

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY (CAMDEN)

INCYTE CORP., et al,	)	24-4366 (CPO/MJS)
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
APOTEX, INC.	)	
	)	Camden, NJ
Defendant.	)	February 26, 2026
_____	)	1:07 p.m.

TRANSCRIPT OF DISCOVERY/STATUS CONFERENCE
BEFORE THE HONORABLE MATTHEW SKAHILL
UNITED STATES MAGISTRATE JUDGE

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I N D E X

<u>ISSUES:</u>	<u>PAGE</u>
Colloquy	3
Ruling By The Court	8

Colloquy

3

1 (Proceedings commenced at 1:07 p.m.)

2 THE COURT: Okay. So we're on the record. This is
3 the Incyte Matter v. Apotex. It's case number 24-4366.

4 We're here for a conference call on the case, and
5 I'm going to just -- there's a lot of attorneys on the call.
6 I'm going to run through who we have and handle the
7 appearances that way so we can move this along. We have Mr.
8 Callo, Ms. Brown-Marshall, Mr. Booker, Mr. Oaks, and Mr. Lizza
9 here for the plaintiff.

10 And I believe Mr. Murtha, Mr. Warner, and Mr.
11 Anderson for defendants, Apotex.

12 Am I missing anybody?

13 All right. Good. So what I want to do today is
14 just discuss what's outstanding in the case and just do a
15 general overview of things. I know you have a Markman hearing
16 scheduled, I think, on March 24th with Judge O'Hearn. And
17 there is the -- which I want to address today -- well, I want
18 to address the Incyte's Letter seeking to amend its
19 infringement contentions. We had some argument on that, I
20 believe, back in January when we were here. So those are open
21 issues.

22 In terms of discovery, I don't think there's any
23 active discovery disputes. I did receive the letter that was
24 submitted on behalf of the parties on February 6th, which is
25 ECF number 147, which addressed some of the issues that came

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1 up when we spoke previously. That was the Apotex answers to
2 interrogatories and Apotex's responses to requests for
3 admissions, as well as the document production. And I think
4 these issues are all resolved.

5 So with that said, why don't we hear first from
6 plaintiffs on what is out there, if I'm missing anything.
7 Then we'll hear from defendants, and then we can talk about
8 the request for leave to amend the infringement contentions.

9 So whoever wants to speak for the plaintiff, I would
10 just ask you to identify yourself for the record.

11 MR. OAKS: Yes, good afternoon, Your Honor. This is
12 Bob Oakes from Fish & Richardson on behalf of Incyte. And
13 I'll just, with respect to the discovery, Your Honor's
14 question, I think you're correct, there are no pending
15 discovery issues at this time. One update to the letter, the
16 joint letter the parties sent you on February 6th. At the
17 time, we had indicated that Apotex had not yet served its
18 supplemental interrogatory responses. It did those -- it did
19 serve those supplemental responses on February 20th, last
20 Friday. We're evaluating the sufficiency of those responses,
21 but there is nothing, no issues to address to Your Honor at
22 that time. And I think as we said in the letter, all the
23 other discovery issues have been resolved.

24 I guess one other thing to note, just with respect
25 to the case status, since we last spoke in January, Apotex

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1 asked to extend the expert discovery deadlines, and we agreed
2 to do that. And so now opening expert reports are due a week
3 from Thursday, March 5th. And so there's no expert discovery
4 related issues because reports have not yet been served.

5 And then finally, with respect to the pending motion
6 to amend, we're happy to address any additional questions Your
7 Honor may have.

8 THE COURT: Right. And we have the new schedule,
9 which is ECF 146, which the Court just stamped ordered after
10 it received the party's dates.

11 So, all right. Good.

12 How about with regard to defendants?

13 MR. ANDERSON: Good afternoon, Your Honor. Matthew
14 Anderson from the Rakoczy firm on behalf of Apotex.

15 So in consistent with plaintiff's counsel, fact
16 discovery did close on December 19th, and now we have expert
17 reports that are due a week from today. So we are proceeding
18 into expert discovery.

19 And then similarly, with the new adjustments to the
20 schedule, we are preparing to move forward with that schedule
21 and preparing to be trial ready by November.

22 THE COURT: Okay. Very good.

23 Any other issues on that?

24 And obviously, again, you have the Markman hearing,
25 and we'll talk about the Incyte's request to amend its

Colloquy

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1 infringement contentions. But any other issues that I should
2 be aware of from Apotex's perspective?

3 MR. ANDERSON: Nothing from Apotex, Your Honor. No.

4 THE COURT: Okay. All right.

5 Then we'll turn back to the current letter motion
6 that Incyte filed, excuse me, to amend its initial
7 infringement contentions. That's ECF number 122, and
8 defendants responded to it.

9 I don't need any further argument from counsel, but
10 I'm happy briefly if either side had one -- anything -- want
11 -- anything they want to add that didn't get brought up when
12 we spoke about this back in January. But based on my notes
13 and review of the record here, we had addressed questions that
14 the Court had back in January. I think it was January 13th,
15 actually, when we spoke last.

16 So if there's anything else the plaintiffs want to
17 add, I'm happy to hear it. I'm happy to hear from defendants,
18 and then we'll proceed accordingly here.

19 MR. OAKS: Your Honor, this is Bob Oakes again on
20 behalf of plaintiffs. We think our position is well set out
21 in the letter and the argument in the January status
22 conference. So nothing further from us unless there are
23 specific things you would like us to address or, you know, if
24 defendants add additional things, I may want to respond.

25 THE COURT: Right. All right.

Colloquy

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1 Anything on behalf of defendants?

2 MR. ANDERSON: Again, Matthew Anderson on behalf of
3 Apotex, Your Honor.

4 Similarly, our arguments, you know, were set forth
5 in the briefing as well as presented during the last status
6 conference with Your Honor. Just, you know, to reiterate
7 that, you know, based on those arguments and what plaintiffs
8 are seeking to do here, there's nothing timely or diligent
9 about it. This is a completely new theory that's being added
10 at the last minute, not new citations. It's not new evidence.
11 It's something they could have raised back in September, and
12 they chose not to.

13 So at this point, they haven't shown good cause.
14 There's nothing timely or diligent, and any extreme prejudice
15 will be -- will hurt Apotex in not only the case moving
16 forward, but also the current schedule that's been set forth.

17 So, again, we maintain our positions and nothing
18 else to add there.

19 THE COURT: Okay. All right.

20 Plaintiffs, anything in response? Again, these are
21 the same arguments that have been raised.

22 MR. ANDERSON: Yeah, Your Honor. I think they're
23 the same arguments, and I believe we've addressed them again.
24 If you have other questions, we're happy to address them, but
25 I don't. Otherwise --

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1 THE COURT: I don't --

2 MR. ANDERSON: -- we're okay.

3 THE COURT: I don't have --

4 MR. ANDERSON: We are okay.

5 THE COURT: I don't have any questions, and I've
6 considered the issue, so I'm going to just put the Court's
7 ruling into the record in lieu of a more formal written
8 opinion on this. But obviously, I went on the record here so
9 that there's a transcript if either side requests it. So the
10 issue here is Incyte's letter request seeking leave to amend
11 its infringement contentions.

12 Incyte served its initial infringement contentions
13 for Apotex's new drug application product on September 22nd of
14 2025. The following month, Incyte asserts that Apotex
15 produced, and I quote, "Key information about its NDA
16 product," and revealed, "Additional critical information," in
17 December 2025. I'm pulling that from the filing.

18 In light of this information, Incyte became aware
19 of, after initially serving its infringement contentions,
20 "Incyte is seeking to drop its literal infringement
21 allegations as to 52 claims and add a doctrine of equivalence
22 infringement allegations as to 26 of those claims across the
23 salt patents." And that's at page 5 of ECF number 122.

24 As argued in the briefing and as we heard from
25 counsel back in January, Incyte argues that there's good cause

1 here because it sought to amend its contentions as a result of
2 discovery that Apotex delayed or withheld. And, again, that's
3 coming from page 6 of the filing.

4 Incyte asserts that amendment is critical because
5 its crucial because its DOE allegations make up the only
6 infringement theory on Apotex's NDA product for the later
7 expiring patents.

8 Incyte also argues that Apotex is not unduly
9 prejudiced because it's their position that no further fact
10 discovery is required. Since Apotex is the party that
11 originally possessed the information, it is using to amend its
12 contentions, the parties have not yet served expert reports
13 and a trial date has not been set. And, again, that's coming
14 from page 7 of the briefing, although I'll note the expert
15 deadlines are coming up here.

16 Apotex asserts that Incyte, on the other hand, lacks
17 diligence because it had enough information to make the
18 allegations it seeks to add when it served its initial
19 contentions, including Apotex's new drug application, drug
20 master file, and other internal documents relating to the
21 accused product. And that's from entry number 127, page 1,
22 the response to Incyte's filing.

23 In Apotex's view, Incyte analyzed that information
24 and decided only to pursue a literal infringement theory. And
25 now that it's concluded that Apotex's product does not

1 literally infringe Incyte's phosphate salt patents, Incyte,
2 according to Apotex, wants a do-over to explain for the first
3 time why the same samples and documents it used to assert
4 literal infringement now support an entirely new DOE argument.
5 And that's coming from page 2 of the filing.

6 Apotex maintains that there's no good cause for this
7 request because it only produced cumulative discovery after
8 the contentions deadline.

9 Further, they argue they would suffer unfair
10 prejudice if Incyte were allowed to switch theories because,
11 "Allowing substantive DOE contentions at this late stage would
12 require reopening fact discovery, demand significant resources
13 of Apotex when it instead should be focused on expert reports
14 consistent with current contentions, and could unnecessarily
15 delay the start of the trial." Apotex argues that new
16 contentions will likely require moving back the schedule for
17 dispositive motions.

18 So, again, as I mentioned, the Court had questions
19 and the parties presented some argument on the issue and
20 responded to the Court's questions back on January 13th of
21 this year. And when we were on that call and during that
22 argument, again, Incyte maintained its position and argued
23 that it could not have asserted a DOE theory earlier because
24 it lacked a good faith basis to make those allegations when
25 its initial contentions were served.

1 And further, to the extent that it could formulate
2 good faith DOE allegations from the documents previously
3 produced by Apotex and any publicly available content, they
4 argued that they use that information. It simply took longer
5 to articulate the theory from it, given that the information
6 existed in a raw form and did not consist of internal Apotex
7 documents or answers to interrogatories that more directly
8 illuminated a DOE theory.

9 So, as such, Incyte argued then, and they maintained
10 in their letters, and again here today, that it -- they moved
11 to amend as soon as it developed a DOE theory from this
12 information. So, as the parties are well aware, Patent Rule
13 3.7 governs amendments which may be made only by order of the
14 Court upon a timely application and a showing of good cause.
15 And, as such, Patent Rule 3.7 implements a conservative
16 approach to amending contentions. There's numerous cases to
17 this effect, including *Razor USA v. D, D as in dog, G as in*
18 *Gary, L as in Larry, DGL Group*, 2022 WL, 44627 at page 3, a
19 DNJ case from 2022.

20 That being said, it's also true that Rule 3.7 is not
21 a straitjacket into which litigants are locked from the moment
22 the contentions are served, but instead a modest degree of
23 flexibility exists, at least near the outset. And that's the
24 TFH Publications case, which is F -- 705 F. Supp. 2d 361 at
25 page 366, also a DNJ case from 2010.

1 Under Patent Rule 3.7, the Court may grant leave to
2 amend infringement contentions upon a showing of three things,
3 that the application is timely, that there's good cause for
4 the amendment, and that the adverse party will not suffer
5 undue prejudice if leave to amend is granted.

6 Again, citing back to the Razor USA case that I just
7 referenced earlier at page 4. Several factors inform the good
8 cause analysis, including the reasons for the delay and
9 whether the moving party has been diligent, prejudice to the
10 non-moving party, and the impact of a delay on judicial
11 proceedings. That said, diligence is the dominant
12 consideration in determining whether good cause exists under
13 Rule 3.7.

14 And again, numerous cases stand for that
15 proposition, including the Razor case that I mentioned just a
16 few moments ago.

17 Now here -- the relevant here, the moving party may
18 satisfy the diligence requirement if it acted diligently to
19 discover that an amendment was appropriate and move to amend
20 its contentions promptly after learning amendment was
21 necessary.

22 Moreover, considerations in determining a party's
23 diligence include additional or unexpected results of
24 discovery. And again, there's cases that stand for that
25 proposition, including a case from District of Connecticut,

1 2023, Geomatrix System, 668 F. Supp. 3d. 126.

2 In deciding whether amendment unfairly prejudices
3 the non-moving party, Courts consider whether permitting the
4 proposed amendments would require the non-moving party to
5 expend significant additional resources or significantly delay
6 resolution of the dispute.

7 In the ACME case, Courts also analyzed whether the
8 non-moving party has been genuinely surprised or harmed by
9 amendment. See ACME Worldwide v. United States, 2025 WL,
10 3677, 381, page 3. The Court need not consider whether the
11 non-moving party would be prejudiced unless it is first found
12 that the moving party was diligent in discovering that an
13 amendment was appropriate and then promptly moved to amend its
14 contentions. Again, citing that Razor case that I mentioned
15 earlier.

16 Finally, the timeliness of an amendment is guided by
17 the well-established principle that the patent rules are
18 designed to require parties to crystallize their theories of
19 the case early in the litigation and to adhere those theories
20 once they've been disclosed. So here, the Court takes all of
21 this into account and first looks at the issue of good cause.
22 Now, a party may not seek to add substance to conclusory
23 assertions of DOE infringement through amendment when it could
24 have made those allegations in its previous contentions.
25 Courts have found a lack of diligence where the moving party

1 fails to substantively assert its DOE allegations at the
2 outset when that information was otherwise available because a
3 general assertion of infringement under a doctrine of
4 equivalence theory does not satisfy the requirements of local
5 patent rule 3.1(e). Again, citing to Razor at page 6.

6 Doctrine of equivalence contentions unsupported by
7 substantive information concerning the presence of the
8 limitation on an equivalence theory amount to mere
9 boilerplate. As such, Courts have repeatedly held that
10 conclusory invocations of the doctrine that lack substantive
11 supporting information do not provide good cause to amend for
12 the purpose of bolstering those conclusory accusations.

13 Now here, Incyte states that it seeks to add DOE
14 infringement allegations. Apotex agrees that Incyte provided,
15 and I'll quote from ECF 127, "No substantive DOE theory for
16 any claim limitation in its initial contentions." This
17 general mention of a DOE theory does not provide good cause
18 for amendment now.

19 Therefore, whether Incyte has demonstrated good
20 cause essentially turns on whether it could have asserted DOE
21 contentions earlier. And from the Court's perspective, key to
22 this analysis is whether the discovery Apotex provided that
23 forms the basis of these amendments is essentially cumulative.

24 Now Apotex's view is that Incyte's new DOE
25 contentions rely on the same full set of Apotex produced

1 samples cited in its literal infringement contentions. And
2 use the same NDA documents that it cited in its literal
3 infringement contentions. And I'm pulling that from the
4 briefing ECF 127 at pages 4 and 5. Courts often neglect to
5 find good cause when a party seeking amendment bases the
6 amendment on information cited in its initial contentions
7 because this suggests that the party had a good faith basis to
8 assert the information previously.

9 And see, for example, the Aurinia Pharma case, which
10 is 2022 Westlaw 3040950 at page 6, where the Court found a
11 lack of good cause where plaintiff had not shown there was a
12 link between the amendments and the documents produced by
13 defendants after plaintiff asserted served its initial
14 contentions. But here in this case, Incyte has provided
15 argument and it contended that to rebut this assertion, namely
16 that it had to serve its initial contentions.

17 And at that time did not have a good faith basis to
18 assert a DOE theory that's raised in the papers. That's also
19 what was put forth by counsel during the January 13th, 2026
20 argument. To the extent that the documents it relied on its
21 initial contentions also contained information that supported
22 a DOE theory. Incyte had to spend more time on review and
23 analysis because the information was in a raw form. And that
24 was the argument. Courts have denied a moving party leave to
25 amend when at the time its previous contentions were served,

1 the moving party was put on notice of theories it seeks to
2 assert through amendment.

3 And you see the Verinata Health case for this
4 proposition, 236 F. Supp. 3d at 1115, where the Court denied
5 plaintiff leave to amend its invalidity contentions, because
6 although plaintiff argues that it could not have reasonably
7 expected certain non-infringement contentions, and that it
8 would have been unreasonable to rely on earlier discovery
9 materials or scientific literature because those materials
10 concerned a different version of the test at issue, Plaintiff
11 previously represented to the Court that the two versions
12 operate largely in the same way.

13 To the court, that does not appear to be the case
14 here. Rather than use cumulative discovery to assert a new
15 theory after its literal infringement theories appeared
16 inadequate, Incyte essentially asserts that it continually
17 worked to develop a DOE theory from the information it had at
18 its disposal, which was bolstered by discovery production made
19 by Apotex after its initial contentions were served.

20 While the -- the evidence that Incyte points to with
21 regard to this point may be thin, it likely weighs slightly in
22 favor of granting the motion. And "thin" and "weighing
23 slightly in favor of granting the motion," can pull from a
24 case from the Eastern District of Texas, STA Group, LLC., 2023
25 WL 8587258, where the Court granted plaintiff's motion to

1 amend its contentions on the basis of newly discovered
2 information. And the court finds that to be the case here. I
3 do think there is a, in this case, good cause based on the
4 subsequent discovery that was produced.

5 We also look at the issue of timeliness. Whether
6 Incyte's application was timely, turns on whether this
7 amendment is based on cumulative discovery, and asserts a
8 theory Incyte could have raised in its initial contentions.

9 Accordingly, since Incyte's diligence argument
10 favors granting amendment, the motion appears to be timely.
11 Discovery was received from Apotex, and over the next three
12 months, this application was thereafter filed.

13 Additionally, with regard to prejudice, the Court
14 finds good cause here. The Court found good cause, so I need
15 to analyze whether there's any prejudice to Apotex. Apotex
16 notes that it would have to expend significant additional
17 resources if amendments were granted, because expert reports
18 have not been -- well, I would find the -- they did not have
19 to expend significant resources, because expert reports have
20 not been exchanged, a trial date has not been set, and
21 additional expenses in amending responses to contentions does
22 not constitute undue prejudice.

23 Finally, I'll also note that it doesn't appear
24 Apotex would be genuinely surprised or harmed by the
25 amendment. Apotex argues against amendment because it

Colloquy

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1 believes Incyte should have raised the DOE allegations sooner.

2 To Apotex, the documents it produced and the patent
3 application it submitted should have put Incyte on notice that
4 these theories should have been raised. Therefore, Apotex
5 will not suffer genuine surprise from amendment because this
6 information is not new to Apotex.

7 All this being said, the Court does find, again,
8 there's good cause. I don't think that, you know, they
9 balance all this. I don't think the prejudice outweighs that.
10 So I'm going to permit it, and again, the finding is largely
11 based, as I note, on the fact that this additional discovery
12 material was produced and that, upon receipt, Incyte processed
13 it, reviewed it, and the Court finds filed this motion in a
14 timely fashion.

15 Again, I note the expert deadlines are coming up.
16 They have not yet passed, and the Court will work with the
17 parties to the extent I need to adjust any of these deadlines
18 in light of the Court's decision.

19 So that's the Court's finding and ruling on this.
20 Plaintiff, have any questions?

21 MR. OAKS: No questions. Thank you, Your Honor.

22 THE COURT: Defendants?

23 MR. ANDERSON: Nothing for Apotex, Your Honor.

24 THE COURT: Okay. All right.

25 So what else for today, counsel?

Colloquy

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1 MR. OAKS: Your Honor, this is Bob Oakes on behalf
2 of the plaintiffs. We don't have anything further.

3 THE COURT: All right.

4 For defendants?

5 MR. ANDERSON: My name is (inaudible) for Apotex.
6 Nothing else, Your Honor.

7 THE COURT: All right. Very good.

8 So I'll enter an order, and the next event in this
9 case for court proceeding from my review of the record, again,
10 is the March 24th Markman hearing. I will set up another
11 status conference with counsel probably for, I'll say, about
12 60 days, so late April. If there's a need for my attention,
13 any matters before that time, reach out, and I'm happy to move
14 up the conference.

15 Anything further?

16 MR. OAKS: Thank you, Your Honor.

17 THE COURT: All right. Thanks, everybody.

18 ALL: Thank you, Your Honor.

19 THE COURT: All right.

20 (Proceedings concluded at 1:32 p.m.)

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C E R T I F I C A T I O N

I, Bernadette Arlene, court approved
transcriber, certify that the foregoing is a correct
transcript from the official electronic sound recording of the
proceedings on March 11, 2026 in the above-entitled matter.

/s/Bernadette Arlene

03/11/2026

BERNADETTE ARLENE

DATE

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