

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

LISA SYKES, individually and as Parent and natural guardian of Wesley Alexander Sykes, a minor child, ET AL.)	
)	
Plaintiffs,)	Case No. 3:07CV660
)	
v.)	
)	
BAYER PHARMACEUTICALS CORPORATION,)	
)	
Defendant.)	

**DEFENDANT BAYER PHARMACEUTICALS CORPORATION'S
REPLY TO PLAINTIFFS' OPPOSITION TO BAYER'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

Bayer Pharmaceuticals Corporation ("Bayer") submits this reply to the Plaintiffs' Memorandum in Opposition ("Opposition") to Bayer's Motion for Judgment on the Pleadings presently pending before this Court ("Bayer's Motion"). The Plaintiffs' Opposition is simply not responsive to Bayer's Motion. Instead, the Opposition is devoted almost entirely to the issue of federal preemption, the issue that Judge Stengel of the Eastern District of Pennsylvania has already dispositively addressed and an issue not even mentioned in Bayer's Motion. In the absence of any substantive opposition to its motion, Bayer's Motion should be granted.

Bayer's Motion, filed with this Court on January 3, 2008, presented straightforward Virginia legal authority as to why the Plaintiffs' remaining two claims (*i.e.*, those claims not dismissed by Judge Stengel) are due to be dismissed:

- that Plaintiffs’ claims sounding in strict liability (Complaint, ¶¶ 14-23), should be summarily dismissed because, as this Court has correctly noted, “it is beyond question that Virginia does not recognize a cause of action for strict liability in tort.” *St. Jarre v. Heidelberger Druckmaschinen A.G.*, 816 F. Supp. 424, 427 (E.D. Va. 1994); **see Bayer Memo. at 13;**
- that Plaintiffs’ claims that Bayer failed to conduct “adequate testing” on the product at issue, HypRho-D (*see* Compl. ¶¶ 20, 27(d)), should be dismissed because Virginia does not recognize a claim for “failure to adequately test a product”; **see Bayer Memo. at 13-14;**
- that Plaintiffs’ “design defect” claim alleging that that HypRho-D is defectively designed because it failed to use single-dose shots rather than multi-dose shots (Compl. ¶¶ 17, 18, 27(b)) should be dismissed because it is undisputed that HypRho-D was *always* administered in single doses; **see Bayer Memo. at 14-15;** and
- that Plaintiffs’ “design defect” claim alleging that single-dose biologics were not required to contain any preservative should be dismissed because the FDA’s own regulations (21 C.F.R. § 640.103(a)) clearly required the use of a preservative in *all* immune globulins like HypRho-D, a point that the Plaintiffs have conceded in their earlier briefs; **see Bayer Memo. at 14-15.**¹

In “response,” Plaintiffs filed a virtual copy of their original brief from the Eastern District of Pennsylvania on the issue of federal preemption’s impact. *Compare* Pl. Opp. at 40-50 *with*

¹ On January 22, 2008, Plaintiff’s filed a Motion to Amend their Complaint. Bayer submits that potential amended complaint should have no bearing on the Court’s consideration of Bayer’s Motion and Plaintiff’s Opposition.

Exhibit A at 5-14.² In short, Plaintiffs' legal arguments concerning preemption, which are found on pages 40-50 of its Opposition, do not offer *any* response to the legal authority cited in Bayer's Motion. Finally, contrary to Plaintiffs' conclusory assertion, none of Bayer's arguments depend on or call for discovery. Bayer's Motion is founded on clear legal authority; not potential disputes of facts. The legal bases of Bayer's Motion have been simply ignored by the Plaintiffs.³

Under Virginia law and the other legal authorities cited in Bayer's Motion and supporting memorandum, Plaintiffs' remaining claims are without merit and Bayer submits it is entitled to judgment on the pleadings.

CONCLUSION

WHEREFORE, pursuant to Federal Rule of Civil Procedure 12(c), Bayer respectfully requests this Court to enter an Order granting judgment in its favor on all of the Plaintiffs' claims.

Respectfully submitted this 23 day of January, 2008.

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² The reference to the "District of Oregon" in the style of Exhibit A was a drafting mistake on the part of the Plaintiffs; Exhibit A was filed in the Eastern District of Pennsylvania.

³ In addition to being totally nonresponsive, Plaintiffs' Opposition appears also to be untimely under this Court's rules. Plaintiffs should have filed their Opposition within 11 days of the filing of Bayer's motion and memorandum in support, which were filed on January 3, 2008. *See* Local Rule 7(f)(1). However, Plaintiffs Opposition was not filed until January 17, 2008.

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CERTIFICATE OF SERVICE

I herby certify that on the 23 day of January, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send notification of such filing to the following:

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