

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

HOUSEY PHARMACEUTICALS, INC.,            )  
  )  
  Plaintiff,                                    )  
  )  
  v.    ) Civil Action No. 01-401-SLR  
  )  
ABBOTT PHARMACEUTICAL CORP.,            )  
et al.,    )  
  )  
  Defendants.                                    )

**MEMORANDUM ORDER**

**I. INTRODUCTION**

Plaintiff Housey Pharmaceuticals, Inc. filed this action on June 14, 2001 charging defendants Otsuka America Pharmaceutical, Inc. and Otsuka Maryland Research Institute, L.L.C. ("the Otsuka defendants"), among others, with infringement of four patents.<sup>1</sup>

(D.I. 4) The court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338(a) and 2201(a).

After receiving the complaint, the Otsuka defendants moved to dismiss the complaint and stay discovery, and filed contention interrogatories asking plaintiff to explain the basis for its claim of infringement. (D.I. 116, 170) Defendants alleged plaintiff had no basis for bringing suit against the Otsuka defendants. On June 20, 2002, this court granted in part the

---

<sup>1</sup>Defendant Housey Pharmaceuticals, Inc. recently changed its name from ICT Pharmaceuticals, Inc. The patents in suit are United States Patent Nos. 4,980,281, 5,266,464, 5,688,655 and 5,877,007 (collectively, the "ICT patents").

Otsuka defendants' motion. (D.I. 205) The court required plaintiff to either amend its complaint or answer pending interrogatories "to provide more than conclusory allegations of infringement" on or before July 8, 2002. (Id.) The court also stayed discovery as to the Otsuka defendants. (Id.) Plaintiff chose to answer the pending interrogatories. The Otsuka defendants continue to believe plaintiff had no basis for bringing this suit. Currently before the court is the Otsuka defendants' rule 11 motion requesting dismissal of the complaint and sanctions and plaintiff's motion to lift the stay of discovery. (D.I. 287, 263) For the following reasons, the court shall deny defendants' motion and grant plaintiff's motion.

## **II. DISCUSSION**

In response to this court's June 20, 2002 order, plaintiff chose to answer pending interrogatories "to provide more than conclusory allegations of infringement." Plaintiff filed a supplemental response to defendants' first set of interrogatories on July 8, 2002 and, in response to defendants' initial rule 11 motion,<sup>2</sup> a second supplemental response to defendants' first set of interrogatories on August 23, 2002. (D.I. 324, Exs. B, C) Plaintiff's interrogatory answers provided a claim chart

---

<sup>2</sup>In accordance with the "safe harbor" provisions of rule 11, the Otsuka defendants' initial rule 11 motion was provided to plaintiff but not filed with the court. After the 21-day safe harbor time period elapsed, the Otsuka defendants' filed the amended rule 11 motion currently before the court.

comparing the claims of the asserted patents to two articles published by Otsuka's scientists.<sup>3</sup> (Id.)

The Otsuka defendants argue that the claim charts are not sufficient to satisfy this court's June 20, 2002 order. Defendants assert that the articles relied upon do not show infringing activity. The articles only discuss "a type of assay Dr. Housey expressly told the U.S. Patent and Trademark Office ("PTO") is distinct from his claimed invention." (D.I. 288 at 4)

As plaintiff correctly notes, determining whether the articles discuss a type of assay disclaimed during prosecution would require this court to conduct an infringement analysis or, at the least, a claim construction analysis including a review of the prosecution history. The court declines to conduct such an analysis for purposes of a rule 11 motion. The court finds that plaintiff's claim construction charts relying on published articles by Otsuka scientists demonstrate sufficient factual support for an allegation of infringement and further discovery. The court finds that plaintiff's interrogatory responses are

---

<sup>3</sup>The articles relied on by plaintiff to show infringement are: 1) Sun B, Li J, Okahara K, Kambayashi J., P2X1 Purinoceptor in Human Platelets. Molecular Cloning and Functional Characterization After Heterologous Expression, J Biol Chem May 8; 273(19):11544-11547 (1998) ("Sun I"); and 2) Sun B, Lockeyer S, Li J, Chen R, Yoshitake M, Kambayashi JI, OPC-28326, A Selective Femoral Vasodilator, Is An Alpha2C-Adrenoceptor-Selective Antagonist, J Pharmacol Exp Ther Nov; 299(2):652-658 (2001) ("Sun II").

sufficient to satisfy this court's June 20, 2002 order.<sup>4</sup>

Accordingly, the court denies defendants' rule 11 motion and grants plaintiff's motion to lift the stay of discovery.

---

<sup>4</sup>The court notes that the Otsuka defendants argue that plaintiff failed to comply with the court's order because their first set of interrogatory responses relied upon the Sun II article which post-dated the complaint. The court's June 20, 2002 order did not, however, address Otsuka's current rule 11 motion that plaintiff had no basis for filing its complaint. Rather, the court was presented with a motion to dismiss and required plaintiff to amend its complaint or answer interrogatories "to provide more than conclusory allegations of infringement." The court did not require plaintiff to provide facts known before the filing of the complaint. In addition, although after the court's deadline, plaintiff did provide a basis for the complaint using the Sun I article which pre-dated the complaint.

### III. CONCLUSION

At Wilmington this 20th day of November, 2002, having reviewed defendants' rule 11 motion and the papers submitted in connection therewith;

IT IS ORDERED that:

1. Defendants' rule 11 motion (D.I. 287) is denied.
2. Plaintiff's motion to lift the stay of discovery (D.I. 263) is granted.

Sue L. Robinson  
United States District Judge