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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3845-10T2

APOTEX INC. and APOTEX CORPORATION,

Plaintiffs-Appellants,

v.

SANOFI-AVENTIS, SANOFI-SYNTHELABO INC., BRISTOL-MYERS SQUIBB COMPANY, and BRISTOL-MYERS SQUIBB SANOFI PHARMACEUTICALS PARTNERSHIP,

Defendants-Respondents.

Submitted October 31, 2012 - Decided November 15, 2012

Before Judges Axelrad, Nugent and Haas.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2828-08.

Blank Rome, Howard Langer (Langer, Grogan and Diver) of the Pennsylvania bar, admitted pro hac vice, and Edward Diver (Langer, Grogan and Diver) of the Pennsylvania bar, admitted pro hac vice, attorneys for appellants (Stephen M. Orlofsky, of counsel and on the briefs).

McCarter & English, Mark P. Goodman (Debevoise & Plimpton) of the New York bar, admitted pro hac vice, and Sean Hecker (Debevoise & Plimpton) of the New York bar, admitted pro hac vice, attorneys for respondents Bristol-Myers Squibb Company and Bristol-Myers Squibb Sanofi Pharmaceuticals

Partnership (William J. O'Shaughnessy, on the joint brief).

Gibbons, David B. Anders (Wachtell, Lipton, Rosen & Katz) of the New York bar, admitted pro hac vice, and Adam S. Hobson (Wachtell, Lipton, Rosen & Katz) of the New York bar, admitted pro hac vice, attorneys for respondents Sanofi-Aventis and Sanofi-Synthelabo Inc. (Michael R. Griffinger, on the joint brief).

PER CURIAM

In this patent infringement action, plaintiffs Apotex Inc. and Apotex Corp. (collectively Apotex) appeal the April 8, 2011 order of the Law Division granting summary judgment to defendants Sanofi-Aventis, Sanofi-Synthelabo Inc., Bristol-Myers Squibb Co., and Bristol-Myers Squibb Sanofi Pharmaceuticals Partnership (collectively Sanofi/BMS) and denying their own motion for summary judgment. After reviewing the record in light of the contentions advanced on appeal, we reverse the entry of summary judgment as to Sanofi/BMS's claims, affirm the denial of Apotex's motion, and remand for further proceedings consistent with this opinion.

I.

Sanofi/BMS is the owner of the patent for the drug Plavix® (the '265 patent). Apotex sought approval from the Food and Drug Administration (FDA) to produce a generic equivalent prior to the expiration of Sanofi/BMS's patent, claiming that the

patent was invalid. In response to Apotex's application with the FDA, Sanofi/BMS filed a patent infringement suit in federal district court against Apotex. Apotex counterclaimed, alleging that Sanofi/BMS's patent was invalid. See Sanofi-Synthelabo v. Apotex, Inc., 488 F. Supp. 2d 317 (S.D.N.Y. 2006), aff'd, 470 F.3d 1368 (Fed. Cir. 2006).

Sanofi/BMS's filing of the patent infringement action triggered a thirty-month stay of FDA approval for Apotex's application to market the generic drug. Sanofi-Synthelabo, supra, 470 F.3d at 1373. The stay expired on May 17, 2005 and, on January 20, 2006, the FDA gave Apotex final approval to sell its generic product. Ibid.

Prior to the FDA's approval, however, the parties initiated negotiations that culminated in a written settlement agreement on March 17, 2006 (the March Agreement). Paragraphs three through fifteen of the March Agreement contained provisions that would result in a settlement of the patent infringement litigation and the dismissal of all claims and counterclaims without prejudice, and would grant Apotex a limited license to market its product under the '265 patent. These provisions are not at issue in this appeal.

Because of its involvement in prior patent litigation, Sanofi/BMS was subject to several consent decrees with the

Federal Trade Commission (FTC) and stipulated injunctions with a consortium of State Attorneys General (the Consortium), which required review by either the FTC or the Consortium, or both, of any agreement that would settle patent litigation involving Sanofi/BMS.[1] These reviews had to be concluded within thirty days of receipt by the regulators of a proposed agreement. Sanofi/BMS was prohibited, by the stipulated injunctions and consent decrees, from settling any matter without approval by the FTC or the Consortium.

The parties addressed the need for this regulatory review in the March Agreement. Paragraph seventeen of the March Agreement provided it was subject to "Regulatory Review" by the FTC and the Consortium. Under this provision, paragraphs three through fifteen would not become effective unless the FTC "issued an advisory opinion determining that the agreement would not raise issues under . . . the Federal Trade Commission Act[.]" These terms would also not go into effect if the

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[1] Specifically, BMS/Sanofi was subject to two consent decrees with the FTC, which were entered into in the following matters: In re Bristol-Myers Squibb Co., FTC No. C-4076 (April 14, 2003) (In re BMS); and In re Hoechst AG, FTC No. 9293 (April 4, 2001) (Hoechst). Sanofi/BMS was also subject to two stipulated injunctions with the States Attorneys General, which were entered into in the following matters: Ohio v. Bristol-Myers Squibb Co., No. 02-01080 (D.D.C. April 13, 2003) (Taxol); and In re Buspirone Antitrust Litig., No. 01-11401 (S.D.N.Y. Nov. 14, 2003) (BuSpar).

Consortium failed to "provide written notice that they do not object to the agreement." If both of these conditions were met, "Regulatory Clearance" would be achieved, and paragraphs three through fifteen of the March Agreement would become effective. On the other hand, "Regulatory Denial" would occur if either the FTC or the Consortium denied its approval or Sanofi/BMS opted not to continue to seek Regulatory Clearance.

Paragraph eighteen provided that, if Regulatory Denial occurred, the litigation would resume. In addition, BMS/Sanofi would pay Apotex $60 million (the "break-up fee") if Regulatory Denial occurred on or before June 30, 2006. If BMS/Sanofi opted to continue to seek Regulatory Clearance, it would make additional payments to Apotex if Regulatory Denial thereafter occurred. If BMS/Sanofi was later successful on its patent infringement claim, the parties agreed that Apotex's damages would be limited to 70% of its net sales of its generic product. Without this provision, Apotex would have faced possible treble damages and damages calculated on the basis of BMS/Sanofi's loss from the infringement.

Paragraph nineteen provided that, five business days after Regulatory Denial, Apotex could begin to market its generic drug product. BMS/Sanofi agreed not to seek to enjoin Apotex from proceeding until Apotex actually began delivering the product to

the marketplace. BMS/Sanofi also agreed not to launch a generic version of its own to compete with Apotex prior to Apotex doing so.

Finally, paragraph twenty of the March Agreement stated that "[n]o provision of this agreement shall require [Sanofi/BMS] or Apotex to do any act that violates any term of any of the FTC consent decrees or court injunctions [involving the Consortium] to which [Sanofi/BMS] is subject, or is otherwise unlawful."

On March 22, 2006, Sanofi/BMS submitted the March Agreement to the FTC and the Consortium, seeking their review as required by the March Agreement and by the injunctions and consent decrees to which it was bound. On April 4, 2006, an in-person meeting between representatives of Sanofi/BMS and the regulators was held to discuss the March Agreement. At that meeting, staff attorneys from the Consortium expressed concern about paragraph eighteen of the March Agreement. On April 13, 2006, BMS/Sanofi submitted a "white paper" to the regulators in an attempt to persuade them to approve the settlement.

During discovery in the present matter, deposition testimony was obtained from Anne Schenof, an FTC attorney, and from Meredyth Smith Andrus, an Assistant Attorney General (AAG) of the Maryland Attorney General's Office, which was one of the

states comprising the Consortium. Both depositions were strictly limited in terms of time, place, duration and subject matter by the FTC and the Maryland Attorney General.

Schenof testified that paragraph eighteen raised some issues for the FTC because the $60 million break-up fee to be paid by Sanofi/BMS "was in the nature of a pay to delay, which the [FTC] had consistently been objecting to and actually litigating against because the way it was set up is that Apotex agreed . . . not to launch at risk pending the [FTC's] decision to issue an advisory opinion." According to Schenof, "this looked exactly to us like an agreement for [Sanofi/BMS] to pay Apotex not to put a generic on the market. So we said that was a problem under . . . the FTC Act, and we said we could not approve a settlement that contained that term."

After the April 4, 2006 meeting, Schenof told Sanofi/BMS's attorney, Richard Stark, the break-up fee was a problem and that its payment would violate provisions of the FTC consent decrees. Schenof testified that only the full FTC could issue an advisory opinion on any subject. The FTC never issued an advisory opinion stating the break-up fee was permissible under the consent decrees. However, sometime in May 2006, Schenof called Stark and told him to withdraw Sanofi/BMS's request for an

advisory opinion "because you're going to get a negative advisory opinion, and I don't think your client wants that."

AAG Andrus had served as a liaison counsel in the litigation between the Consortium and Sanofi/BMS. Her duties in this role included "communicating with the investigators at the [FTC and] coordinating enforcement efforts on behalf of the multistate" Consortium.

AAG Andrus was present at the April 2006 meeting. She testified she told Stark "that the agreement that [Sanofi/BMS] . . . had submitted to us for review was not acceptable to the states" because of the provisions dealing with the exclusivity period during which Apotex could market the product and the break-up fee. After the meeting, AAG Andrus told Apotex's attorney, Howard Langer, about this objection and how the March Agreement would violate the stipulated injunctions and "also be seen as violative of the antitrust laws."

When asked whether the Consortium would issue a ruling regarding the break-up fee, AAG Andrus explained:

> The . . . State Attorneys General, in reviewing . . . the agreement submitted pursuant to the orders and stipulated injunctions, were not required to issue any ruling whatsoever regardless of what the agreement stated. We were to review it and to either accept it or not accept it. There was no ruling involved.

Thus, according to AAG Andrus, there was never a ruling as to any particular provision of the March Agreement. However, she also testified "the states declined to approve the agreement with the breakup[-] fee in it, so yes, we took action to prevent [Sanofi/BMS] from making the breakup[-] fee payment, yes."

Stark and Langer were also deposed. Stark recalled being advised by AAG Andrus that the Consortium's objections were "essentially the same" as those posed by the FTC. He testified he told AAG Andrus that, "if the deal is not cleared, if FTC tells us it would be a violation of the [consent] decree, that [Sanofi/BMS] wouldn't pay" the break-up fee.

Langer testified he spoke to Schenof and AAG Andrus several times during the Regulatory Review. While the regulators did not take firm positions at the April 2006 meeting, Langer testified it later became clear "the regulators had determined that there were no circumstances under which they would approve the settlement provisions of the agreement." On May 3 or 4, 2006, AAG Andrus told Langer the Consortium would not approve the March Agreement, but Langer testified she would not explain why. He stated that Schenof told him "the FTC was going to take a similar position to that of the States, but that it is going to take much longer for the FTC position to filter upward."

On May 5, 2006, AAG Andrus sent the following e-mail to Sanofi/BMS's attorney, Richard Stark:

> Rick: As I said on the phone this afternoon, the states have reviewed the proposed Settlement Agreement dated March 17, 2006 signed by BMS, Sanofi and Apotex that BMS submitted for our review pursuant to our Taxol and BuSpar Orders and Stipulated Injunctions ("Agreement"). Effective today, May 5, the states decline to affirmatively approve the Agreement as that term is used in the definition of "Regulatory Denial" in paragraph 17(i) of the Agreement, nor will the states provide written notice that we do not object, as required in Paragraph 17(b) of that Agreement.
>
> I am copying the Liaison States for the Taxol and BuSpar Orders, the FTC and counsel for Apotex.
>
> Meredyth

By letter dated May 18, 2006, Sanofi/BMS formally withdrew its request to the FTC for an advisory opinion concerning the March Agreement. On May 26, 2006, Apotex sent a written demand for payment of the $60 million break-up fee to Sanofi/BMS, which refused to pay.

By that date, however, the parties had already renewed settlement negotiations and, on May 26, 2006, they executed a new written agreement (the May Agreement). The terms of the May Agreement were contingent upon the same regulatory review and approval provisions as the March Agreement. "Regulatory Denial"

under the May Agreement was defined as "a denial of approval by either of the FTC or a state attorney general as to which neither party seeks further review." The May Agreement further provided that if "Regulatory Review has not been completed by July 31, 2006, either party has the right to declare that there has been Regulatory Denial."

Unlike the March Agreement, however, the May Agreement did not require Sanofi/BMS to pay Apotex a break-up fee in the event of Regulatory Denial. The cap on Apotex's damages in the event a patent infringement was determined by a court was reduced to 50% of Apotex's sales of the infringing product.

On May 30, 2006, Sanofi/BMS submitted the May Agreement to the FTC and the Consortium for review. By letter dated June 5, 2006, Apotex advised the regulators that Sanofi/BMS's submission failed to disclose certain oral representations that were not part of the written May Agreement. Those representations included Sanofi/BMS's verbal agreement not to launch an authorized generic product during a 180-day period where Apotex would have the exclusive right to market its product. The parties had also orally agreed that, by signing the May

Agreement, Apotex had not waived its right to seek payment of the $60 million break-up fee under the March Agreement.[2]

By letter dated July 28, 2006, AAG Andrus notified Sanofi/BMS that the liaison counsel for the Consortium objected to the May Agreement:

> This letter serves as written notice to Bristol-Myers Squibb ("BMS") pursuant to the Order and Stipulated Injunctions pending in the [In re Buspirone Antitrust Litigation and State of Ohio, et al. v. Bristol-Myers Squibb Co.] matters that Liaison Counsel for the Plaintiff States object to and will not approve the Settlement Agreement dated May 25, 2006 between and among Apotex Inc., Apotex Crop., Sanofi-Aventis, Bristol-Myers Squibb Company and Bristol-Myers Squibb Sanofi Pharmaceuticals Holding Partnership.

On July 31, 2006, Apotex declared that Regulatory Denial had occurred. Sanofi-Synthelabo, supra, 488 F. Supp. 2d at 324. Sanofi/BMS unsuccessfully moved before the federal district court for a temporary restraining order to bar Apotex from launching its general product. Id. at 325. On August 8, 2006, Apotex launched its generic drug and delivered approximately $900 million of product into the market. Sanofi-Aventis v. Apotex Inc., 748 F. Supp. 2d 293, 294 (S.D.N.Y. 2010), aff'd in part, rev'd in part, 659 F.3d 1171 (Fed. Cir. 2011). On August

[2] Although Sanofi/BMS initially denied making the oral representations, BMS representatives were later charged criminally and pleaded guilty to two counts of making false statements to the FTC in connection with the May Agreement.

31, 2006, Sanofi/BMS's motion for a preliminary injunction was granted. Sanofi-Synthelabo, supra, 488 F. Supp. 2d at 350.[3]

On November 13, 2008, Apotex filed a breach of contract action in the Law Division against Sanofi/BMS, as a result of Sanofi/BMS's failure to pay the $60 million break-up fee pursuant to the March Agreement. On December 31, 2008, Sanofi/BMS removed the matter to the United States District Court in New Jersey. By order dated June 30, 2009, the district court remanded the matter to the Law Division.

Thereafter, the parties cross-moved for summary judgment. Following oral argument, the trial judge issued a written opinion granting Sanofi/BMS's motion for summary judgment and denying Apotex's motion. The judge determined to grant Sanofi/BMS's motion because he found that paragraph twenty of the March Agreement barred "any performance of said agreement if it is objected to by the state attorneys general" because it would violate provisions of the stipulated injunctions. Referring to AAG Andrus's July 28, 2006 letter, in which she

[3] Eventually, the federal district court held that Sanofi/BMS's '265 patent was valid and enforceable, and that Apotex had violated the patent by manufacturing and distributing a generic form of the drug. Sanofi-Aventis, supra, 748 F. Supp. 2d at 294. On October 19, 2010, the court upheld the cap on damages set forth in the May Agreement, limiting Apotex's liability to 50% of its net sales of $884,418,724 (or $442,209,362), plus interest and costs.

stated the Consortium had objected to the May Agreement, the judge found that this constituted an objection to the March Agreement. He reasoned that, because the stipulated injunctions

> bar[] any settlement agreement that is objected to by the states attorneys general, . . . and the states attorneys general did in fact object to the underlying Agreement at issue, the Agreement is therefore unenforceable. Whether or not the basis for that objection is legally valid, as Ms. Andrus testified to in her depositions, is of no import. Likewise the oral statements made to Defendants by the FTC were also of no import. Under the terms of the injunction and settlement Agreement, the written objection as set forth in Ms. Andrus' July 26 [sic], 2006 letter on behalf of the states attorneys general alone is sufficient to void the settlement agreement.

The judge conceded his ruling "create[d] a circular situation" with regard to the break-up fee. He stated the March Agreement required the fee to be paid if the regulators did not approve the settlement. However, he ruled the fee could not be paid under paragraph twenty because doing so would violate the stipulated injunctions. The judge concluded that "[t]he only way [Apotex] could have received money under the [March] Agreement was if the Agreement had been approved, or not objected to by the states attorneys general and FTC. It, however, was not approved, and there was indeed an objection." Therefore, the judge granted Sanofi/BMS's motion for summary

judgment, finding it was not required to pay the break-up fee, and he denied Apotex's cross-motion, which had sought to compel this payment.

II.

On appeal, both parties concede the trial judge made a factual error in his decision by relying upon AAG Andrus's July 28, 2006 letter to find the Consortium had objected to the March Agreement. That letter referred only to the May Agreement, not to the March Agreement. This factual mistake permeated the judge's decision.

Contrary to Sanofi/BMS's argument that this was a mere technical error, the July 28, 2006 letter played a critical role in the judge's analysis. Indeed, the judge found "the written objection as set forth in Ms. Andrus' July [28], 2006 letter on behalf of the state attorneys general alone is sufficient to void the settlement agreement." However, the July 28, 2006 letter only referred to the May Agreement.

In their cross-motions for summary judgment, the parties had only referred to AAG Andrus's May 5, 2006 e-mail, which concerned the March Agreement, in arguing their respective positions concerning the $60 million break-up fee provided for in that settlement. The July 28, 2006 letter was not mentioned in reference to the March Agreement.

Because the July 28, 2006 letter had no relevance whatsoever to the March Agreement, the judge's reliance upon that letter was clearly mistaken. Because the July 28 letter was the linchpin of the judge's entire analysis, this mistake, by itself, would warrant a reversal of the judge's decision on the cross-motions for summary judgment.

However, appeals are taken from judgments, not from court opinions or reasons. Ellison v. Evergreen Cemetery, 266 N.J. Super. 74, 78 (App. Div. 1993). Attempting to apply this principle in this case, both parties argue that, notwithstanding the trial judge's substantial factual error, we should make our own legal determination based upon the record and decide the motions without reference to the July 28, 2006 letter. However, because the record reveals there are numerous, significant and disputed factual issues regarding the parties' March Agreement and the regulators' review thereof, we are compelled to decline the parties' invitation.

We evaluate the parties' respective arguments under customary principles governing summary judgment motions. Summary judgment must be granted where there is "no genuine issue as to any material fact challenged and . . . the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "If there is the slightest doubt as to the

existence of a material issue of fact, the motion should be denied." Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994).

Reviewing a trial court's grant of summary judgment, we review the legal conclusions de novo, using the same legal standard applied by the trial court. Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003). We must determine whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the disputed issues in favor of the non-moving party. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-41 (1995). To survive summary judgment dismissal, a party must rely on more than "conclusory and self-serving assertions." Puder v. Buechel, 183 N.J. 428, 440-41 (2005). Where issues of credibility are presented, however, summary judgment is generally inappropriate. Brill, supra, 142 N.J. at 540. Credibility is always for the factfinder to determine. Ferdinand v. Agric. Ins. Co. of Watertown, N.Y., 22 N.J. 482, 492 (1956).

Here, Apotex argues there was never any objection by the Consortium to the break-up fee because AAG Andrus's May 5, 2006 e-mail essentially took no position on the March Agreement and did not specifically object to the payment of the break-up fee.

Therefore, Apotex asserts it is entitled to summary judgment requiring Sanofi/BMS to pay it the break-up fee. Sanofi/BMS, on the other hand, relies upon the deposition testimony of AAG Andrus, Schenof and the parties' attorneys to support its assertion that both the Consortium and the FTC objected to the March Agreement in general, and the break-up fee provision in particular, during the Regulatory Review process leading up to the May 5 e-mail.

However, disputed factual issues abound regarding these conflicting arguments, ranging from when AAG Andrus took a position on the March Agreement, to whether she "objected to" or "took no position" concerning the Agreement or the break-up fee, to whether she was even authorized to take a position on behalf of all the states comprising the Consortium. There is no "single, unavoidable resolution of the alleged disputed issue[s] of fact" that underlie the parties' contradictory assertions regarding these issues. Brill, supra, 142 N.J. at 540.

In examining this issue, we find it significant that, under the terms of the stipulated injunctions, Regulatory Review had to be completed within thirty days of Sanofi/BMS submitting a proposed settlement for review by the FTC and the Consortium. AAG Andrus's May 5, 2006 e-mail appears to have been issued more than thirty days after Sanofi/BMS submitted the March Agreement

on March 22, 2006. Whether AAG Andrus received the Agreement for review sometime after March 22, however, or whether she believed her oral comments to counsel during the review process were sufficient to set forth the Consortium's position, are material factual issues involving credibility that must be determined by the trier of fact.

In this regard, Sanofi/BMS argues "[t]here can be no dispute that Ms. Andrus informed Sanofi/BMS that the states objected to the March Agreement and never withdrew that objection." According to Sanofi/BMS, AAG Andrus orally communicated the Consortium's objections to Sanofi/BMS prior to her sending the May 5, 2006 e-mail, voicing objections at the April 4, 2006, meeting, and therefore within thirty days of the submission of the March Agreement for Regulatory Review. Contrary to Sanofi/BMS's contention, however, the credible evidence does not firmly establish, for purposes of a summary judgment motion, whether AAG Andrus properly and timely objected to either the settlement terms or the break-up fee provision of the March Agreement.

AAG Andrus testified she did not recall any of the dates or the specifics of her conversations with Sanofi/BMS's counsel. While she was "quite certain" she informed counsel for both Sanofi/BMS and Apotex that the break-up fee would be a violation

of the stipulated injunctions, she could not recall when she made the statement, only that it was made sometime in the "March through June 2006 time frame." Thus, it is unclear from AAG Andrus's testimony when her oral communications were made to the parties' counsel, i.e., whether they were made within thirty days of the submission of the March Agreement.

Although AAG Andrus testified she communicated to Sanofi/BMS's counsel that the Consortium objected to paragraphs 5 and 18 of the March Agreement at the April 4, 2006 meeting, she could not recall whether she provided the basis of her objection to the break-up fee. Moreover, Schenof, who was also present at the April meeting, testified she did not recall any discussion by AAG Andrus or anyone else pertaining to the break-up fee provision. Schenof's testimony specifically contradicted AAG Andrus's testimony regarding what was said at the meeting, calling Andrus's recollection and credibility into question. Where issues of credibility are presented, summary judgment is inappropriate. Brill, supra, 142 N.J. at 540.

Additionally, it is not even clear from this record whether AAG Andrus was authorized to speak for all of the states comprising the Consortium, or whether her participation was limited to being the liaison for the Attorney General of Maryland to the Consortium. Under the stipulated injunctions, a

settlement agreement would not be valid if "liaison counsel" for the Consortium objected to the proposed agreement. Under the injunctions, "liaison counsel" for the Consortium is a defined term, meaning "the Attorneys General of the States of Ohio, Maryland, Florida, New York and Texas." None of the Attorneys General from these states objected to the March Agreement. Rather, any objection came from AAG Andrus from the Maryland Attorney General's Office. Although she stated she was acting as liaison counsel for this matter, she was a staff attorney from a single state. Sanofi/BMS' attorney, Richard Stark testified at his deposition that AAG Andrus was "one of the liaison counsel, meaning one of the people in the various state AGs' office who worked on matters related to the injunctions and consent decrees."

On the other hand, there is evidence in the record that AAG Andrus was the "liaison counsel," because of her representations to this effect and the parties' apparent acceptance of her in that role. Nevertheless, for purposes of deciding a motion for summary judgment, there was insufficient evidence in the record to establish that AAG Andrus had the authority to act for, and bind, all the Attorneys General of all the states comprising the Consortium.

Schenof's role as staff attorney for the FTC in reviewing the March Agreement also raises significant and unresolved factual issues. While she testified at her deposition that she was not authorized to speak for the FTC, she nevertheless advised Sanofi/BMS's attorney that the break-up fee would violate the consent decrees. She also specifically advised the attorney to withdraw Sanofi/BMS's request that the FTC review the March Agreement because it would be denied. However, it is not clear whether these admonitions were made within the thirty-day review period. Her credibility of this issue cannot be resolved on a summary judgment motion.

In sum, the key legal issues in this case are whether the Consortium or the FTC objected to the March Agreement or the break-up fee, the basis for any such objection, and the timing of the objection. The resolution of these legal issues, however, is dependent upon the resolution of disputed facts which currently are based upon vague and contradictory deposition testimony, an informal e-mail, and the representations and arguments of counsel. We are satisfied that there exists genuine issues of material fact which should have precluded summary judgment for either party.

Accordingly, we reverse the trial judge's April 8, 2011 order granting Sanofi/BMS's motion for summary judgment and

affirm the denial of Apotex's motion. The matter is remanded to the Law Division for further proceedings consistent with this opinion.

Affirmed in part; reversed in part; and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION