

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



Commissioners: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeney

)
In the Matter of)
)
Impax Laboratories, Inc.,)
a corporation,)
)
Respondent)
_____)

DOCKET NO. 9373

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT IMPAX
LABORATORIES, INC.'S MOTION FOR EXTENSION OF DEADLINE FOR
OPPOSING COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION

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Dated: August 14, 2017

On August 3, 2017, Complaint Counsel filed a Motion for Partial Summary Decision.¹ The motion seeks an order holding that Respondent Impax Laboratories, Inc.'s patent-related affirmative defenses are not cognizable. Such an order would shorten the trial, allowing the parties to focus on relevant issues rather than on Respondent's non-cognizable patent defenses.

Respondent's opposition to Complaint Counsel's motion is due within 14 days of the filing. Five days after receiving Complaint Counsel's motion, Respondent filed a motion seeking to nearly double its time to respond. Complaint Counsel respectfully requests that the Commission deny Respondent's motion for two reasons: (1) Impax fails to demonstrate good cause for extending the deadline for its response and (2) granting Impax's requested extension will unfairly prejudice Complaint Counsel.

ARGUMENT

I. Impax Fails to Demonstrate Good Cause for Extending the Deadline for Its Opposition to the Motion for Summary Decision.

Complaint Counsel's Motion for Partial Summary Decision presents a straightforward legal issue. The motion applies *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), to the question of whether Impax may raise certain purported patent-related defenses for its anticompetitive conduct. Complaint Counsel's brief is only eighteen pages and presents a pure question of law for the Commission to decide. Putting aside Impax's over-heated rhetoric that Complaint Counsel "seek to upend 100 years of rule of reason jurisprudence" or to "rewrite the rule of reason" (Motion at 3, 4), Impax fails to explain why it needs more time to oppose a motion concerning justifications that Impax first asserted during the pre-complaint investigation of this

¹ Impax's assertion that the Motion for Summary Decision is dated August 4, Motion at 2, is incorrect. Despite an email outage on August 3, Complaint Counsel served the Motion for Summary Decision and supporting papers on August 3 via FTP and confirmed service in a telephone call with Impax's counsel that afternoon.

matter, then in its answer to the complaint on February 7, 2017, and again during the scheduling conference on February 16, 2017. Presumably, Impax understood the legal arguments underlying its patent defenses when it put them in its answer and described them at the scheduling conference. There is no reason it needs almost a month to put those arguments into an opposition brief.

Impax's assertions about the "extensive factual record" in this case and the pending fact and expert deadlines, Motion at 4, are red herrings. The "extensive factual record" is irrelevant to the Motion for Partial Summary Decision, which presents a pure legal question for the Commission's decision. The pending deadlines are a function of the expedited Part III schedule, a schedule that applies to both parties and that the Commission has already extended once before at the joint request of the parties. Six attorneys of record from a large, multinational law firm are representing Impax in this matter. There is no basis for Impax's assertion that it is "overburdened to meet the current deadline." Motion at 4.

Impax cites *Anhanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1260 (9th Cir. 2010) (cited in Motion at 2) to explain the meaning of "good cause," but the court in that case found good cause to extend Anhanchian's deadline for opposing summary judgment for two reasons that do not apply here. First, Anhanchian "faced an exceptionally constrained deadline" for opposing summary judgment that provided only "five business days and three days over the [Labor Day] holiday weekend." 624 F.3d at 1259. Second, Anhanchian and his counsel were out of town over the Labor Day weekend, and "Anhanchian's lead counsel was out-of-state in fulfillment of a previously-scheduled commitment from the day [the motion was filed] through the day the responses were due." *Id.* By contrast, Impax enjoys the full, fourteen-day period that

the Commission's rules provide, there are no intervening holidays, and its counsel's availability is not an issue.

Impax has not demonstrated any cause—let alone good cause—for almost doubling the time for its response beyond the fourteen days provided for in the Commission's rules.

II. Impax's Requested Extension Will Unfairly Prejudice Complaint Counsel.

Complaint Counsel filed its Motion for Partial Summary Decision well in advance of the hearing date—before fact discovery was even closed—so that the parties and the Administrative Law Judge would have the benefit of the Commission's decision as soon as possible before the hearing commences on October 24. The Commission's decision will significantly affect the hearing of this matter, including the written and testimonial evidence submitted and the theories argued. Indeed, a ruling striking Impax's patent-related defenses would streamline the trial, and getting a decision as far in advance of trial as possible is needed to help Complaint Counsel—and Impax—prepare. Impax's requested extension will deny that benefit. It will unfairly prejudice Complaint Counsel and is contrary to the rules' emphasis on efficiency in Part III proceedings.

Only ten weeks remain before the hearing commences on October 24, and Impax's request would take two of those weeks as additional time to respond to a straightforward legal motion. As it is, the Commission's order on Complaint Counsel's motion would not be due until two weeks before the trial begins. *See* 16 C.F.R. § 3.22(a). That time is important to help Complaint Counsel—and Impax—prepare their trial presentations in light of the legal guidance gained from the Commission's opinion. Impax's requested two-week extension would eliminate

that preparation time. It would make a Commission decision on Complaint Counsel's motion due just before trial.²

The Commission's Part III rules reflect a careful policy to foster the efficient and expeditious resolution of matters before the Commission. The Commission's rule providing fourteen days' time for opposing motions for summary decision, 16 C.F.R. § 3.24(a)(2), is an important part of that effort. Impax's requested extension would undermine that policy.

CONCLUSION

For these reasons, Complaint Counsel respectfully requests that the Commission deny Respondent Impax Laboratories, Inc.'s Motion for Extension of Deadline for Opposing Complaint Counsel's Motion for Summary Decision.

Respectfully submitted,

Dated: August 14, 2017

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Counsel Supporting the Complaint

² Complaint Counsel does not have a "lack of confidence in the Commission's ability to decide its motion promptly," as Respondent asserts. Motion at 3. But Complaint Counsel does not presume that the Commission has nothing else on its plate, allowing the Commission to turn all its focus to an opinion on Complaint Counsel's motion as soon as Impax's extended briefing is complete.

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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I also certify that I delivered via electronic mail (FTP) a copy of the foregoing documents to:

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Dated: August 14, 2017

By: /s/ Rebecca E. Weinstein
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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

August 14, 2017

By: /s/ Rebecca E. Weinstein
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Notice of Electronic Service

I hereby certify that on August 14, 2017, I filed an electronic copy of the foregoing Complaint Counsel's Opposition to Respondent's Motion for Extension, with:

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I hereby certify that on August 14, 2017, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Opposition to Respondent's Motion for Extension, upon:

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I hereby certify that on August 14, 2017, I served via other means, as provided in 4.4(b) of the foregoing Complaint Counsel's Opposition to Respondent's Motion for Extension, upon:

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