IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IDENIX PHARMACEUTICALS LLC, UNIVERSITA DEGLI STUDI DI CAGLIARI, CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE and L'UNIVERSITE MONTPELLIER, Plaintiffs, v. GILEAD SCIENCES, INC. and GILEAD PHARMASSET LLC, Defendants.	C.A. No. 13-1987-LPS [redacted] REDACTED VERSION
IDENIX PHARMACEUTICALS LLC, UNIVERSITA DEGLI STUDI DI CAGLIARI, CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE and L'UNIVERSITE MONTPELLIER, Plaintiffs, v. GILEAD PHARMASSET LLC, Defendant.	C.A. No. 14-109-LPS [redacted] REDACTED VERSION
IDENIX PHARMACEUTICALS LLC UNIVERSITA DEGLI STUDI DI CAGLIARI, Plaintiffs, v. GILEAD SCIENCES, INC. Defendant.	C.A. No. 14-846-LPS [redacted] REDACTED VERSION

OPENING BRIEF IN SUPPORT OF GILEAD'S
MOTION TO CONTINUE TRIAL

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I. NATURE AND STAGE OF THE PROCEEDINGS

On July 26 2016, this Court explained that if the Federal Circuit had not ruled on the pending appeal regarding Idenix's '600 patent by November, this Court would consider a request from either party to continue the December trial. Gilead now makes such a request, for two reasons: First, the Federal Circuit has still not ruled on the '600 patent appeal, meaning that if trial proceeds in December without the '600 patent, there remains the risk that a second trial on the '600 patent will later be necessary. Significantly, the degree of overlap between the trial presentation for the '054/'597 patents and the '600 patent now appears to be even greater than was anticipated during the July hearing, making duplicate trials even less efficient for the parties and the Court and more disruptive for the likely witnesses. Second, to support its opposition to Gilead's defense of Merck's prior invention, Idenix has now produced a 185-page declaration on the topic of Idenix's diligence related to the '054 and '597 patents from Gilles Gosselin, a witness whom Idenix previously represented had no testimony relevant to the '054 and '597 patents. Not only does Idenix now represent that Dr. Gosselin's testimony is relevant to those patents, Idenix has identified Dr. Gosselin as a live trial witness and its key witness on the topic of Idenix's diligence, yet has not agreed to make Dr. Gosselin available before the December trial for a deposition on that critical topic. Similarly, Idenix has produced a 49-page declaration from David Standring, also on the topic of Idenix's diligence, and has likewise not agreed to make Dr. Standring available for deposition before the December trial. Thus, even setting aside the '600 patent appeal, proceeding to trial in December would unfairly prejudice Gilead's ability to respond to Idenix's new diligence contentions, which warrants a short continuation of trial to permit full discovery on Idenix's new disclosures.

II. STATEMENT OF FACTS

There are presently three related actions before this Court: (1) CA 13-1987, for infringement of the '600 patent (the "'600 infringement action")[1]; (2) CA 14-846, for infringement of the '054 and '597 patents (the "'054/'597 infringement action"); and CA 14-109, an appeal from the PTO (the "interference appeal"). There is also a fourth, related, action pending in the Federal Circuit (the "'600 appeal"), in which Idenix appeals from the PTO's cancellation of the relevant claims of the '600 patent as part of an interference between the '600 patent and a Gilead Pharmasset patent application. The parties agree that resolution of the '600 appeal could resolve not only the '600 infringement action, but also the interference appeal pending in this Court in CA 14-109. (*See* D.I. 372 at 1 (representing that the '600 appeal "may impact and moot some or all issues in these two actions").)

Since the beginning of these cases, Gilead's position has been that the two infringement actions should be tried as one jury trial. (*See* D.I. 25.) The cases both center around the use of modified nucleosides to treat Hepatitis C, the inventorship on the patents facially overlaps, and Idenix alleges that the same active ingredient, Sofosbuvir, in Gilead's groundbreaking HCV therapies infringes all three patents. By contrast, Idenix has expressly taken the position that it is entitled to a second jury trial on the '600 patent if the Federal Circuit reverses the PTO's decision as part of the '600 appeal. (Hufnal Decl. at ¶ 5.) Thus, Idenix has omitted the '600 patent from the pre-trial order presently being drafted by the parties in preparation for the scheduled December jury trial. (*Id.*)

[1] The CA 13-1987 action also includes a count for an interference between the '600 patent and Gilead's U.S. Patent No. 8,415,322, (*see* CA-1387 D.I. 1), which Idenix has represented it is not pursuing.

Both this Court and the district court for the District of Massachusetts have previously suggested that the infringement actions should be tried together. First, after Idenix originally brought the '054/'597 infringement action in the District of Massachusetts, that court granted Gilead's motion to transfer to this court—where the '600 infringement action was already pending—recognizing the substantial overlap between the "technologies, products and parties" in the two actions and that it would be inefficient to "requir[e witnesses] to travel twice for trial." (CA 14-846, D.I. 43 at 6, 10). Then, during the recent July 26, 2016 hearing, this Court remarked on the "extensive factual overlap among the three patents, in terms of the common inventors, the subject matter, [and] the overlapping witnesses." (D.I. 380 at 134:23-25.) This Court then elected to forego trial in October in favor of trial in December with the aim to "increase th[e] chances" that the '600 appeal would be resolved and that there could be "one jury trial with three patents rather than two separate jury trials." (D.I. 380 at 134:19-21, 135:1-3.)

At that time, the Court told the parties that if the Federal Circuit had not yet ruled on the '600 appeal by November, either side could request a continuance of the December trial. (D.I. 380 at 133:20-134:2.) This Court stated that it would be disinclined to grant the request *if the only reason was that the Federal Circuit had not yet ruled*. *Id.* Notably, as discussed below, that the Federal Circuit has not yet ruled is one of the reasons, but not the only reason, for Gilead's request to continue the trial.[2]

III. ARGUMENT

"Continuance of a trial is a matter of discretion with the trial court." *Woodham v. Sayre Borough Police Dept.*, 2006 WL 1371575, at *4 (3rd Cir. 2006). Where there is a "justifiable request for delay," however, "expeditiousness" alone does not warrant denial of a request for a

continuance. (*Id.*) Here, as discussed below, there is a justifiable request for delay both because of the risk of significant and burdensome duplication of effort should the trial not be continued, and because of the unfair prejudice to Gilead's ability to present its response to Idenix's alleged diligence story if trial is not continued.

A. This Court Should Continue Trial to Avoid the Risk of Holding Two Separate Trials

This Court should continue the December trial because proceeding with that trial creates risk that the parties, this Court, and the witnesses will have to return for a second trial covering essentially the same subject matter and resolving virtually identical issues. Even in July, this Court recognized that, due to the "extensive factual overlap among the three cases" it would be beneficial to "conserve judicial resources" and "conserve our need to draw on jurors" by holding only a single trial. (D.I. 380 at 134:19-23.) Significantly, since that time, it has become apparent that the overlap between the presentation necessary for the '054/'597 patents and the '600 patent is even more pronounced than the parties previously believed. Specifically, the parties have now exchanged their lists of likely live witnesses for the December trial and, of the twenty-four fact and expert witnesses identified by the parties, it is not clear that any have knowledge unique to the '054 and '597 patents. (*See* Hufnal Decl. ¶ 8.) Whatever subset of the identified witnesses the parties actually decide to call likely would have to come to trial for a second time, too, were the Court to conduct separate trials for the '054/'597 patents and the '600 patent.[3]

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[2] Prior to Gilead filing this motion, the parties, including Delaware counsel, met and conferred regarding Gilead's request for a continuance, but were unable to reach agreement regarding Gilead's motion. (*See* Hufnal Decl. at ¶¶ 5-7.)

[3] One of Idenix's identified witnesses, Peter Schaeffer Price, Jr., should not be called as a witness at any trial—whether one or two—for the reasons already described in Gilead's and Mr. Price's pending Motion to Quash. (D.I. 319.) Nonetheless, Gilead expects that just as Idenix has subpoenaed him for the presently scheduled December trial, Idenix would likewise subpoena him for any separate trial on the '600 patent as well.

There is no prejudice to Idenix in continuing the trial. To the extent Gilead is found to infringe any valid patent, a jury will be able to award Idenix the appropriate damages either in December or at some future date. Gilead, by contrast, should not be required to bear the very substantial cost and burden of conducting two separate trials for substantially overlapping patents. To the extent continuing the trial might disrupt the schedules for witnesses, any disruption would be significantly less than the disruption of requiring those witnesses to come for a two-week trial in Delaware only to return again for a second trial sometime in the future.

Holding separate trials would also create a significant problem with the fit for the opinions offered by Idenix's damages expert, and could necessitate additional expert discovery and expert reports. Specifically, the expert report for Idenix's damages expert, Mr. Carter, contains only a single opinion regarding the appropriate amount of damages for all three patents collectively. It includes no separate analysis regarding the value of, on the one hand, the '054 and '597 patents and, on the other hand, the '600 patent. Nor is it apparent to Gilead how, if at all, Mr. Carter could reconcile that opinion regarding the royalty the parties would have negotiated for a license to all three patents if, instead, the jury is required to determine a royalty for only two. Certainly, Mr. Carter should not be permitted to offer an opinion that the jury should award [redacted] (the amount of damages identified by Mr. Carter) for the '054 and '597 patents, and then offer that same opinion again to seek [redacted] in damages for the '600 patent.[4]

[4] This is in substance what happened in the Merck California trial and here – Mr. Carter concluded Merck and Idenix both should be paid [redacted], for the same alleged invention, pursuant to materially identical damages theories. Thus, by seeking to have two separate trials in this case, Merck and Idenix are now seeking a *third* chance at damages for essentially the same invention.

In sum, the least efficient possible outcome is for the parties to proceed to trial on the '054 and '597 in December, only to have the Federal Circuit revive the '600 patent at some later date, necessitating a second complete jury trial. This Court should remove that risk by continuing the December trial.

B. This Court Should Continue Trial to Allow Gilead to Conduct Discovery into Idenix's Newly Disclosed Diligence Case

On October 31, 2016, in support of its motion for summary judgment, Idenix submitted two declarations on the topic of Idenix's diligence with respect to the '054 and '597 patents: a 185-page declaration from Gilles Gosselin and a 49-page declaration from David Standring. (D.I. 414 Exs. 6, 10.) Those declarations, and the accompanying exhibits, include extensive new diligence citations that were not included in Idenix's prior interrogatory responses on diligence, resulting in one new citation for almost every day. (Hufnal Decl. at ¶ 11.)

With respect to Dr. Gosselin, Gilead has never been given the opportunity to depose him on the topic of Idenix's diligence or on the topic of his knowledge regarding the '054 and '597 patents generally. Indeed, Idenix did not identify Dr. Gosselin (who is not an inventor on the '054 or '597 patents) as having knowledge on those topics until it amended its initial disclosures on September 30, 2016—the last day of fact discovery related to Gilead's defense of Merck's prior invention. (*Compare* Hufnal Decl. Ex. 1 at 3 *with* Ex. 2 at 3.) Idenix had previously represented to both Gilead and this Court that Dr. Gosselin's testimony was "not relevant to the '054 and '597 patents." *See* D.I. 372 (including Dr. Gosselin on the list of witnesses that Idenix represented were not relevant to the '054 and '597 patent). Thus, although Gilead deposed Dr.

Gosselin during the original fact discovery period, Gilead, reasonably, did not ask Dr. Gosselin any questions regarding the '054 and '597 patents or Idenix's alleged diligence.[5]

After receiving Idenix's amended initial disclosures on September 30, in which Idenix first identified Dr. Gosselin as having knowledge regarding the "research and development work of the inventions claimed in the '054 and '597 patents" (Hufnal Decl. Ex. 1), Gilead requested that Idenix make Dr. Gosselin available for a deposition. (Hufnal Decl. at ¶ 10.) Idenix refused. (*Id.*) Subsequently, after Idenix submitted the 185-page declaration from Dr. Gosselin and the 49-page declaration from Dr. Standring on the topic of Idenix's diligence, Gilead again requested a deposition of Dr. Gosselin as well as a deposition of Dr. Standring. (Hufnal Decl. at ¶ 12.) Idenix would not commit to providing either witness before trial, explaining that it may be difficult for Dr. Gosselin—who lives in France—to come to the U.S. for a deposition before trial, and that Dr. Standring has a busy November, and may not be available before trial.

At this point, given the critical role Dr. Gosselin's testimony—and, to a lesser extent, Dr. Standring's testimony—will apparently play at trial, given that Gilead has not yet had the opportunity to depose either witness on the subject of their declarations, and given the very limited time remaining before trial, proceeding with the scheduled December trial would unfairly prejudice Gilead's ability to respond to Idenix's new diligence allegations. This Court should continue the trial so as to allow Gilead the opportunity to conduct limited discovery into Idenix's new disclosures. Although this is not the sole reason for continuing trial, it is another factor supporting Gilead's request.[6]

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[5] The problem is compounded because Idenix likewise did not identify Dr. Gosselin or his alleged knowledge in response to Gilead's interrogatories on conception, reduction to practice and diligence. (Hufnal Decl. Ex. 2 at 8-13.)

[6] Although it was Gilead's expectation that any Merck-related discovery could be completed in sufficient time for the December trial date, (D.I. 380 at 24:19-22), Idenix's failure to disclose

IV. CONCLUSION

For the foregoing reasons, Gilead respectfully requests that this Court grant its motion to continue the scheduled December trial.

Dr. Gosselin's knowledge regarding the '054/'597 patents until the last day of the renewed discovery period coupled with Idenix's failure, thus far, to commit to a deposition of either Dr. Gosselin or Dr. Standring before trial has made it impossible for Gilead to obtain the necessary discovery to fairly respond to the evidence now relied on by Idenix.

Dated: November 7, 2016

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