Federal Court  Cour fédérale

Date: 20200601

Docket: T-1315-19

Citation: 2020 FC 658

Toronto, Ontario, June 1, 2020

PRESENT: Case Management Judge Angela Furlanetto

BETWEEN:

ALLERGAN INC.

Plaintiff

and

APOTEX INC.

Defendant

and

LABORATOIRE HRA-PHARMA AND THE UNITED STATES OF AMERICA AS REPRESENTED BY THE SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendant/Patent Owners

Docket: T-1316-19

BETWEEN:

ALLERGAN INC.

Plaintiff

and

APOTEX INC.

Defendant

and

LABORATOIRE HRA-PHARMA

Defendant/Patent Owner

ORDER AND REASONS

[1] **UPON** motion brought by the Defendant Apotex Inc. ("Apotex") and heard by Zoom video on May 6, 2020, for:

1. An order requiring the Plaintiff, Allergan Inc. ("Allergan"), to deliver further and better affidavits that list:

   i. all documents that Allergan has received from the Defendant, Laboratoire HRA-Pharma ("HRA") pertaining to ulipristal acetate and the development work underlying Canadian Patent Nos. 2,713,254 (the "254 Patent') and 2,745,084 (the "084 Patent") or their foreign counterparts; and

   ii. all documents related to the relationship between Allergan and HRA as it pertains to ulipristal acetate or the 254 or 084 Patents, and all documents and communications concerning HRA's participation or lack of participation in these actions.

2. An order permitting the questions posed by Apotex to Dr. Nieman and the United States of America ("USA") at their upcoming examinations to be deemed, for the purposes of Apotex's discovery of Allergan, to be Apotex's requests of Allergan to make inquiries of USA and Dr. Nieman to answer these same questions, and that the answers given by USA and Dr. Nieman at their examinations be deemed, for the purposes of Apotex's discovery of Allergan, to be the responses Allergan received to these inquiries.

3. An order requiring Allergan to make its best efforts to have Dr. Erin Gainer (failing which, another employee or former employee of HRA familiar with the work done at HRA in respect of ulipristal and the 254 and 084 Patents (or their foreign counterparts)) (the "HRA witness") attend for an oral examination in accordance with Rules 87 and 98 of the *Federal Court Rules* by Apotex in relation to this work within the period set for the completion of discovery in these actions.

4. An order directing that, if an HRA witness attends for examination in accordance with paragraph 3 hereof, the questions posed by Apotex to the HRA witness at the examination are to be deemed, for the purposes of Apotex's discovery of Allergan, to be Apotex's requests of Allergan to make inquiries of HRA to answer these same questions, and that the answers given by the HRA witness at its examination be deemed, for the purposes of Apotex's discovery of Allergan, to be the responses Allergan received to these inquiries.

5. An order directing that, if an HRA witness does not attend for examination of Apotex in accordance with item 3 hereof, then no HRA employee or former employee may give evidence at the trial in these actions.

6. An order directing that, if the HRA witness does not attend for examination by Apotex in accordance with item 3 hereof, then Allergan must provide an affidavit that details what efforts were made in respect of paragraph 3 above what responses were received and what obstacles prevented the requested attendance.

7. Costs of this motion in any event of the cause.

8. Such further and other relief as this Honourable Court may deem just.

[2] **AND UPON** reading the motion records of Apotex, Allergan and the USA and upon hearing the submissions of the parties at the hearing of the motion;

[3] This motion brought by Apotex seeks various relief relating to discovery of the patentees, HRA and USA, and of inventors of the 254 Patent and the 084 Patent, including with respect to the use that can be made of such discovery.

[4] The underlying proceedings are actions brought under s. 6(1) of the *Amended Patented Medicines (Notice of Compliance) Regulations* (*"PMNOC Regulations"*) in which Allergan Inc. (said to be acting under the consent of the patent owners) seeks a declaration of infringement in respect of the 254 Patent (T-1315-19) and the 084 Patent (T-1316-19). Apotex defends the actions, in part, by alleging that the 254 and 084 Patents are invalid for a number of reasons,

including allegations that put into issue the work conducted by the inventors of the patents. As part of its obviousness allegation, Apotex alleges that the work done by the inventors of the patents was neither long nor arduous, but rather was routine. Apotex further alleges that the claims of the patents are broader in scope that what the inventors actually invented. Apotex also challenges Allergan's standing to bring the actions as Plaintiff.

[5] As pleaded, Allergan is the only Plaintiff named in these actions and as Apotex does not seek to impeach either the 254 or 084 Patents is the only party against whom Apotex seeks remedies. In its reply to the actions, Allergan denies each of Apotex's allegations referred to above.

[6] The Defendant, USA has taken a limited role in the proceeding. It sought and obtained leave to file a reply to the invalidity allegations made against the 254 Patent and to support the validity of the 254 patent. The USA seeks no relief against Apotex in the proceedings.

[7] To date, the Defendant HRA, who is based in France, has taken no active role in the proceedings and has not attorned to the jurisdiction of this Court.

[8] At the current stage of the proceedings, the parties have exchanged affidavits of documents. The productions from Allergan are minimal. In the T-1315-19 action, Allergan listed only five documents and in the T-1316-19 action, it listed only four documents. None of the documents listed in either action relate to the development of the alleged inventions of the patents or to Allergan's relationship with either HRA or the USA. Allergan asserts that it has no

documents relating to the development of the purported inventions of the patents, and that it cannot produce a representative for discovery with any knowledge, or information relating to this. Allergan asserts that it was not involved in those development efforts and that any such information is solely within the knowledge of the USA and HRA.

[9] The USA has delivered their own affidavit of documents relating to the development of the invention of the 254 Patent and has agreed that a representative of the USA and the inventor Dr. Nieman will be available for discovery by Apotex. There is no issue on this motion relating to the affidavit of documents served by the USA. The only issue on the motion involving the USA relates to the use that can be made by Apotex of the discovery of the USA and of its inventor Dr. Nieman at trial.

[10] Until very recently there were no documents delivered by HRA in the proceeding. Since the outset of the proceedings in August 2019, Allergan advised that it made requests of HRA but had received no response to the request for documents relating to Apotex's invalidity allegations. It was not until March 31, 2020, that Allergan advised Apotex that it had received an archive from HRA including thousands of documents. Allergan delivered 1499 documents from this archive to Apotex on April 29, 2020. Allergan asserts that the subset of documents delivered are those that "are potentially relevant" to the proceedings. The manner of this production - i.e., that only a subset of the documents from HRA has been produced and that the documents have been produced by Allergan not HRA, although omitted from Allergan's affidavit of documents - is one of the issues on this motion.

[11] The other issue relates to the ability of Apotex to obtain oral discovery of an HRA witness, and more specifically, of its inventor Dr. Gainer, and its ability to use any such discovery in the same manner as proposed for the USA's inventor, Dr. Nieman. To date, there has been no formal agreement that Dr. Gainer or any HRA employee or former employee to attend for discovery by Apotex.

[12] Apotex proposes that because of the business relationship between Allergan and HRA, Allergan should be required to use best efforts to obtain the attendance of Dr. Gainer or another appropriate HRA witness for discovery. Allergan argues that it has no such obligations under the *Federal Court Rules* or the *PMNOC Regulations*.

[13] In correspondence between Allergan and Apotex at the beginning of March 2020, Allergan advised that it did not have control over the HRA inventors. Allergan indicated that it had made inquiries of HRA as to whether they would make any inventors employed at the company available for discovery but that HRA had not committed to doing this.

[14] Until only recently, Allergan did not have any contact with the inventors. At the hearing of the motion, counsel for Allergan was asked about the status of the inquiries it had made and its knowledge as to whether Dr. Gainer or anyone from HRA would be willing to attend for discovery by Apotex. I understand from the comments made that while counsel could not speak formally on behalf of HRA, it was his belief that HRA's inventor Dr. Gainer may be willing to voluntarily attend. To date, Apotex has made no formal inquiries of its own to seek attendance of any of the inventors or of HRA for discovery.

[15] Separately, Allergan has also proposed a process for discovery whereby Apotex could provide written discovery questions intended for HRA to Allergan, which Allergan would then provide to HRA. When Allergan receives HRA's written answers, it proposes it would give those answers back to Apotex. Apotex does not consider this proposal satisfactory and argues that it seeks to deprive Apotex of oral discovery. It asserts that this proposal supports the close relationship between Allergan and HRA and is an admission that Allergan would be required to make inquires of HRA as part of its own discovery obligations.

Apotex's Request for Discovery of Dr. Gainer and/or an HRA Witness with Knowledge

[16] Rules 234 to 248 of the *Federal Court Rules* set out the rules relating to examinations for discovery. These rules provide that each party has the right to examine a representative of each adverse party for discovery (rule 236). Each corporate party has the right to choose their own representative (rule 237(1)). Where the representative does not have sufficient information of their own, they are required to inform themself in advance of the examination by making inquiries of present or former employees of the corporation (rule 241).

[17] In the case of a patent action, the defendant also has the right to examine any assignors of the patent under rule 237(4). Where an inventor is no longer in the control of the plaintiff, but where a relationship still exists, it is common for the plaintiff to make a request to determine if the inventor will voluntarily attend for discovery. Where an inventor is no longer an employee and does not voluntarily attend for discovery, a defendant may seek to compel attendance at discovery, including by seeking letters of request and a commission, under rules 90(2) and 272, if the inventor resides outside of Canada.

[18] In the context of proceedings under the *PMNOC Regulations* parties are expected to act diligently in carrying out their obligations under the *Regulations* and cooperatively in expediting the proceedings (section 6.09). It is understood that cooperation between the plaintiff and defendant will be required as it relates to information sought from inventors. Indeed, under the *PMNOC Regulations* provisions are included that allow for requests to be made as early as the notice of allegation for documents relating to the development of the invention, for the name and contact information of any inventor who might have information relevant to the allegation, and for an indication as to whether the inventor is an employee of the first person or of the patent owner (section 5(3.1)). The first person is also required to forward a copy of the notice of allegation along with any request made under section 5(3.1) to the patent owner within five days of service of the notice of allegation (section 5(3.3)). It is implicit from these provisions that the intention is to facilitate and expedite access to relevant evidence (*Regulatory Impact Analysis Statement – Canada Gazette – Regulations Amending the Patented Medicines (Notice of Compliance) Regulations*, 2017, page 20) and to provide a means early-on to facilitate contact with inventors for the purpose of obtaining relevant documents and information.

[19] In the circumstances of this case, while the obligations under section 5(3.1) have been complied with by Allergan, information arising from inquiries made under section 5(3.1) has been slow and information relating to the inventors not fully complete. Allergan has indicated that it does not have any information relating to the development of the inventions of the 254 and 084 Patents. However, it is clear that relevant information relating to the development of the inventions of the 254 and 084 Patents is within the knowledge of HRA and its inventors.

[20] Allergan has admitted to the Court that it has a business relationship with HRA. Indeed, documents from HRA have recently been produced to Apotex through Allergan. Further, Allergan proposes a method of interrogatories that would have Apotex ask questions of HRA through Allergan in order to make further inquiries on these documents and on the development of the inventions. These steps in my view are an indication of a close commercial relationship where requests for information may be made and honoured.

[21] In light of the stakes at play and the issues that are pending, I agree with Apotex that it is reasonable to seek to have an inventor who is knowledgeable about HRA's development documents attend on examination for discovery to answer questions relating to the documents. Apotex should not be required to limit its discovery to Allergan's proposal to conduct their examination in writing through Allergan.

[22] Further, when asked, Allergan acknowledged to the Court that Dr. Gainer may be willing to attend a discovery to be examined by Apotex, while it could not formally confirm such participation. Allergan argues that the onus for making inquiries lies with Apotex; however, in these circumstances there is a more practical solution.

[23] Where it is clear that a commercial relationship exists and that the formal requirements to obtain discovery of an inventor in Europe could be avoided, the most practical solution, in line with rule 3 of the *Federal Court Rules* and section 6.09 of the *PMNOC Regulations,* is for Allergan to use its best efforts to obtain the participation of Dr. Gainer or another HRA witness with knowledge. As stated in *Eli Lilly* v. *Apotex Inc*., [2000] F.C.J. No. 154 (F.C.) at para 5:

"where one may reasonably expect, because of a relationship existing between a party and some third party, that a request for information will be honoured. It is proper to require that party to make a request." While this statement was made in the context of a request for the production of documents relating to the process by which an offshore supplier manufactured bulk drug product, and not to the examination of a party, the same logic would still apply.

[24] In view of the business relationship between Allergan and HRA and the cooperation already provided to Allergan to date, I agree with Apotex that there is an expectation that if Allergan requests cooperation from HRA and Dr. Gainer that they may accede. Allergan should use its best efforts to work cooperatively with Apotex to request that Dr. Gainer (or another HRA employee or former employee with knowledge of the development works relating to the 254 and 084 Patents) attend by an agreeable means (e.g. by video) for an examination by Apotex and should provide Apotex and the Court with confirmation of the details of its inquiries and of the responses received.

[25] If such efforts prove to be unsuccessful, it will then be up to Apotex to take whatever formal steps it may wish to take to compel discovery. In such circumstance, Apotex argues that Allergan should be foreclosed from relying on any evidence from HRA's inventors at trial. It relies on the following statements made by Justice Rouleau in *Elders Grain Company Limited* v. "M/V Ralph Misener" *(The)*, [2000] F.C. J. No. 1862 at para 16, 17, 21 ("*Elders Grain*"), a case dealing with an uncooperative discovery representative on behalf of the plaintiff, as support for this proposition:

> [16] It is obvious to me that counsel are responsible to provide a person on behalf of the plaintiff companies to attend a provide

> answers on discovery. To suggest that she is not bound to answer the questions and if unable to do so, has no obligation to inform herself. The fact that she must be away from work would cause an onerous situation for her or the plaintiffs' counsel does not excuse the failure to provide answers to questions and produce some insight to the undertakings.
>
> [17] To suggest that she may testify at trial is even more ludicrous. If she is to be available at trial for the plaintiffs she or someone else should have been made available for the discovery to which the defendants are entitled under the rules.
>
> …
>
> [21] This Court will not entertain a trial by ambush.

[26] I agree with Allergan that the facts relating to the *Elders Grain* case are not consistent with the facts here, as the comments made are in respect of the plaintiff's obligation to provide an informed discovery representative and whether in the absence of their participation, they could still attend at trial. In this case, there is no obligation on Allergan to provide a discovery representative from HRA. However, there is an obligation to co-operate to try to facilitate and proceed with discovery and I agree with Apotex that some safeguards should be in place to ensure that there are no surprises to Apotex at trial from the inquiries made now.

[27] It is expected that Allergan will be asked questions on discovery relating to its knowledge, information and belief regarding the facts relating to the development work leading to the purported inventions of the 254 and 084 Patents. As such, Allergan will maintain a continuing obligation to correct those answers should it become further informed. This would include any further knowledge or information it may obtain from the inventors of the patents if such information becomes available (rule 245). This obligation arises from the rules and need not be ordered.

[28] In addition, if Allergan proposes to call any of the inventors at trial, I will order that such intention be communicated to Apotex as soon as the decision is made and in any event, before the scheduled date for completion of all discovery. Apotex may then seek to obtain any further contact information for such inventors to conduct their own examination and the matter can be dealt with further in case management.

Apotex's Request Regarding the Use of any Discovery of Dr. Gainer or an HRA Witness

[29] Apotex requests that it be granted an order now that would hold the information from any discovery of Dr. Gainer or an HRA witness to be the information of Allergan. As set out below, such order is premature and beyond the rules of the court.

[30] It is uncontested that Allergan is required to provide its knowledge, information and belief regarding the development of the invention as part of discovery. Allergan has indicated on its Form IV document that it has the consent of HRA to list the 245 and 084 Patents on the Patent Register and has asserted in its Reply that it is a proper "first person" for the purposes of this action. Allergan has admitted that it has a business relationship with HRA. It is through that relationship that HRA that Allergan has provided HRA's documents in this proceeding.

[31] Where a party has a commercial relationship with a third party that is known to have relevant information, and where it is in the interests of justice, a Court may also require that inquiries be made of a third party for relevant information on discovery: *Michelin North America*

v. *9130-4550 Quebec*, 2008 FC 1101 at paras 20-22; *Oceanex* v. *Praxair Canada*, 2010 FC 798 at para 10-12.

[32] In view of the relationship between Allergan and HRA, it is reasonable to expect that Allergan would have the ability to make reasonable inquiries of HRA regarding information relating to the development of the invention as part of the discovery process, particularly as Allergan has advised Apotex that HRA would have that information. Indeed, Allergan has proposed that Apotex provide its inquiries of HRA in advance of the discovery and that Allergan will obtain written responses from HRA for those questions. Apotex argues that by this offer, Allergan has acknowledged an obligation to make inquiries of HRA. Apotex contends that its proposal seeks to accomplish the same objective but to do this through oral discovery of HRA.

[33] However, the proposal is more nuanced. The proposal requests an order be granted now that would hold the information from any discovery of and HRA witness to be the information of Allergan.

[34] As the information is not Allergan's own evidence, there is no basis to order that Allergan be bound to HRA's information or to require Allergan to agree to the information outright. The rules relating to hearsay prohibit this suggestion. Unless a party agrees to adopt statements as their own information, admissions obtained on examination for discovery can only be used against the party who made the admission, not against any other party, whether on the same side or not: *Dennison Mfg. Co*. v. *Dymo of Can. Ltd*. (1975), 23 C.P.R. 92d) 155 at para 19.

Indeed, as noted by Allergan, Apotex provides no support for its proposition from any rules relating to discovery or from jurisprudence.

[35] Apotex's proposal also goes one step further. It extends not just to HRA but also to Dr. Gainer, who is no longer an employee of HRA. Essentially, Apotex is seeking to have all information of Dr. Gainer deemed to be the knowledge of Allergan such that Allergan would not be able to present any contrary evidence to that information at trial.

[36] Rule 288 of the *Federal Courts Rules* states that:

> A party may introduce as its own evidence at trial any part of its examination for discovery of an adverse party or of a person examined on behalf of an adverse party, whether or not the adverse party or person has already testified.

[37] Dr. Gainer is not an adverse party, but rather an assignor. Her evidence would therefore be that of a non-party: *Eli Lilly and Co*. v. *Apotex Inc*., [2006] 4 F.C.R. 104 at par 15. It is well-established that the examination of an assignor is more limited than that of an adverse party. Its purpose is for providing information and possible lines of inquiry, and to allow the examining party to use the transcript of the examination to impeach the assignor should they be called as a witness for trial: *Faulding (Canada) Inc*. v. *Pharmacia S.P.A.* 1999 CanLII 7940 at para 4; *Richter Gedeon Vegyeszeti Gyar Rt* v. *Merck & Co*.., 1995 CanLII 3514 at p. 18. It represents the evidence of that assignor and cannot be used to bind an adverse party unless it is adopted by that adverse party as its own evidence by agreement.

[38] Apotex contends that it is not seeking to bind Allergan, but rather to ask for an admission as to what Allergan was told by the inventor regarding the questions asked about the development story so that a different story cannot be told at trial. In my view, this is a distinction without any meaningful difference. The end result of what Apotex proposes is that Allergan cannot put forward any evidence at trial relating to the development of the invention that is contrary to the information of the inventors examined for discovery.

[39] Apotex argues that such an order promotes efficiency and removes the possibility of ambush at trial. It relies on rules 3, 55 and 385 of the *Federal Courts Rules* and the principles of case management as its support for the request.

[40] However, these Rules do not provide a case management judge with the authority to overrule the rules of discovery. As stated in *Apotex Inc*. v. *Bayer Inc. et al*, 2020 FCA 86 at para 40:

> The Regulations thus provide for the case management of any action commenced under subsection 6(1), and the Rules provide the case management judge or prothonotary with discretion to make any order for the just, most expeditious and least expensive determination of proceedings. However, the question remains how exactly the powers granted to a Case Management Judge under Rule 385(1) are to be exercised. In considering the exercise of his or her powers, a Case Management Judge must remain cognizant of Rule 55, which provides that, only in special circumstances may the Court "vary a rule or dispense with compliance with a rule".

[41] The rules of discovery are grounded in the principles of evidence. They cannot be subordinated for expedition: *Apotex Inc*. v. *Bayer Inc*. *supra* at para 42, referring to *Apotex Inc. v. Merck & Co.*, 2003 FCA 438. I agree with Allergan that to grant the order requested now

would be unfair and prejudicial. In this case, there are no such special circumstances that would allow the Court to vary the inherit rules of discovery, particularly where there are other options available to Apotex.

[42] As proposed by Allergan, once any examination of Dr. Gainer or an HRA witness is concluded and the transcript obtained, Apotex could identify appropriate passages to ask Allergan if has any further or other knowledge, information or belief regarding the answers given. If not, Apotex could then ask whether Allergan would be prepared to adopt the relevant evidence as its own knowledge, information or belief, or to come to some agreement as to the facts relating to HRA's involvement in the development of the invention either by an agreed statement of facts or a fact stipulation. If agreed to, this could provide a way, by agreement, for the parties to streamline the evidence at trial or, in the negative, lay the foundation for a request for commission evidence. In contrast, if Allergan had further information beyond the evidence of HRA, Apotex would be able to explore this further as part of the discovery process.

[43] Further, any transcript of the cross-examination of Dr. Gainer would be able to be used to impeach Dr. Gainer if she were called as a witness at trial and could be use for its information to plan for cross-examination of any other inventor who might appear as witness.

[44] In this case, the rules of the Court and principles of discovery do not support an order for the further relief requested.

Apotex's Request Regarding the Use of the USA Transcript at Trial

[45] In the case of the USA, they are already an active party to the litigation and have agreed to make a representative for the USA as well as the inventor Dr. Nieman available for discovery. Apotex requests an order that Allergan would be held to the discovery information arising from these examinations. Apotex again analogizes this to the offer made by Allergan relating to HRA. It requests that questions that are asked of USA be deemed to be those that Apotex would put in writing to provide to USA and that the answers be deemed to be those that Allergan would receive in writing from USA and deemed to be Allergan's answers regarding its knowledge. The proposal assumes that Allergan would be required to make inquiries of USA and Dr. Nieman based on a relationship between USA and Allergan. Notwithstanding that this assumption would need to be established through evidence on discovery, and thus at this stage is premature, for the same reasons discussed with respect to the request relating to HRA, this request runs contrary to the principles of discovery and Allergan cannot be ordered to be bound in this manner without agreement.

[46] The USA is a separate party from Allergan. Further, Dr. Nieman is being examined under Rule 237(4) as an assignor of the patent rights relating to the 254 Patent. As noted above, the evidence of an inventor is that of a non-party and is limited to providing information and possible lines of inquiry, and for allowing the examining party to use the transcript of the examination to impeach the assignor should they be called as a witness for trial: *Faulding supra* at para 4; *Richter Gedeon supra* at p. 18. Absent an agreement that this information is consistent with Allergan's knowledge, the rules do not permit the Court to order what Apotex is requesting.

[47] Apotex can read-in evidence from the discovery of the USA as against the USA at trial and if the USA agrees to adopt the evidence of Dr. Nieman (an employee of the USA) as its own, could also read-in that evidence as against the USA. However, as this is not the evidence of Allergan, it cannot bind Allergan to such evidence, without Allergan's agreement.

[48] Once the discovery of the USA and Dr. Nieman have been completed Apotex is free to identify the appropriate passages to ask Allergan as to whether it has any knowledge, information and belief about the development events beyond or contrary to what the USA and Dr. Nieman have disclosed. If not, as set out in the discussion regarding HRA, this may form a basis for an agreement by Allergan to adopt this information as its knowledge or form the basis for an agreed statement of facts, or a fact stipulation relating to this evidence which could help to streamline the trial.

[49] If Allergan does have knowledge, information or belief beyond the passages identified, Apotex would be entitled to explore this further as part of the discovery process.

[50] There is no basis in the *Rules* or the principles of discovery to require Allergan to be bound to this evidence upfront or to consider this evidence before any discovery has taken place and without any knowledge of the questions and answers provided.

Apotex's Request for a Further and Better Affidavit of Documents

[51] Rule 223 of the *Federal Courts Rules* provides that every party to an action must serve an affidavit of documents that lists and describes every relevant document that is or once was in the

party's possession, power or control. Where the list of documents in an affidavit of documents are deficient, and further relevant documents in the power, possession or control of the party exist, the Court may order that an accurate or more complete affidavit of documents be served and filed: Rule 226; *Apotex Inc*. v. *Sanofi-Aventis*, 2010 FC 77; *NOCO Company Inc*. v. *SBI Smart Brands International (America) Ltd*., 2018 FCA 857 at para 11.

[52] I agree with Apotex, the affidavits of documents provided by Allergan are minimal and deficient in at least the two categories noted by Apotex: 1) documents relating to the relationship between Allergan and HRA; and 2) the HRA development documents.

[53] Documents relating to the contractual or corporate relationship between Allergan and HRA for the medicine in issue (ulipristal acetate) or the 254 or 084 Patents, and documents and communications relating to HRA's participation or lack of participation in these actions, are relevant to issues relating to the availability of HRA evidence for discovery and trial, and to the issue of standing. They should be included in Allergan's affidavit of documents. Any issue of confidentiality relating to contractual agreements can be dealt with by the confidentiality/solicitor's eyes only provisions of the parties' protective agreement.

[54] Further, the affidavit of documents does not include the HRA documents that have now come into the possession and control of Allergan. Allergan has admitted to obtaining a database of documents from HRA. They have also admitted to exercising control over such documents by reviewing the documents for relevance. Apotex should be permitted to ask Allergan questions

about this review process. Such documents should be included in Allergan's affidavit of documents.

Costs

[55] For the reasons set out above, I consider the motion to be of divided success. I will therefore not make any award as to costs.

ORDER in T-1315-19 and T-1316-19

THIS COURT ORDERS that:

1. Allergan shall co-operate with Apotex to use its best efforts to discern whether Dr. Gainer or another knowledgeable HRA witness will voluntarily agree to be examined for discovery by Apotex. The parties shall report further to the Court on these efforts within two (2) weeks of the date of this Order.

2. If Allergan proposes to call any of the inventors who are or were associated with HRA at trial, such intention shall be communicated to Apotex as soon as the decision is made and in any event, before the scheduled date for completion of all discovery.

3. Allergan shall update its affidavit of documents and productions to include: a) all corporate and contractual documents relating to the relationship between Allergan and HRA as it relates to ulipristal acetate or the 254 or 084 Patents; b) documents and communications relating to HRA's participation, or lack of participation, in these actions; c) and all relevant documents that have come into Allergan's possession and control from HRA.

4. A revised affidavit of documents shall be provided to Apotex within ten (10) days of the date of this Order.

5. The balance of the relief sought by Apotex is dismissed.

6. There shall be no award as to costs.

"Angela Furlanetto"

Case Management Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS:	T-1315-19 and T-1316-19
STYLE OF CAUSE:	ALLERGAN INC. v. APOTEX INC. AND LABORATOIRE HRA-PHARMA AND THE UNITED STATES OF AMERICA AS REPRESENTED BY THE SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES ALLERGAN INC. v. APOTEX INC. AND LABORATOIRE HRA-PHARMA
PLACE OF HEARING:	TORONTO, ONTARIO
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DATED:	JUNE 1, 2020

APPEARANCES:

Andrew Brodkin Richard Naiberg	FOR THE DEFENDANT
Steve Tanner	FOR THE PLAINTIFF
Marc Crandall	FOR THE DEFENDANT USA/PATENT OWNER

SOLICITORS OF RECORD:

Goodmans LLP Toronto, Ontario	FOR THE DEFENDANT
McCarthy Tetrault LLP Toronto, Ontario	FOR THE PLAINTIFF
Gowling WLG Ottawa, Ontario	FOR THE DEFENDANT USA/PATENT OWNER