

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

ARIAD PHARMACEUTICALS, INC.,
MASSACHUSETTS INSTITUTE OF
TECHNOLOGY, THE WHITEHEAD
INSTITUTE FOR BIOMEDICAL RESEARCH,
and THE PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

Plaintiff,

v.

ELI LILLY AND CO.,

Defendant.

Civil Action No. 02 CV 11280 RWZ

U.S. District Judge
Rya W. Zobel

**PLAINTIFFS' OPPOSITION TO DEFENDANT ELI LILLY AND COMPANY'S
MOTION TO PRECLUDE A CLAIM CONSTRUCTION THAT IS BARRED BY
JUDICIAL ESTOPPEL**

Plaintiffs have always followed the Court's claim construction. From the time that the Court's Order deciding claim construction issued, through the jury trial, until now, Plaintiffs have followed the Court's claim construction to the letter. Lilly's motion is simply a red herring intended to divert the Court from the real issues before it and block Plaintiffs from submitting evidence and eliciting testimony relevant to those issues. Lilly's motion is not only premature, it is completely unfounded; the Court should not even entertain this motion and should summarily deny it.

The whole basis for Defendant's motion is erroneous. The Court did not adopt either Plaintiffs' or Defendant's proposed language, but, as it should have, arrived at its own construction. (D.I. 75). What is even more preposterous, is that the few questions of Dr.

Latchman regarding the specification of the '516 patent have nothing to do with this Court's claim construction.¹

Lilly's tactic can only be viewed as a means to block proper cross-examination of Dr. Latchman by raising this make-weight argument. The speed with which Lilly foisted a bench memorandum on the Court is indicative of the fact that this was a pre-meditated tactic on Lilly's part. Thus, there is no need for the Court to even entertain this motion and it should be denied.

In any event, Lilly cannot meet the standards for this relief. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783-84 (9th Cir.2001). Lilly fails to satisfy the requirements of mutual exclusivity of position, and prior success with the Court. *See Faigin v. Kelly*, 184 F.3d 67, 82 (1st Cir.1999); *Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 13 (1st Cir.1999). Simply, Lilly's motion must be denied.

¹ It should be noted that the Court did not adopt the same construction proposed by either party, but did credit some of Lilly's arguments as reflected in the Court's use of the phrase "regulates transcription".

