Neutral Citation Number: [2024] EWHC 1408 (Pat)

Case No: HP-2022-000023

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
PATENTS COURT

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Friday, 7th June 2024

Before:

MR. JUSTICE MEADE

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Between:

(1) BIONTECH SE (a company incorporated under the laws of Germany) **(2) PFIZER INC.** (a company incorporated under the laws of the State of Delaware, United States of America)	**Claimants**
- and -	
CUREVAC SE (a company incorporated under the laws of Germany)	**Defendant/ Part 20 Claimant**
-and-	
(1) BIONTECH MANUFACTURING GMBH (a company incorporated under the laws of Germany) **(2) PFIZER LIMITED**	**Part 20 Defendants**

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MR. MICHAEL TAPPIN KC, MR. TOM ALKIN and MR. MICHAEL CONWAY (instructed by **Powell Gilbert LLP**) for **BioNTech**
MR. JEREMY HEALD (instructed by **Taylor Wessing LLP**) for **Pfizer**
MR. PIERS ACLAND KC (instructed by **Bird & Bird LLP**) for **CureVac**

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Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE MEADE:

1. I first of all have to decide what to do with the pleadings in an unusual situation where CureVac (the patentee) agrees that EP 1 857 122 ("EP '122") is invalid on the current state of the law as set out by the Supreme Court in *Warner-Lambert* [2018] UKSC 56 and I do so against the background of the directions I gave at the first hearing of the summary judgment application.

2. Both sides criticise each other for not setting out clearly enough what the legal test is, but I think there has been a reasonably useful discussion of that today and, in any event, I do not think it is the function of the pleadings to try to identify legal standards with absolute precision and I also think that that is not a realistic aspiration in circumstances where matters are both unclear and developing, and I prefer to focus on ensuring that all the relevant facts are identified in the pleadings and the evidence.

3. Mr. Acland resists the proposition that the "derivable" test is one to do with disclosure, but he has made clear that, if it is, the Patentee relies on paragraph [0019] of the specification and he has clarified that, in general terms, the Patentee's position is that the test is to be found in the post-G2/21 decision of the referring Board, the Technical Board of Appeal, which is useful. He has confined his pleading of post-published data to the two publications, Leppek and Bicknell in paragraph (d2) of the Re-Re-Amended Defence and Counterclaim that is before me, and he has confined himself to specified parts of Professor Richter's evidence, namely paragraph 49 and footnote 11. So I think the Patentee's position on the evidence is confined to those matters.

4. The Patentee's expert evidence on *ab initio* implausibility is, indeed, as Mr. Tappin KC submits, both very brief and very conclusory, but the somewhat unique feature of the current situation is that there will be an argument at the trial in July about what to do in the circumstances where the Patentee says the Supreme Court should revisit *Warner-Lambert* and I therefore will have to address my mind, potentially, to what the case management implications will be of applying the *ab initio* implausibility standards to the facts.

5. Although the Patentee therefore has its back to the wall in a sense, because of the impact that it accepts the current state of the law from *Warner-Lambert* has, what will be under consideration at trial is the scenario where the test is, indeed, *ab initio* implausibility. I agree with Mr. Acland KC that, by its very nature, that test requires reasons to be put forward to doubt the technical effect and it cannot realistically be for the patentee to put those forward; they need to come from the party attacking the patent.

6. I think it was relatively clear from the discussion at the previous hearing that I expected that to be identified, and I must say I am somewhat disappointed that Pfizer/BioNTech have not done that already. But, in my view, it is right that if Pfizer/BioNTech have positive reasons to put forward why the skilled addressee of the patent would consider the technical effect implausible, then they ought to identify those in a timely fashion. I suspect that they may well already have thought about it and certainly they should have done.

7. So my conclusion is that by appropriate procedural means, which we can now discuss, it is now for Pfizer/BioNTech to put forward any factual matters they rely on as to why the skilled addressee would think that the technical effect was implausible.

(For continuation of proceedings: please see separate transcript)

8. I now come to the trial timetable. I think that I will need time to read EP '122. I am going to have to look at all of the foreign decisions. I am going to have to look at the evidence to understand its scope. I understand Mr. Tappin's view that it is all very clear, but I think the fact that we have spent an hour arguing about the pleadings today itself is testament to the fact that half a day could be too short and I also prefer not to interleave EP '122 with EP 3 708 668 ("EP '668") and EP 4 023 755 ("EP '755").

9. So, for those reasons, I prefer the CureVac proposal to start on Monday 8th July and conclude EP '122 by lunchtime on Tuesday 9th July. Once Professor Qian is moved to a different berth in the timetable – which I will accommodate as appropriate – then I think with, perhaps, an early start on Thursday 18th July, it will be possible to finish Professor Ashe by lunchtime on Thursday 18th July, and that will give a day-and-a-half, plus the weekend, for closings to be prepared, which is a little bit less than Pfizer/BionNTech ideally wanted, but sufficient, I think.

10. In conclusion, what that means is that Professor Qian can be crossed out from this CureVac proposal, to be rehoused somewhere appropriate and Professor Ashe will start after Professor Hart concludes on Tuesday 16th July and his evidence will then conclude by lunchtime on Thursday 18th July.

(For continuation of proceedings: please see separate transcript)