

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BAXALTA INCORPORATED, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 17-1316-RGA
	:	Consolidated
BAYER HEALTHCARE, LLC, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM ORDER

Defendant produced a two-page document (JIVIBAYER0884706), clawed it back, and Plaintiff sought its reproduction. The Magistrate Judge reviewed the document in camera. She then ordered its production. (D.I. 425). Defendant filed an objection (D.I. 432), to which Plaintiff responded. (D.I. 439).

In due course, I too ordered the *in camera* submission of the document at issue. (D.I. 486). Bayer duly submitted an unredacted version for *in camera* review. (D.I. 487). I reviewed it. It is part of a slide presentation, made by a non-lawyer. There is an unredacted heading – “Key Issues / risks & mitigations” – under which there are three bullet points, the first of which is “Patents.” Under that is the redacted portion, which states in full: “FTO and litigation. Mitigation: 2nd legal opinion pending (Q1 08).” In context, pretty clearly the risks are “FTO and litigation.” The mitigation is the pending second legal opinion.

It was Defendant’s burden to show that the attorney-client privilege applied, and Defendant did not do so. The author of the slide presentation, so far as I can tell, did not provide any testimony that would support a finding of attorney-client privilege. (D.I. 439 at 1, citing D.I.

409-1, Ex. 17 at 251, 253-55). The redacted information does not by itself show the substance of any attorney-client communications. Thus, I find that the Magistrate Judge's ruling is not clearly erroneous (which is the standard of review, according to Defendant (D.I. 432 at 3)).

I note Defendant's footnote objection to the admissibility of the unredacted version of the document (*Id.* at 5 n.1), and I specifically express no opinion on that issue.

Defendant is to reproduce the document today.

IT IS SO ORDERED this 15th day of July 2020.

/s/ Richard G. Andrews
United States District Judge