

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

GENENTECH, INC. and CITY OF HOPE,)

Plaintiffs,)

v.)

AMGEN, INC.,)

Defendant.)

C.A. No. 18-924-CFC

PUBLIC VERSION FILED:
JULY 29, 2019

**GENENTECH'S OPENING BRIEF IN SUPPORT OF ITS FED. R. CIV. P.
62(d) MOTION FOR AN INJUNCTION PENDING APPEAL, OR, IN THE
ALTERNATIVE, A 14-DAY INJUNCTION TO ENABLE GENENTECH TO
PURSUE AN EXPEDITED MOTION FOR AN INJUNCTION PENDING
APPEAL BEFORE THE FEDERAL CIRCUIT PURSUANT TO FED. R. APP. P. 8**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
LEGAL STANDARD	4
ARGUMENT	6
A. Unless Enjoined, Amgen's Infringement Will Irreparably Harm Genentech.....	6
1. The Court Finding of Delay Would Require Premature and Unnecessary Filings.....	6
2. The Evidence Presented Supports Genentech's Irreparable Harm.	10
B. The Remaining Factors Support Granting Genentech's Rule 62(d) Motion	12
1. Genentech Has Made a Strong Showing That It Is Likely to Succeed on the Merits.....	12
2. The Balance of Hardships Favors Genentech.....	13
3. Granting An Injunction Pending Appeal Serves The Public Interest.	13
CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Abbott Labs. v. Sandoz, Inc.</i> , 500 F. Supp. 2d 807 (N.D. Ill. 2007),.....	9
<i>Abbott Labs. v. Sandoz, Inc.</i> , 544 F.3d 1341 (Fed. Cir. 2008).....	9, 10
<i>Amgen, Inc. v. Sandoz, Inc.</i> , No. 2015-1499, D.I. 105 (Fed. Cir. May 5, 2015)	4
<i>Amgen Inc. v. Sandoz Inc.</i> , No. 3:14-cv-04741-RS (N.D. Cal. Apr. 15, 2015).....	4
<i>Apple Inc. v. Samsung Elecs. Co.</i> , 695 F.3d 1370 (Fed. Cir. 2012) (<i>Apple I</i>).....	6
<i>Apple Inc. v. Samsung Elecs. Co.</i> , 735 F.3d 1352 (Fed. Cir. 2013) (<i>Apple II</i>).....	3, 9
<i>Apple Inc. v. Samsung Elecs. Co.</i> , 809 F.3d 633 (Fed. Cir. 2015).....	11
<i>Astrazeneca LP v. Breath Ltd.</i> , Nos. 2013–1312, 2013–1352, 2013 WL 9853383 (Fed. Cir. May 24, 2013).....	5
<i>BioTechnology Gen. Corp. v. Genentech, Inc.</i> , 80 F.3d 1553 (Fed. Cir. 1996).....	11
<i>Butamax Adv. Biofuels LLC v. Gevo, Inc.</i> , 2012 WL 2675232 (D. Del. July 6, 2012)	5
<i>Celsis in Vitro, Inc. v. Cellzdirect, Inc.</i> , 664 F.3d 922 (Fed. Cir. 2012).....	11, 13
<i>In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.</i> , 2011 WL 1980610 (D. Del. May 20, 2011)	5
<i>Douglas Dynamics, LLC v. Buyers Prods. Co.</i> , 717 F.3d 1336 (Fed Cir. 2013).....	11
<i>High Tech Medical Instrumentation, Inc. v. New Image Industries, Inc.</i> , 49 F.3d 1551 (Fed. Cir. 1995).....	10

<i>Impax Labs., Inc. v. Aventis Pharm. Inc.</i> , 235 F. Supp. 2d 390 (D. Del. 2002)	13
<i>Kos Pharms., Inc. v. Andrx Corp.</i> , 369 F.3d 700 (3d Cir. 2004)	13
<i>Noven Pharm., Inc. v. Mylan Techs. Inc.</i> , 2018 WL 4007848 (D. Del. Aug. 22, 2018)	5
<i>PPG Indus., Inc. v. Guardian Indus. Corp.</i> , 75 F.3d 1558 (Fed. Cir. 1996)	12
<i>Pfizer, Inc. v. Teva Pharm., USA, Inc.</i> , 429 F.3d 1364 (Fed. Cir. 2005)	8
<i>Polymer Techs v. Bridwell</i> , 103 F.3d 970 (Fed. Cir. 1996)	8, 10
<i>Purdue Pharma L.P. v. Boehringer Ingelheim GmbH</i> , 237 F.3d 1359 (Fed. Cir. 2001)	11
<i>In re Revel AC, Inc.</i> , 802 F.3d 558 (3d Cir. 2015)	5
<i>Sandoz Inc. v. Amgen Inc.</i> , 137 S. Ct. 1664 (2017)	8
<i>Standard Havens Prods., Inc. v. Gencor Indus., Inc.</i> , 897 F.2d 511 (Fed. Cir. 1990)	5
<i>Trading Techs. Int’l, Inc. v. eSpeed, Inc.</i> , No. 04 C 5312, 2008 WL 4531371 (N.D. Ill. May 22, 2008), aff’d, 595 F.3d 1340 (Fed. Cir. 2010)	9

Federal Statutes

42 U.S.C. § 262(k)(4)	14
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Rules

Fed. R. App. P. 8	1, 4, 15
Fed. R. Civ. P. 62(d)	1, 4, 5, 12

INTRODUCTION

Genentech respectfully brings this motion pursuant to Fed. R. Civ. P. 62(d) for an injunction pending appeal, or, in the alternative, a 14-day injunction to enable Genentech to pursue an expedited motion for an injunction pending appeal before the Federal Circuit pursuant to Fed. R. App. P. 8, as it is required to do prior to filing its motion with the Federal Circuit. Fed. R. App. P. 8(a). Genentech asked Amgen to stipulate to this relief, which it has declined to do.

On July 10, 2019, Genentech filed an emergency motion in which it asked the Court to temporarily restrain and preliminarily enjoin Amgen from launching its trastuzumab biosimilar Kanjinti. In its supporting papers, Genentech contended that: (1) without an injunction, Genentech would suffer loss of market share, price erosion, and reputational injury resulting directly from Amgen's infringement that cannot be addressed with money damages; (2) Genentech is likely to prevail on the merits inasmuch as Amgen effectively concedes infringement, and Amgen's defense hinges on essentially the same invalidity arguments that the Patent Office recently rejected in multiple IPRs; (3) unlike the significant and permanent harm facing Genentech, Amgen will lose no customers or market share if forced to wait until the issues are resolved in the December trial; and (4) patient access would not be affected because Genentech ensures that patients can obtain Herceptin regardless of ability to pay. The Court did not resolve any of those issues adversely to Genentech.

Instead, the Court concluded that Genentech had failed to establish irreparable harm in two other respects—both of which establish new criteria that present substantial appellate issues.

First, the Court found that any harm alleged by Genentech could not be “irreparable” because Genentech delayed in filing its motions. While the Court's opinion does not specify when the period of delay started, it suggests that the clock started ticking on Genentech's

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