



June 25, 2018

VIA ECF

Hon. Michael A. Hammer, U.S.M.J.
U.S. District Court for the District of New Jersey
Martin Luther King, Jr. Federal Building & U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07101

RE: Merck & Co., Inc., et al. v. Merck KGaA,
Civil Action No. 16-0266 (ES) (MAH)

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Dear Judge Hammer:

This firm, along with Sidley Austin LLP, represents Plaintiffs Merck & Co., Inc. and Merck Sharp & Dohme Corp. ("Plaintiffs") in the above-referenced matter. We submit this letter jointly with Blank Rome LLP and Debevoise & Plimpton LLP, counsel for Defendant Merck KGaA, Darmstadt, Germany ("Defendant").

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Plaintiffs' Position

Plaintiffs respectfully request a three-week extension of the discovery deadlines. Plaintiffs' proposed schedule, which is set forth below, would allow the parties to depose the few remaining witnesses before the close of fact discovery, with the sole exception of Plaintiffs' private investigator, Exiger LLC.¹ That deposition can be conducted during the expert discovery period without interfering with the preparation of expert reports.

For its part, Defendant demands a six-week extension, and states that it may seek even more time later. Defendant's sole justification for this indefinite delay is that it refuses to allow the expert discovery period to begin until it has deposed Exiger. This is not the first time Defendant has used Exiger's deposition to impede the progress of this case. That deposition had previously been set for May 16, but Defendant upended the parties' carefully negotiated schedule by serving a motion to compel production of Exiger's protected work-product less than a week before the deposition.

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NEW YORK
NEWARK
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WILMINGTON
WASHINGTON, DC

¹ Plaintiffs' position, which Defendant does not dispute, is that this extension should only permit the completion of discovery that has already been noticed, and should not allow either party to notice new depositions or seek additional fact discovery not yet noticed.

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Defendant is now using its untimely motion practice to freeze the litigation in place for several weeks while the dispute is resolved. There is no justification for this. Under Plaintiffs' proposed schedule, Defendant's expert report is not due until October. That is ample time for Defendant to conduct Exiger's deposition and incorporate any testimony.

But by throwing up roadblocks to discovery, Defendant is helping itself to a stay of Plaintiffs' claims. Meanwhile, Defendant is actively pursuing claims against Plaintiffs in a variety of jurisdictions around the world.

Plaintiffs respectfully request that the Court reject Defendant's lengthy and unnecessary extension request and order the below discovery schedule:

Event	Current Schedule	Proposed Schedule
Fact discovery to close	June 25	July 16
Telephone Status Conference	July 19	July 19
Plaintiffs' affirmative expert reports due	July 24	August 14
Defendant's affirmative and rebuttal expert reports due	September 18	October 9
Plaintiff's rebuttal and reply expert reports due	October 8	October 29
Close of expert discovery	November 15	December 6

Defendant's Position

Defendant agrees with Plaintiffs that an extension is necessary, but respectfully asks for an extension of six weeks, instead of three, in order to accommodate the deposition of Exiger LLC. Defendant believes that all fact discovery should be completed before expert discovery, so that the parties will be able to fully assess the expert testimony that will be necessary in this case. The testimony that Exiger LLC is expected to give is anticipated to be relevant both to whether or not Defendant retains certain experts, as well as to topics that both parties already know will be the subject of expert discovery, such as damages and harm. It does not make sense to begin serving expert reports, when discovery of the facts underlying such reports have not yet been completed. An additional three weeks should provide sufficient time to allow Plaintiffs to satisfy any remaining document production obligations if ordered by the Court, and for the parties to conduct Exiger's deposition. To the

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extent that the Exiger deposition does not occur sufficiently in advance of Defendant's deadline for its expert reports, Defendant reserves the right to seek further extensions as necessary.

Plaintiffs' accusations of delay are meritless—Plaintiffs were the ones who requested this extension, and Defendant merely wishes to minimize the number of times the parties need to request extensions from the Court. Indeed, Defendant had proposed proceeding with the Exiger deposition on May 16 as originally scheduled, provided Plaintiffs agree to call the Exiger representative back if the Court rules in favor of Defendant's motion. Plaintiffs refused and canceled the deposition. Further, Plaintiffs' concern about the schedules of unrelated proceedings around the world have no bearing on this case.

Defendant therefore respectfully proposes the following schedule:

Event	Current Schedule	Proposed Schedule
Fact discovery to close	June 25	August 6
Telephone Status Conference	July 19	July 19
Plaintiffs' affirmative expert reports due	July 24	September 4
Defendant's affirmative and rebuttal expert reports due	September 18	October 30
Plaintiff's rebuttal and reply expert reports due	October 8	November 19
Close of expert discovery	November 15	December 27

Thank you for your consideration.

Respectfully submitted,

s/John E. Flaherty

John E. Flaherty

cc: Counsel of Record (via email)