

word. Plaintiffs may file a total of ten pages of double-spaced expert reports responding to the eleven items by July 12, 2017. Defendants may file a total of five pages of double-spaced expert reports in reply by July 20, 2017. The motion is otherwise **DENIED**. On the exhibits, Plaintiffs do not need to be concerned, as any objections to wholesale admission of exhibits used during cross-examination will be sustained.¹

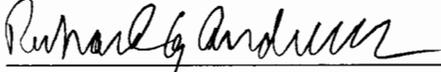
Defendant's MIL #1. Defendant seeks to limit Dr. Burris's "unexpected results" testimony to such results in comparison with the "closest prior art." (D.I. 68-3 at 3-5). As to "AML," the testimony is said to be conclusory, and should be completely excluded. As to "RCC," it is said to involve additional art beyond temsirolimus, which is the closest prior art. The AML argument is rejected. If the testimony turns out to be conclusory, it will carry no weight in the final analysis; but, whether it is conclusory is something I will better understand after hearing it. The RCC argument is also rejected. I do note that, "when unexpected results are used as evidence of nonobviousness, the results must be shown to be unexpected compared with the closest prior art." *Kao Corp. v. Unilever U.S., Inc.*, 441 F.3d 963, 970 (Fed. Cir. 2006). It is not clear to me, however, which art is the closest, although I may be able to decide that after hearing the evidence. If Plaintiffs argue "unexpected results" based on a comparison by Dr. Burris to the wrong art, it will have no weight, and there will be no harm to Defendant. The motion is **DENIED**.

Defendant's MIL #2. Defendant seeks to preclude Plaintiffs from responding to Defendant's obviousness arguments with what it calls "post art," that is, art which is after the relevant dates (February 2001 for one patent, November 2005 for the other) for considering the

¹ As a general rule, most exhibits used on cross-examination will not be admitted into evidence, and, for any exhibits for which a party seeks admission, the exhibit should be limited to what is actually used in the cross-examination.

state of the art for obviousness analysis. Defendant states that some of the post art is more than a decade after the relevant date. Defendant argues that I should exclude the post art pursuant to Federal Rules of Evidence 402 and 403. (D.I. 68-5 at 3-5). Plaintiff responds (in so many words) that post art can be used assuming that it supports some relevant theory. I agree. I have admitted post art in prior cases. Pretty obviously, post art has some limitations. Unlike prior art, post art is not itself known to a POSA at the relevant time. It is certainly possible, though, for post art to be offered for a number of purposes, for example, (1) to show circumstantially what was known or unknown earlier – if something was an open question in 2002, it could be inferred that it was an open question in 2001; (2) to corroborate what an expert says – if an expert says POSAs would have been motivated to combine genus A and genus B to accomplish C in 2001, and there were numerous papers reporting on experiments in 2002 with combinations of that type, it might add credibility to the expert’s opinion; and (3) to show directly something that was known at an earlier time. Of course, the further away in time one gets from the relevant date, the less likely the post art is relevant. Any relevance or Rule 403 objections are best resolved in the context of the trial. The motion is **DENIED**.

IT IS SO ORDERED this 30 day of June 2017.


United States District Judge