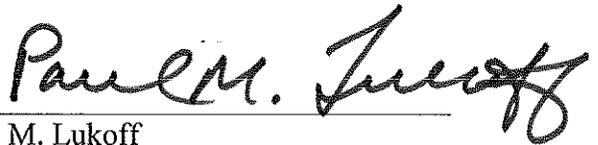


2013 Oral Order, which resolved against them plaintiffs' work product concerns about a test conducted at in-house counsel's behest.

I now find, however, that a focus only on whether the materials are "technically" the same or not misses the mark. Putting aside that plaintiffs' submission may provide a plausible explanation for how the tested materials might have been materially different than what was deposited in ATCC, this is not the time for a decision on whether they were the same or not. That issue, in fact, may be for the trier of fact. The Court's Oral Order required disclosure of test results of ATCC 55370. Plaintiffs concede that "'tests of ATCC 55370' includes tests of that material coming from the ATCC or material that is the *same* as what was lodged with the ATCC." How can we know if the 2011 testing was of materials which were the same as those deposited with ATCC unless plaintiffs' contention is subjected to adversarial scrutiny? For discovery purposes, where the defendant has had no opportunity to obtain samples of the University's deposit at the ATCC to test, hasn't the defendant satisfied the provisions of Rule 26(b)(3)(A)(ii) in a case where the efficacy of a patent based on a biological deposit is at issue?

Under the circumstances, I remain convinced, consistent with the liberal approach to discovery envisioned by Rule 26, that plaintiffs must produce the results of the 2011 testing.



Paul M. Lukoff
Special Master

Dated: April 24, 2013