

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF DELAWARE

RECKITT BENCKISER	:	
PHARMACEUTICALS INC., et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 13-1674-RGA
	:	Consolidated
WATSON LABORATORIES INC., et al.,	:	
	:	
Defendants.	:	

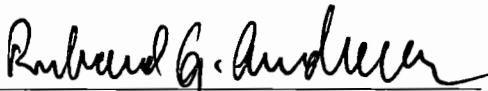
MEMORANDUM ORDER

Defendants want to show that the suboxone film has not achieved commercial success. Plaintiffs are not claiming commercial success, but are asserting other secondary factors of non-obviousness. “The absence of objective evidence is a neutral factor.” Harmon, et al., Patents and the Federal Circuit, 11th ed., p. 250. I believe that marketplace failure could, under the right circumstances, be a “negative factor.” It could rebut (in a roundabout way) “long-felt need.” Based on the sketchy discussion at the pretrial conference, I am doubtful that Defendants can show marketplace failure, and, indeed, I am not sure that they even have a good shot at making commercial results a neutral factor. Defendants have to decide how to allocate their time. Thus, if Defendants believe the proffered Lawton evidence is a good use of their time, I will allow it.

It is true that Plaintiffs unilaterally withdrew their commercial success expert, and

Defendants' expert was to respond to that now foregone evidence, but I do not see Plaintiffs being unfairly prejudiced by allowing Defendants to put on their evidence.

IT IS SO ORDERED this 14 day of December 2015.


United States District Judge