

## Plaintiffs’ ‘Strategic Decision’ to Respond to Expert’s Untimely Invalidity Theories Dooms Motion to Strike

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In an ANDA litigation, the District of Delaware recently denied the plaintiffs’ motion to strike portions of the defendants’ expert reports and related deposition testimony. Although the defendants’ invalidity contentions did not state the specific theories of invalidity upon which the expert opined, the court found that none of the *Pennypack* factors supported excluding that expert testimony.

During discovery, the defendants served final invalidity contentions followed three months later by an opening expert report on invalidity. The expert opined that certain asserted claims were invalid for lack of written description and lack of enablement even though those theories were not disclosed in the contentions. The plaintiffs did not object to these portions of the expert’s report, nor did they seek discovery to rebut the untimely theories. Instead, the plaintiffs served a rebuttal report addressing the substance of the opinions, and, after the expert had served a reply report, took extensive deposition testimony of the expert on the opinions. Thereafter, the plaintiffs moved to strike the portions of the expert reports and deposition testimony relating to written description and enablement as untimely.

The court began its analysis by agreeing that the opinions were untimely. However, the court explained that the plaintiffs had missed the opportunity to object through their “subsequent course of conduct,” which included the strategic choice of challenging the substance of the untimely opinions.

The court considered whether exclusion of the opinions was warranted under the *Pennypack* factors: (1) the surprise or prejudice to the moving party; (2) the ability of the moving party to

cure any such prejudice; (3) the extent to which allowing the evidence would disrupt the order and efficiency of trial; (4) bad faith or willfulness in failing to disclose the evidence; and (5) the importance of the evidence withheld.

The court found that each *Pennypack* factor weighed against exclusion. First, the plaintiffs had failed to show prejudice because, instead of objecting to the untimely opinions, they chose to substantively challenge the opinions at length in a rebuttal expert report. Nor could the plaintiffs show that they were surprised six months after the opinions had been disclosed. Second, the plaintiffs failed to articulate with specificity what additional discovery would be needed to cure any alleged prejudice and had declined the defendants' offer of a sur-reply report. Third, the plaintiffs failed to show how allowing the expert's opinions would disrupt the pretrial conference or trial because they failed to identify the additional discovery they required, and the rebuttal report and deposition transcripts showed that the plaintiffs had ample opportunity to address the opinions. Finally, after finding no evidence of bad faith, the court determined that the plaintiffs had undercut their own argument that the evidence was unimportant by devoting significant resources to the issue. Having found that every factor weighed against striking the opinions, the court denied the motion.

(In the same order, the court also rejected the defendants' motion to compel production of correspondence between the plaintiffs' testifying expert and a third-party analyst, which we will discuss in a companion post.)

**Practice Tip:** Parties served with untimely expert opinions should consider the potential ramifications of not objecting to the opinions or seeking additional discovery to rebut the opinions. By substantively engaging in the untimely opinions, such as by serving a rebuttal report and taking a deposition, a party may weaken its objections under the *Pennypack* factors.

*Harmony Biosciences, LLC v. Lupin Ltd.*, Civil Action No. 23-1286-JLH-SRF (D. Del. Dec. 12, 2025)

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