

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

EXELA PHARMA SCIENCES, LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 20-cv-365 (MN)
)	
ETON PHARMACEUTICALS, INC.,)	
)	
Defendant.)	

ORDER AFTER PRETRIAL CONFERENCE

AND NOW, this 4th day of March 2022, after a Pretrial Conference and upon consideration of the Proposed Pretrial Order (D.I. 179) and the discussion at the February 28, 2022 Pretrial Conference, IT IS HEREBY ORDERED that:

1. The Proposed Pretrial Order is **ADOPTED** as modified by any discussion at the Pretrial Conference. (*See* D.I. 183).
2. A bench trial will begin on Monday, March 14, 2022 at 8:30 a.m. Subsequent trial days will begin at 8:30 a.m. and generally will end at 6:00 p.m., although the end of the trial day may, at the discretion of the Court, be earlier or later than 6:00 p.m.
3. The trial will be timed. Each side is allowed up to ten (10) hours for its opening statement, direct and cross-examination of witnesses, closing arguments and argument of evidentiary issues. Each party shall reserve at least one (1) hour of its ten (10) hours for closing arguments. Time during the trial day that does not neatly fit into one of those categories will be attributed to one side or the other as the Court deems appropriate.
4. Issues that need to be addressed may be taken up at 8:00 a.m., during the lunch break, or at the end of the day. Those issues – including objections to anticipated exhibits or demonstratives – must be brought to the attention of the Court’s Judicial Administrator by 7:00

a.m. on the day on which the evidence objected to will be adduced. The objected to anticipated exhibits and/or demonstratives must be attached to the email sent to the Judicial Administrator with the objected to portions being highlighted, if possible. There will be at least thirty minutes for lunch as well as a fifteen-minute break in both the morning and the afternoon.

5. For the reasons stated at the Pretrial Conference, Plaintiff's first Motion *in Limine* (D.I. 179, Ex. 13) is DENIED, Plaintiff's second Motion *in Limine* is GRANTED-IN-PART and DENIED-IN-PART, and Plaintiff's third Motion *in Limine* is GRANTED. (See D.I. 183 at 4:8–9:13).

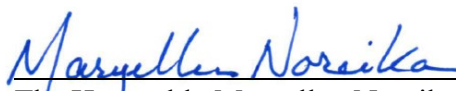
6. As explained at the Pretrial Conference, Defendant is precluded from raising a prior use defense under 35 U.S.C. § 273 at trial. Defendant did not raise the defense in any of its answers, and may not litigate a defense it raised for the first time on the eve of trial. Section 273 creates a defense to infringement for parties who commercially used the claimed invention at least one year prior to the claimed invention's filing date or date of disclosure. Because this defense was not timely disclosed, Plaintiff was not able to take discovery on the issue. Accordingly, the Court finds that the prejudice to Plaintiff from having to litigate a claim it was not able to conduct discovery on militates in favor of barring this defense from being tried.

7. As explained at the Pretrial Conference, the parties shall provide electronic copies of ALL trial exhibits to the Courtroom Deputy and Judicial Administrator by NOON on March 11, 2022. The trial exhibits must be labeled with JTX, DTX or PTX prefixes with exhibit numbers. Additionally, at the beginning of each trial day, the parties shall provide to the Courtroom Deputy and Judicial Administrator electronic copies of witness folders containing the exhibits and demonstratives (if any) to be used on direct examination and cross-examination of

any witnesses expected to be called that day. The parties need not exchange the cross-examination witness folders among themselves, they are to be provided to the Court only.

8. Counsel shall confer prior to trial to determine what testimony will be offered by deposition. If there are objections that remain to be resolved, the party calling the witness by deposition shall, no later than two (2) calendar days before the witness is to be called at trial, submit, on behalf of all parties: (i) A copy of the entire deposition testimony of the witness at issue, clearly highlighting the designations, counter-designations, and pending objections; and (ii) a cover letter clearly identifying the pending objections as well as a brief indication (i.e., no more than one sentence per objection) of the basis for the objection and the offering party's response to it. Failure to comply with these procedures, will result in waiver of the use of the deposition testimony or waiver of objection to the use of the deposition testimony depending on who has caused the failure to abide by the Court's rules.

9. Any trial logistics should be coordinated through the Courtroom Deputy.



The Honorable Maryellen Noreika
United States District Judge