

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ERAGEN BIOSCIENCES, INC.,
a Delaware corporation,

Plaintiff,

v.

NUCLEIC ACIDS LICENSING, LLC,
a Florida limited liability company and
STEVEN BENNER, an individual,

Defendants.

ORDER

06-C-305-C

Three motions for summary judgment have been filed in this civil action for alleged violation of a patent licensing agreement. On November 11, 2006, plaintiff Eragen Biosciences, Inc. filed its motion for summary judgment. Defendants Nucleic Acids Licensing, LLC and Steven Benner responded on December 13, 2006, filing a cross-motion in conjunction with their opposition to plaintiff's motion. On January 3, 2007, defendant Benner filed a second motion for summary judgment.

Now before the court is plaintiff's "Motion to Strike Defendant Steven A. Benner's Second Motion for Summary Judgment, Defendants' Amended Proposed Findings of Fact

in Support of Their First Motion for Summary Judgment, and the Second Affidavit of Craig Billings.” Because defendant Benner’s second motion for summary judgment was filed without prior leave of the court, as is required by the pretrial conference order, the motion will be stricken. Plaintiff’s motion to strike defendants’ amended proposed findings of fact will be denied because plaintiff will not be prejudiced by responding to the two amended facts contained in that document. Finally, plaintiff’s motion to strike the second affidavit of Craig Billings will be denied as unnecessary.

A. Defendant Benner’s Second Motion for Summary Judgment

The preliminary pretrial conference order, dkt. #10, at 3, states clearly that “[a] party may not file more than one motion for summary judgment in this case without leave of court.” On December 13, 2006, defendants Benner and Nucleic Acids Licensing filed a joint motion for summary judgment. Dkt. #46. On January 3, 2007, defendant Benner filed a second motion for summary judgment, dkt. #61, without obtaining the court’s leave to do so. Because defendant Benner’s second motion for summary judgment has been filed in violation of this court’s procedures, plaintiff’s motion to strike it will be granted.

B. Defendants’ Amended Proposed Findings of Fact

As mentioned above, defendants filed their cross-motion for summary judgment, dkt.

#46, on December 13, 2006. Plaintiff was given until January 2, 2007, to respond to that motion. On January 3, 2007, defendants filed a document titled “Defendants’ Amended Proposed Findings of Fact,” in which defendants modified two of their proposed findings of fact (PFOF ##119 and 121) to clarify the opinion of their expert witness with respect to the amount defendants allegedly overpaid plaintiff. Although the expert, Craig Billings, has added a new figure to the one he proposed previously, the amendment is a minor one, which plaintiff is free to dispute. Although I will not strike the document, I will provide plaintiff until January 16, 2007, in which to reply to the amended facts, should it wish to do so.

C. Second Affidavit of Craig Billings

Rule 12(f) of the Federal Rules of Civil Procedure authorizes a court to strike from any pleading “any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Plaintiff asserts that the second affidavit of accountant Craig Billings (which supports both plaintiff’s “amended” proposed facts) is irrelevant to the motion for summary judgment. If, indeed, the information contained in the affidavit turns out to be irrelevant, the court will disregard the proposed facts that rely upon it, so long as plaintiff places the materiality of those facts properly into dispute. If not, the facts will be considered. Either way, it is unnecessary to strike the affidavit itself. Plaintiff’s motion to

strike Billings's second affidavit will be denied as unnecessary.

ORDER

IT IS ORDERED that

1. Plaintiff Eragen Biosciences, Inc.'s motion to strike defendant Steven Benner's second motion for summary judgment is GRANTED.

2. Plaintiff's motion to strike defendants Benner and Nucleic Acids Licensing L.L.C.'s amended proposed findings of fact is DENIED.

3. Plaintiff's motion to strike the second affidavit of Craig Billings is DENIED.

Entered this 9th day of January, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge