

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2010-1096

BIOPOLYMER ENGINEERING, INC. (doing business as Biothera),

Plaintiff-Appellant,

and

MASSACHUSETTS INSTITUTE OF TECHNOLOGY,

Plaintiff,

v.

IMMUNOCORP and BIOTEC PHARMACON ASA,

Defendants.

Appeal from the United States District Court for the District of Minnesota
in case no. 05-CV-0536, Judge Joan M. Ericksen.

ON MOTION

ORDER

Immunocorp and Biotec Pharmacon ASA submit a letter informing the court that they will not be participating in this appeal due to settlement. Biopolymer Engineering, Inc. has not responded.

The letter indicates:

Pursuant to the settlement, defendants-appellees have agreed not to participate in this appeal by filing opposition briefs. Biothera believes that it may still properly appeal and argue the question of law as to claims construction, notwithstanding the lack of opposing briefing from defendants-appellees. Under the terms of the settlement agreement (which otherwise is confidential), a reversal of the district court's decision will not affect the finality of the parties' settlement agreement, which includes a provision that eliminates the need for any further litigation among them in the district court, even if this Court reverses the judgment below with respect to this patent.

It is unclear whether, due to settlement, there is now a lack of a case or controversy in this matter. See, e.g., Alvarez v. Smith, --- U.S. ---, 130 S.Ct. 576, 579-81 (2009); Havens v. Realty Corp. v. Coleman, 455 U.S. 363, 371 (1982); Nixon v. Fitzgerald, 457 U.S. 731, 744 (1982); Praxair, Inc. v. ATMI, Inc., 543 F.3d 1306, 1313 n.7 (Fed. Cir. 2008); Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125 (9th Cir. 2005) (en banc). Accordingly, Biopolymer is directed to respond within 14 days of the date of filing of this order concerning why this appeal should not be dismissed. Biopolymer must attach a copy of the settlement agreement to a confidential version of any response in opposition to dismissal (and should also file a nonconfidential version of the response pursuant to Fed. Cir. R. 27(m)).

Upon consideration thereof,

IT IS ORDERED THAT:

- (1) The revised official caption, removing the designation of "appellees," is reflected above.
- (2) Biopolymer is directed to respond, within 14 days of the date of filing of this order, concerning why this case should not be dismissed due to a lack of case or controversy.
- (3) The briefing schedule is stayed.

FOR THE COURT

MAR 01 2010

Date

/s/ Jan Horbaly

Jan Horbaly
Clerk

cc: Darren B. Schwiebert, Esq.
Susan A. Cahoon, Esq.

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THE FEDERAL CIRCUIT

MAR 01 2010