants have proposed an ambitious schedule which would allow a hearing on any motion at least six weeks before trial, it would be next to impossible for this Court to give such a motion the consideration it deserves and issue any reasoned decision about it before the proposed October 30 trial date.¹

The same schedule would apply to summary judgment filings of Alnylam, which proposes to file motions on at least five additional contract-based issues in the case. Those motions focus on other agreements between the parties and would ask the Court to decide (among other things) the application of certain terms in those agreements to claims involving “Lead formulation derivatives,” the sharing of “batch records” including the “VSP02record/IND,” and the development of the “MC3” lipid. The contract provisions themselves are keyed to facts of a highly technical nature. Clearly, resolution of these issues requires more than reading the agreements and applying them to a narrow set of undisputed facts that are capable of being understood without any special scientific expertise.

Of course, plaintiffs do dispute many facts, and at the June 29 hearing, this Court got a preview of some of those disputes. For example, plaintiffs allege that the former Tekmira employees whom the defendants maintain are protected by the covenant not to sue actually stole documents from Tekmira before they departed. Plaintiffs also argue that, at the same time the


¹The defendants’ schedule – which proposes that all briefs be filed with the Court by the end of August – also appears to be unrealistic. Although fact discovery has closed, additional information may still be forthcoming in light of this Court’s recent rulings on discovery motions, and expert discovery is ongoing. Finally, to comply with the proposed schedule puts the plaintiffs in the difficult position of devoting a large amount of resources to responding to the motions at the same time that counsel must gear up for trial so as not to be forced to request a postponement.

parties were negotiating the Supplemental Agreement, defendants were developing a lipid almost identical to a lipid formulation belonging to the plaintiffs and not only concealed that from the plaintiffs but also made deliberate misrepresentations to the plaintiffs about their activities. Finally, plaintiffs cite emails suggesting that defendants deliberately delayed other work so that Tekmira (which had certain residual rights) would not receive the benefit of such activities. Whether these allegations are true could very well affect not only the interpretation of the contractual provisions at issue but also their enforceability if plaintiffs' position that they were fraudulently induced can be factually supported.

The defendants suggested at the hearing that, at the very least, summary judgment motions would educate the Court to the issues in the case and, at the same time, require the parties to focus and narrow their claims and counterclaims; thus even if the motions were denied, the trial would be conducted more fairly and efficiently. The plaintiffs reply that there are other ways to educate the Court (for example, by motions in limine tailored to address discrete legal issues that could be heard and decided in advance of trial). Moreover, to require them to go through the enormous effort that would be needed to oppose any partial summary judgment motions at the same time that they are attempting to finish discovery and gear up for the trial would actually make it more difficult for them to structure and streamline their trial presentation. See also footnote 1, supra. Particularly in light of this Court's conclusion that any motion would not likely be successful, this Court is inclined to agree with the plaintiffs.

CONCLUSION AND ORDER

For these reasons, this Court will not permit the filing of any partial summary judgment motions.



Janet L. Sanders
Justice of the Superior Court

Dated: July 11, 2012