

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

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WISCONSIN ALUMNI RESEARCH  
FOUNDATION,

Plaintiff,

v.

XENON PHARMACEUTICALS, INC.,

Defendant.

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OPINION AND  
ORDER

05-C-242-C

On May 25, 2006, this court entered judgment in this case, following the disposition of the parties' cross motions for summary judgment and a jury trial on the question of damages. On June 9, 2006, defendant Xenon Pharmaceuticals, Inc. filed a motion to stay execution or enforcement of judgment pending disposition of defendant's post-trial motions. The court granted defendant's motion on June 14, 2006, dkt. #204, before plaintiff Wisconsin Alumni Research Foundation had an opportunity to respond to the motion. Presently before the court is plaintiff's motion for reconsideration of the June 14 order granting defendant's motion.

Because the court jumped the gun when it ruled on defendant's motion before plaintiff had an opportunity to respond, I will treat plaintiff's present submissions not as a motion to reconsider (where plaintiff could prevail only if it showed that the court erred in its prior ruling), but rather as a response to defendant's motion to stay execution or enforcement of judgment. I conclude that neither of plaintiff's arguments (that defendant should be required to post a bond and that the court should amend the stay to allow plaintiff to terminate the Exclusive License Agreement) is persuasive. The stay imposed on June 14, 2006, will remain in force as entered.

A. Requirement to Post Bond

When a court stays the execution or enforcement of a judgment pursuant to Fed. R. Civ. P. 62(b), it has discretion to set the conditions of the stay. Fed. R. Civ. P. 62(b) ("In its discretion and on such conditions for the security of the adverse party as are proper . . ."). One of the conditions the court may impose is the requirement that the party requesting the stay post a bond to secure its payment of the judgment under challenge. I will not require defendant to post a bond as a condition of the stay entered in this case because the bond would be in effect for an extremely brief period (defendant's post-trial motions are presently under advisement and the court expects to rule on the motions promptly) and I am satisfied that defendant's ability to pay the judgment entered against it will not

materially change from the time judgment was entered to the time the post-trial motions are disposed of. See, e.g., International Wood Processors v. Power Dry, Inc., 102 F.R.D. 212, 215 (D.S.C. 1984) (security risks generally prompting requirement for bond are less when stay pertains to post-trial motions and not appeal because post-trial motions are generally resolved in far less time).

#### B. Stay on Termination of Exclusive License Agreement

Plaintiff argues that the court cannot stay the termination of the Exclusive License Agreement for two reasons. First, plaintiff already terminated the agreement (on May 17, 2006, two weeks after the court issued a ruling on the summary judgment motions, dkt. #147, in which it held that defendant had violated the agreement and plaintiff had the right to terminate it, but before judgment was entered on May 25) and the court cannot stay an action that already occurred. Second, the termination clause of the Exclusive License Agreement does not require plaintiff to obtain permission from the court before it may terminate the agreement.

Plaintiff's first argument is formalistic and without merit. Although the court cannot retroactively prevent plaintiff from terminating the agreement, it can certainly impose a stay on the termination so that it is not in effect as long as the stay is in force, or declare that the termination is void. Plaintiff's second argument is unpersuasive. It is undisputed that the

agreement's termination clause does not require plaintiff to obtain permission from the court before it may terminate the agreement:

If Xenon at any time defaults in the timely payment of any monies due to WARF or the timely submission to WARF of any Development Report, fails to actively pursue the Summary Development Plan, or commits any breach of any other covenant herein contained, and Xenon fails to remedy any such breach or default within ninety (90) days after written notice thereof by WARF, or if Xenon commits any act of bankruptcy, becomes insolvent, is unable to pay its debts as they become due, files a petition under any bankruptcy or insolvency act, or has any such petition filed against it which is not dismissed within sixty (60) days, or offers any component of the Licensed Patents to its creditors, WARF may, at its option, terminate this Agreement by giving notice of termination to Xenon.

Exclusive License Agreement, Section 7.C. Plaintiff is correct that prior to filing this lawsuit it did not need the court's permission to terminate the agreement. However, plaintiff filed this lawsuit, in part requesting declaratory judgment that defendant breached the Exclusive License Agreement and plaintiff may terminate it, Cpt., dkt. #2, p.14, ¶ 6. Having brought the court into this dispute, plaintiff cannot now claim that it can terminate the agreement regardless of the court's holding. Plaintiff appears to believe that it can elicit an advisory opinion from the court without having to follow the court's directives. It is wrong. For the time being the court has concluded that plaintiff *is* entitled to terminate the agreement. If the court grants defendant's post-trial motions, ultimately deciding that plaintiff may *not* terminate the agreement, plaintiff will be bound by that decision. Therefore, any attempted termination of the agreement that has already occurred is suspended until the court has ruled

on the post-trial motions and plaintiff may not take renewed action to terminate the agreement until that time.

The stay imposed on June 14, 2006, is to remain in effect as entered. Plaintiff's motion for reconsideration will be denied.

ORDER

IT IS ORDERED that plaintiff Wisconsin Alumni Research Foundation's motion for reconsideration is DENIED.

Entered this 18<sup>th</sup> day of July, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge