

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
(609) 989-2040

CHAMBERS OF
TONIANNE J. BONGIOVANNI
UNITED STATES MAGISTRATE JUDGE

U.S. COURTHOUSE
402 E. STATE STREET, RM 6052
TRENTON, NJ 08608

March 7, 2012

LETTER ORDER

**Re: SCHERING CORP. V. APOTEX INC., et al.
Civil Action No. 09-6373 (PGS)**

Dear Counsel:

Currently before the Court is Plaintiff Schering's informal request that the Court sanction Defendant Apotex for its alleged spoliation of relevant evidence. As explained in more detail below, Schering's request for sanctions is Denied because it is untimely.

On October 21, 2011, Apotex served the expert report of Dr. Springarn upon Schering. By letter dated October 27, 2011, Schering notified Apotex of its belief that relevant information was omitted from Dr. Springarn's report. *Schering's Letter dated February 15, 2012*, at 2; *Schering's Letter to Yixin Tang dated October 27, 2011* (Attached to *Schering's February 15, 2012 Letter* as Ex. C), at 2. The following day, Apotex responded, essentially, that no other information was forthcoming since Dr. Springarn "did not save any spectra, in any form, during the brief survey" nor did he save the slides he analyzed. *Apotex's letter to Audrey Maness dated October 28, 2011* (Attached to *Schering's February 15, 2012 Letter* as Ex. D), at 1. Schering fails to adequately explain why it waited four months, and until the eve of trial, to bring this alleged spoliation to the attention of the Court.

Matters of docket control and conduct of discovery are committed to the sound discretion of the Court. *In re Fine Paper Antitrust Litigation*, 685 F.2d 810 (C.A.Pa.1982). Also, the Court has broad discretion to control the method and timing of discovery. FED R. CIV. P. 26(b). Given the nature of the case and the impact of the 30 month stay, which has been a significant factor in setting deadlines in this case, as well as a major impetus in the formulation of Local Patent Rules in general, Schering's delay in notifying the Court of this issue is significant. In cases such as this, time certainly is of the essence. The parties are now one month from trial and two months from the expiration of the 30 month stay. Influencing the Court's determination is the fact that this issue was not one over which the parties were engaged in the "meet and confer" process. In fact, a discussion of whether the information sought should have been produced would be fruitless given that the expert did not save the information sought by Schering. The Court, therefore declines at this late stage in the proceedings, to impose sanctions upon Apotex based upon the expert's alleged spoliation of information. Schering may, however, address the significance of the missing information at the time of trial through direct and cross examination of the experts.

IT IS SO ORDERED.

s/ Tonianne J. Bongiovanni
TONIANNE J. BONGIOVANNI
United States Magistrate Judge