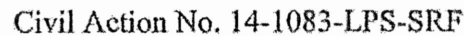
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UCB, INC., UCB MANUFACTURING IRELAND LIMITED, UCB PHARMA GMBH, and LTS LOHMANN THERAPIE-SYSTEME AG,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 14-1083-LPS-SRF 
WATSON LABORATORIES, INC. and ACTAVIS LABORATORIES UT, INC.,	:	
Defendants.	:	

MEMORANDUM ORDER

1. Defendants Watson Laboratories, Inc. and Actavis Laboratories UT, Inc. ("Defendants") move for reargument of the Court's December 5, 2016 Order (D.I. 154), in which the Court denied Plaintiffs UCB, Inc. et al's ("Plaintiffs") request for a stay, but ordered Defendants liable for the costs of litigation from that point forward if either (a) their ANDA is rejected due to the "major deficiencies" cited by the FDA or (b) they change the ANDA formulation contrary to repeated representations to the Court that no such alteration is required.

2. Pursuant to Local Rule 7.1.5, a motion for reargument should be granted only "sparingly." The decision to grant such a motion lies squarely within the discretion of the district court. *See Dentsply Int'l, Inc. v. Kerr Mfg. Co.*, 42 F. Supp. 2d 385, 419 (D. Del. 1999); *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1241 (D. Del. 1990). These types of motions should be granted only if the Court has patently misunderstood a party, made a decision outside the adversarial issues presented by the parties, or made an error not of reasoning but of apprehension. *See Schering Corp. v. Amgen, Inc.*, 25 F. Supp. 2d 293, 295 (D. Del. 1998); *Brambles*, 735 F.

Supp. at 1241. A motion for reargument should be granted only if the movant can show at least one of the following: (i) an intervening change in controlling law; (ii) the availability of new evidence not available when the court made its decision; or (iii) the need to correct a clear error of law or fact to prevent manifest injustice. *See Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). However, in no instance should reargument be granted if it would not result in amendment of an order. *See Schering Corp.*, 25 F. Supp. 2d at 295.

3. For the following reasons, Defendants' motion (D.I. 155) is DENIED.

4. As an initial matter, it appears that Defendants failed to comply with their obligation to meet and confer with Plaintiffs before filing their motion. *See* D. Del. LR 7.1.1. Plaintiffs assert that there was no meet and confer (*see* D.I. 166 at 7) and there is no contrary indication in the record before the Court. For reasons Plaintiffs explain (*see id.* at 7, 10), a meet and confer could have at least narrowed the parties' dispute – for example, with respect to certain ambiguities Defendants find in the Court's order – and could possibly have eliminated the need for any motion altogether. Defendants' failure to meet and confer is an independent and sufficient basis on which to deny the relief they seek.

5. Additionally, Defendants have not met their burden to demonstrate that reargument of the Court's order is appropriate. They point to no change in the controlling law and no new evidence. Their contentions that the Court made a decision outside of the issues presented by the parties, committed a clear error of law, and created manifest injustice are incorrect.

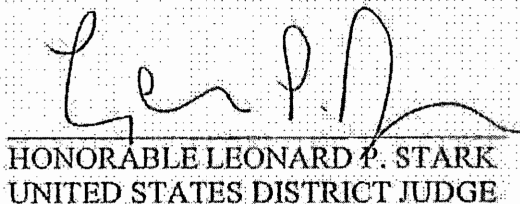
A. Defendants argue that shifting litigation costs was not requested by Plaintiffs or briefed by the parties and, therefore, such an award is "outside the adversarial issues"

presented by the parties. (D.I. 155 at 4) The Court disagrees. In considering whether to grant Plaintiffs' request for a stay, the Court weighed the prejudices to both parties. One such prejudice is continuing litigation based on an ANDA formulation that could ultimately change, resulting in unnecessary litigation expenses. (Compared to other Hatch-Waxman cases, the instant case presents heightened uncertainty surrounding the ANDA formulation due to [REDACTED] [REDACTED]) The Court therefore balanced the concerns of continuing litigation in light of such increased uncertainty by denying a stay, but cautioning Defendants that they proceed at their own risk, and allocating costs accordingly. Weighing these competing concerns, and crafting a response to them, was within the scope of the issues presented by the parties.

B. Defendants assert that reargument is necessary to "correct manifest errors of law" based on their view that there is no legal basis for the Court's contingent imposition of costs. (D.I. 155 at 4) Defendants discuss four potential authorities – 35 U.S.C. § 285, 28 U.S.C. § 1927, Federal Rules of Civil Procedure 26 and 37, and the Court's inherent power. (*Id.* at 5-7) The Court need not decide if there are multiple bases for its prior order as it is sufficient to hold that the Court's inherent authority provides at least one proper basis. The Court may exercise its inherent power to assess costs when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991). In addition, the Court has inherent power to manage its own docket and "consider and take appropriate action to facilitate the just, speedy, and inexpensive disposition of all matters before them." *Greatbatch Ltd. v. AVX Corp.*, 179 F. Supp. 3d 370, 380 (D. Del. 2016) (internal quotation marks omitted). Here, Defendants have represented to the Court that, in response to the [REDACTED], they

anticipate submitting a response [redacted], the same month that trial is scheduled to begin. (D.I. 194 at 14, 23) Therefore, it is entirely possible that after trial begins (and potentially, after trial has concluded), Defendants' ANDA formulation could change. If such events were to transpire, litigation may be disrupted; a new formulation, which could impact the parties' dispute as to infringement, would multiply proceedings and impose duplicative costs on Plaintiffs. To reduce the risks of these unfortunate outcomes, and to manage its docket appropriately, the Court acted within its inherent authority to provide for contingent imposition of costs on Defendants.

C. Nor will the Court's prior order "lead to a manifest injustice." (D.I. 155 at 1) As Plaintiffs explain, "costs will be awarded only if Actavis's representations to the Court are not borne out." (D.I. 166 at 7) "The Court's Order does no more than make Actavis accountable for its representations regarding the approval process and its formulation – representations on which the Court relied . . . ." (*Id.* at 8) Contrary to Defendants' assertion, the circumstances here are not "unremarkable" (D.I. 155 at 8) but are, instead – in this Court's experience – unusual. As Plaintiffs observe, "the Court's Order was limited to the circumstances here, where there is evidence that even Actavis knows that it will have to change its product," yet has so far refused to do so. (D.I. 166 at 9) Since this case appears to be unrepresentative of Hatch-Waxman cases in general, Defendants' concerns that the Court's earlier Order will have "a chilling effect on access to the judicial system" or "defeat[] the objectives of the [Hatch-Waxman] Act" (D.I. 155 at 8) are unpersuasive.



May 19, 2017
Wilmington, Delaware

HONORABLE LEONARD P. STARK
UNITED STATES DISTRICT JUDGE