IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NOVOZYMES A/S and
NOVOZYMES NORTH AMERICA, INC.,

Plaintiffs,

OPINION and ORDER

10-cv-251-bbc

v.

DANISCO A/S,
GENECOR INTERNATIONAL WISCONSIN, INC.,
DANISCO US INC. and DANISCO USA INC.,

Defendants.

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Plaintiffs Novozymes A/S and Novozymes North America, Inc. are suing defendants Danisco A/S, Genecor International Wisconsin, Inc., Danisco US Inc. and Danisco USA Inc. for infringement of U.S. Patent No. 7,713,723, which is related to alpha-amylases that achieve "increased thermostability" under particular conditions. In an order dated September 24, 2010, dkt. #106, I denied plaintiffs' motion for a preliminary injunction because plaintiffs failed to show irreparable harm and because defendants raised a substantial question whether the '723 patent is invalid because it lacks an adequate written description. Now defendants have filed a motion in which they request permission to file an early

summary judgment motion on the adequacy of the written description. The motion will be granted.

Defendants raised a strong argument regarding the adequacy of the written description in opposition to plaintiffs' motion for a preliminary injunction, so there is sense in resolving that issue before expending resources on other matters unnecessarily. Plaintiffs raise a number of objections to defendants' request, but none are persuasive. First, plaintiffs say that summary judgment should never come before claim construction. That argument is disingenuous in this case because neither side identifies any terms that will need to be construed in order to determine whether the written description is adequate. Even if claim construction is required, plaintiffs are free to request construction of terms in the context of briefing summary judgment.

Plaintiffs' second objection is that they need discovery to show that defendants used the written description of the '723 patent in order to develop their own products. Plaintiffs do not cite any authority showing that defendants' actions are relevant to the question whether the written description is adequate. In any event, plaintiffs fail to explain why they will be unable to obtain any documents they need before responding to a summary judgment motion on this one issue. Defendants represent in their reply brief that they have "already agreed to provide the information sought by Novozymes." Dfts.' Br. dkt. #116, at 5. If that is inaccurate, plaintiffs are free to bring a motion to compel.

Third, plaintiffs say that they need "an opportunity to develop" their expert testimony on invalidity. I agree with defendants that it is somewhat ironic that plaintiffs say they need more time to develop their case when it was plaintiffs who moved for preliminary injunctive relief and asked for an expedited schedule. In any event, defendants fail again to identify why they need more time. They do not suggest that they need to obtain any additional experts on invalidity; they do not identify any information that their experts need but do not have; and they do not argue that the issues are so complex that an expert report cannot be prepared in time for their response to defendants' motion.

Finally, defendants say that there is not enough time in the schedule to permit two rounds of summary judgment as well as a separate round of briefing on claim construction. On this point, I agree with plaintiffs, but I disagree on the resolution of the problem. Again, because the issue of invalidity could be dispositive, it makes little sense for the parties or the court to devote resources to claim construction unnecessarily. Further, because there is unlikely to be enough time to set a separate briefing and hearing schedule for claim construction in the event that defendants' motion for summary judgment is denied, I believe the best solution is to combine claim construction and summary judgment. If the parties wish to have any terms in the patent construed, they may put those requests in their summary judgment briefs, along with the proposed constructions and supporting arguments. If the parties' written materials leave important questions unanswered, I will schedule a

hearing on the motion.

ORDER

IT IS ORDERED that

1. The motion by Defendants' Danisco A/S, Genecor International Wisconsin, Inc., Danisco US Inc. and Danisco USA Inc. for leave to file an early summary judgment motion on the question of the adequacy of the written description of the '723 patent, dkt. #109, is GRANTED. Defendants may have until November 5, 2010, to file their motion.

2. The briefing and hearing schedule on claim construction is STRICKEN. If the parties believe that any terms need to be construed to resolve defendants' early summary judgment motion, they may propose constructions in their summary judgment materials. In the event that defendants' early summary judgment motion does not resolve the case, the parties may submit any additional constructions needed to resolve the case in the context of the second round of summary judgment motions.

3. All other deadlines in the schedule remain unchanged.

Entered this 21st day of October, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge