

Date: 20090427

Docket: T-575-04

Citation: 2009 FC 419

Montréal, Quebec, April 27, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

APOTEX INC.

Plaintiff

and

**H. LUNDBECK A/S and
LUNDBECK CANADA INC.**

Defendants

REASONS FOR ORDER AND ORDER

[1] This is a motion by the defendants to appeal Prothonotary Lafrenière's Order dated October 22, 2008, to compel the defendants' representatives to answer certain questions arising from the second round of examinations for discovery.

[2] The defendants submit that the Prothonotary was wrong and erred in law and in fact in ordering the defendants to answer questions that seek legal or expert opinions or are properly the subject of a claim for privilege. The questions concern the allegation that the plaintiff's claim is punitive in nature, the production of the results of tests conducted by the defendants with, and

understanding of, of the therapeutic uses of citalopram, the drug at issue in the proceeding (contested questions).

[3] The contested questions are reproduced at paragraphs 23 A, 29 B, and 48 C of the defendants' written representations and at paragraphs 33, 37 and 43 of the plaintiff's written representations.

[4] The orders of prothonotaries can be reviewed only when they raise a question vital to the final issue of the case or when the orders are clearly wrong in the sense that they rely on a wrong principle or upon a misapprehension of facts (*Merck & Co., Inc. v. Apotex Inc.*, [2004] 2 F.C.R. 459 (F.C.A) at paragraph 27).

[5] In the case at bar, the contested questions are not vital to the final issue of the proceedings. Therefore, the defendants must convince the Court that the prothonotary's discretionary order was wrong or it contained a misapprehension of the facts involved.

[6] The first set of questions (defendants' paragraph 23 A and plaintiff's paragraph 33) relate to the qualification of the damages claimed by the plaintiff. In their Statement of Defence and Counterclaim, the defendants plead that plaintiff's claim is punitive in nature and contrary to the terms of a settlement agreement reached by the parties in 2004.

[7] The Court is of the opinion that the contested questions here are directly linked to the defendants' allegation. There are no reviewable errors in the order.

[8] The second set of questions (defendants' paragraph 29 B and plaintiff's paragraph 37) concerns the production of results of the tests performed by the defendants on the plaintiff's samples. The Prothonotary rejected the defendants' argument that the information sought by the plaintiff was privileged. Again, the Court has no reason to interfere because the answers to the questions asked as they are formulated will undoubtedly disclose factual information and not a conclusion or an expert opinion.

[9] The third set of questions (defendants' paragraph 48 C and plaintiff's paragraph 43) is in reference to the defendants' understanding of, and experience with, the use of citalopram in the treatment of certain diseases. The defendants argue that the contested questions relate to the defendants' "position" and "experience" regarding the alleged prior art of the '368 patent and the co- use of citalopram for treatment of CVD, dementia and depression. Those questions should be prohibited because the answers will provide an opinion on the validity of a patent.

[10] The Court finds that the contested questions are linked to paragraphs 94 and 95 of the defendants' Statement of Defence and Counterclaim. They are relevant to the paragraphs in question.

[11] In conclusion, the Court's intervention is not warranted.

ORDER

THIS COURT ORDERS that the appeal be dismissed. The defendants shall pay to the plaintiff costs by way of a lump sum in the amount of \$2,500.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-575-04

STYLE OF CAUSE: **APOTEX INC.**
and
H. LUNDBECK A/S and LUNDBECK CANADA INC.

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: April 27, 2009

**REASONS FOR ORDER
AND ORDER:** Beaudry J.

DATED: April 27, 2009

APPEARANCES:

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