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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

- - -

SANTARUS, INC., a Delaware	:	Civil Action
corporation, and THE	:	
CURATORS OF THE UNIVERSITY	:	
OF MISSOURI, a public	:	
corporation and body	:	
Politic of the State	:	
of Missouri,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
PAR PHARMACEUTICAL, INC.,	:	
a Delaware corporation,	:	
	:	
Defendant.	:	No. 07-551 (GMS)

- - -

Wilmington, Delaware
Monday, June 22, 2009
9:30 a.m.
Conference

- - -

BEFORE: HONORABLE GREGORY M. SLEET, Chief Judge

APPEARANCES:

JACK B. BLUMENFELD, ESQ., and
JAMES WALTER PARRETT, JR., ESQ.
Morris, Nichols, Arsht & Tunnell
-and-

MORGAN CHU, ESQ.,
GARY FRISCHLING, ESQ.,
ELLISEN SHELTON TURNER, ESQ., and
BENJAMIN T. WANG, ESQ.
Irell & Manella LLP
(Los Angeles, CA)

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Counsel for Plaintiff
Santarus

APPEARANCES CONTINUED:

FREDERICK L. COTTRELL, III, ESQ., and
STEVEN J. FINEMAN, ESQ.
Richards, Layton & Finger

-and-

JANINE A. CARLAN, ESQ.,
AZIZ BURGY, ESQ.,
AMY E.L. SCHOENHARD, ESQ.,
TIMOTHY W. BUCKNELL, ESQ., and
JOSHUA T. MORRIS, ESQ.
Arent Fox LLP
(Washington, D.C.)

Counsel for Defendant

- - -

THE COURT: Good morning. Please, take your
seats.

(Counsel respond "Good morning.")

This is, we have found, over time, the best
place to convene these, because it gets a little cramped in
the largest conference room that I have.

Counsel, let's begin.

MR. BLUMENFELD: Good morning, Your Honor. At
plaintiffs' table, Morgan Chu, Gary Frischling, Ellisen
Turner, from Irell & Manella. James Parrett. And Carey
Fox, who is in house at Santarus.

THE COURT: Good morning.

MR. FINEMAN: Good morning, Your Honor. Steve

1 We will see. We will see. I tend to doubt it.

2 I didn't formally rule on plaintiffs' motion. I
3 am going to deny it without prejudice. I am going to deny
4 this motion without prejudice to you renewing your
5 contentions subsequently, both of you. When I say
6 "subsequently," I mean both at trial and posttrial.

7 That is my instinct as to the other two defense
8 motions as well. Whoever has got responsibility for them,
9 please, tell me why that wouldn't make sense.

10 MR. BUCKNELL: Your Honor, Tim Bucknell. I was
11 going to address the commercial success motion in limine.

12 THE COURT: My favorite one. Okay.

13 MR. BUCKNELL: Your Honor has mentioned judicial
14 economy a couple of times. This motion is really --

15 THE COURT: Let's get the docket item. I want
16 to make sure I have the motion in front of me, counsel.

17 This is Docket Item 131. That is the brief. Go
18 ahead.

19 MR. BUCKNELL: This is really directed towards
20 judicial economy, Your Honor. As you are aware, in patent
21 litigation, commercial success of a product may be an
22 appropriate way for a party to rebut the showing --

23 THE COURT: I had a reaction to this. Tell me
24 why I am wrong about that. I have this phrase I use,
25 "stealth motions" for summary judgment. Why shouldn't I

1 view this as a motion for summary judgment, just sort of
2 running along the surface in disguise, attempting to
3 disguise itself?

4 MR. BUCKNELL: Because we are not asking Your
5 Honor to find either that there is no commercial success or
6 that there is no nexus. This is really an evidentiary
7 issue.

8 The plaintiffs have produced nothing that should
9 suggest a nexus. They have three experts who could have
10 opined on it, none of which have. There is nothing there.
11 It is an evidentiary issue, which is what motions in limine
12 are directed towards.

13 THE COURT: That's what they should be directed
14 towards. I agree.

15 MR. BUCKNELL: You mentioned Daubert previously.
16 This is, in essence, a Daubert on this issue with regard to
17 all three of their experts.

18 THE COURT: I am listening.

19 MR. BUCKNELL: The applicable case law doesn't
20 spell out exactly how a party must go about establishing the
21 nexus, simply that you must establish one in order for the
22 substantive evidence about commercial success to be relevant
23 in the matter. And of the three experts that could have
24 opined on this issue --

25 THE COURT: That is the point that they make in

1 their opposition brief where they write, "There is no
2 requirement in the law that testimony about commercial
3 success must be delivered in its entirety from a single
4 witness with expertise in both technology and economics."

5 MR. BUCKNELL: Right. We never suggested as
6 much, Your Honor.

7 But, as I am sure you have encountered, this
8 type of evidence generally comes from the economics expert
9 that a party proffers. In this case, that would have been
10 Ms. Julie Davis, who is an economist. Not only did she not
11 opine on the required nexus, she admitted in her deposition
12 she doesn't even know how one would go about establishing
13 that.

14 THE COURT: Did she rely on other expertise to
15 offer her opinion?

16 MR. BUCKNELL: She states she relies on the work
17 of Dr. Fennerty and Dr. Banker.

18 THE COURT: Is that not appropriate?

19 MR. BUCKNELL: It wouldn't necessarily be. In
20 this instance it is, because, one, Dr. Banker has done
21 nothing with regard to commercial success, given at his
22 deposition that he was offering no opinions in that regard,
23 and none of plaintiffs' pretrial submissions suggest he is
24 offering an opinion about commercial success.

25 That leaves Dr. Fennerty. Ms. Carlan is going

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