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DNJ Court Denies Motion to Amend Invalidity and Non-Infringement Contentions Citing Lack of Diligence

In [*IBSA Institut Biochimique SA v. Accord Healthcare, Inc.*](#), the United States District Court for the District of New Jersey recently denied Accord Healthcare, Inc.'s ("Accord") motion seeking leave to amend its Invalidity and Non-Infringement Contentions, finding that Accord did not establish the diligence required to support its motion. The case is a Hatch-Waxman litigation involving several patents covering IBSA's Tirosint® product, which is used for the treatment of hypothyroidism.

Motions to amend contentions require a showing of good cause under Local Patent Rule 3.7. In considering Accord's motion, the court noted that diligence is the "key factor" that it considers when deciding a motion to amend contentions. And, courts must consider both whether the party seeking to amend was diligent in moving to amend upon discovery of new prior art *and* whether the party was diligent in discovering the basis for the proposed amendment.

With respect to Accord's motion to amend its invalidity contentions, the court did not dispute that Accord was diligent in moving to amend upon the discovery of new prior art. But, the court did find that Accord was not diligent in discovering the bases for its proposed amendments, which were based on references that were publicly available and readily accessible to Accord for a significant amount of time before Accord filed its motion.

The court also found that Accord's motion to amend its infringement contentions to add an additional sentence based on the parties' differing constructions and the court's *Markman* Order lacked the requisite diligence. Notably, Accord did not provide any explanation for the diligence justifying its proposed amendment and improperly attempted to treat the court's *Markman* decision as a "free pass" for an amendment.

The court also addressed the issues of delay and undue prejudice, even though it did not have to consider those factors after finding

Accord's motion lacked diligence. The court noted that the case was "no longer in its early stages" and that the proposed amendments would "inject[] additional issues" into the case that would delay and complicate the matter.

Thus, parties seeking to amend contentions under the District of New Jersey's Local Patent Rules must be careful to address both prongs of the diligence factor in motions seeking amendments based on "recently discovered" prior art.

FBT Gibbons will continue to monitor and report developments in patent litigation in the District of New Jersey.

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