

Federal Court



Cour fédérale

Date: 20150715

**Dockets: T-1409-04
T-1890-11**

Citation: 2015 FC 671

Ottawa, Ontario, July 15, 2015

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-1409-04

BETWEEN:

**ASTRAZENECA CANADA INC. AND
AKTIEBOLAGET HÄSSLE**

Plaintiffs

and

APOTEX INC.

Defendant

Docket: T-1890-11

AND BETWEEN:

**ASTRAZENECA AB AND AKTIEBOLAGET
HÄSSLE**

Plaintiffs

and

APOTEX INC.

Defendant

AMENDED ORDER AND REASONS

[1] The parties bring this motion under Rule 397 of the *Federal Courts Rules*, SOR/98-106, to modify the terms of my Judgment previously issued in this proceeding.

[2] To the credit of counsel, most of the issues of initial concern to one or the other of the parties have been resolved by agreement, leaving only a few issues to be determined.

[3] I am mindful, of course, of the limitations imposed by Rule 397. This is not a means to reconsider a Judgment on the merits. The Court can only make corrections where the language of the Order fails to conform with the reasons given or to deal with issues that were overlooked or accidentally omitted.

[4] AstraZeneca's first concern arises from my use of the term "Apo-Omeprazole" to describe Apotex's infringing composition. A review of the reasons readily discloses that I was using that term as a short-hand description of Apotex's infringing Omeprazole product. The actual product is a capsule filled with infringing pellets. It is the structure of the pellets that incorporates the essential features of the 693 Patent thereby giving rise to an infringement.

[5] The problem arising with my use of the term “Apo-Omeprazole” is this trade name is used by Apotex only in Canada. In the United States, a different trade descriptor is used. My use of Apo-Omeprazole in the reasons for judgment was not intended to limit AstraZeneca’s claims to damages to products distributed solely within Canada nor was it intended to limit AstraZeneca’s claim strictly to the Apotex capsule form. To the extent that infringing pellets, made in bulk, may have been made by Apotex before the expiry of the 693 Patent, those too could support a claim to compensation.

[6] Accordingly, I agree with AstraZeneca that the Judgment should be clarified to remove the reference to “Apo-Omeprazole” and to replace it with “its Omeprazole capsule products, including its coated Omeprazole pellets”. AstraZeneca’s proposed modifier “all” is redundant and unnecessary.

[7] The parties agree that the Judgment was deficient by failing to refer respectively to the right of election, to the dismissal of the claim to punitive damages, and to the claim to interest. They disagree as to the significance, if any, of the absence of any reference in the Reasons and Judgment to so-called “springboard profits or damages”. In my view, springboard damages are nothing more than a type of loss no different than any other claim to damages. They must be proven or disproven with evidence. There is accordingly no need to refer to springboard damages or to any other particular form of damages at the liability stage. Nothing about my Judgment as rendered will preclude either party from addressing this issue in the damages phase. AstraZeneca’s suggested use of the word “all” and the phrase “after completion of discoveries” are redundant and unnecessary. The Bifurcation Order also adequately addresses the latter issue.

[8] AstraZeneca seeks to substitute the word “sustained” for “arising” in paragraph 5 of the proposed amended judgment to bring the language into conformity with section 55 of the *Patent Act*, RSC 1985, c P-4. The word “arising” was, however, used in the Bifurcation Order. I question whether there is a meaningful distinction to be made between these words but I am not convinced that the Judgment ought to alter the initial language chosen by the parties on consent.

[9] With respect to paragraph 8, the parties agreed at the hearing that their disagreement could be resolved by the removal of the word “infringing” and the Judgment will be amended accordingly.

[10] In the result, the Court’s Judgment will be amended as follows:

1. Subject to paragraph 8 below and subject to a determination of Apotex’s pleaded experimental and regulatory use defence, with respect to both Court Files Nos. T-1409-04 and T-1890-11, it is declared that Claims 1, 5, 6, 13 and 19 of Canadian Letters Patent 1,292,693 (“693 patent”) are valid and have been infringed by Apotex Inc. (“Apotex”) by its manufacture, export, promotion and sale in Canada of its omeprazole capsule products, including its coated omeprazole pellets (subject to exceptions as regards to claim 13);
2. With respect to Court File No. T-1890-11 only, it is declared that Apotex induced infringement of Claims 1, 5, 6, 13 and 19 of the 693 patent by its customers and by end-users throughout Canada;
3. The Plaintiffs are entitled to elect, either an accounting of Apotex’s profits or damages sustained by them, by reason of infringement of Claims 1, 5, 6, 13 and 19 of the 693 patent by Apotex.;
4. The Plaintiffs’ claim for punitive damages is dismissed;
5. The quantification of the Plaintiffs’ damages arising from infringement by Apotex or the quantification of Apotex’s

profits arising from infringement by Apotex, Apotex's asserted experimental and regulatory use defences, and those matters set out in paragraph 1a of the Bifurcation Order as amended December 9, 2013 in T-1409-04, will be assessed by a consolidated hearing preceded by discovery, in accordance with the Bifurcation Order as amended December 9, 2013 in T-1409-04, the Bifurcation Order dated August 3, 2012 in T-1890-11, and the Direction dated December 11, 2013;

6. The question of whether the Plaintiffs are entitled to pre-judgment and post-judgment interest and the terms and measure of any interest are left to be determined on the consolidated hearing;
7. Apotex's counterclaim is dismissed;
8. With respect to Court File No. T-1890-11 only, it is declared that AstraZeneca AB is statute barred from obtaining relief for any infringing activity and any activity constituting inducing infringement that took place before November 22, 2005 and AstraZeneca AB's claims for relief in respect of such activity before November 22, 2005 are dismissed; and
9. The issue of costs is reserved pending a further hearing to be arranged.

ORDER

THIS COURT ORDERS that the Judgment of the Court issued on March 16, 2015 be amended as follows:

1. Subject to paragraph 8 below and subject to a determination of Apotex's pleaded experimental and regulatory use defence, with respect to both Court Files Nos. T-1409-04 and T-1890-11, it is declared that Claims 1, 5, 6, 13 and 19 of Canadian Letters Patent 1,292,693 ("693 patent") are valid and have been infringed by Apotex Inc. ("Apotex") by its manufacture, export, promotion and sale in Canada of its omeprazole capsule products, including its coated omeprazole pellets (subject to exceptions as regards to claim 13);
2. With respect to Court File No. T-1890-11 only, it is declared that Apotex induced infringement of Claims 1, 5, 6, 13 and 19 of the 693 patent by its customers and by end-users throughout Canada;
3. The Plaintiffs are entitled to elect, either an accounting of Apotex's profits or damages sustained by them, by reason of infringement of Claims 1, 5, 6, 13 and 19 of the 693 patent by Apotex.;
4. The Plaintiffs' claim for punitive damages is dismissed;

5. The quantification of the Plaintiffs' damages arising from infringement by Apotex or the quantification of Apotex's profits arising from infringement by Apotex, Apotex's asserted experimental and regulatory use defences, and those matters set out in paragraph 1a of the Bifurcation Order as amended December 9, 2013 in T-1409-04, will be assessed by a consolidated hearing preceded by discovery, in accordance with the Bifurcation Order as amended December 9, 2013 in T-1409-04, the Bifurcation Order dated August 3, 2012 in T-1890-11, and the Direction dated December 11, 2013;
6. The question of whether the Plaintiffs are entitled to pre-judgment and post-judgment interest and the terms and measure of any interest are left to be determined on the consolidated hearing;
7. Apotex's counterclaim is dismissed;
8. With respect to Court File No. T-1890-11 only, it is declared that AstraZeneca AB is statute barred from obtaining relief for any infringing activity and any activity constituting inducing infringement that took place before November 22, 2005 and AstraZeneca AB's claims for relief in respect of such activity before November 22, 2005 are dismissed; and

9. The issue of costs is reserved pending a further hearing to be arranged.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1409-04

STYLE OF CAUSE: ASTRAZENECA CANADA INC. AND
AKTIEBOLAGET HÄSSLE v APOTEX INC.

AND DOCKET: T-1890-11

STYLE OF CAUSE: ASTRAZENECA AB AND AKTIBOLAGET HÄSSLE
v APOTEX INC.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 5, 2015

ORDER AND REASONS: BARNES J.

DATED: MAY 25, 2015

AMENDED: JULY 15, 2015

APPEARANCES:

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MS. URSZULA WOJTYRA

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