

EXHIBIT A

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

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GENENTECH, INC. and CITY OF HOPE,	:	CIVIL ACTION
	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
AMGEN INC.,	:	
	:	
Defendant.	:	NO. 17-1407 (CFC)
-----	:	
GENENTECH, INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
AMGEN, INC.,	:	
	:	
Defendant.	:	NO. 18-924 (CFC)

- - -

Wilmington, Delaware
Wednesday, October 16, 2019
9:00 o'clock, a.m.

- - -

BEFORE: HONORABLE COLM F. CONNOLLY, U.S.D.C.J.

- - -

Valerie J. Gunning
Official Court Reporter

1 APPEARANCES:

2 McCARTER & ENGLISH, LLP
 3 BY: DANIEL M. SILVER, ESQ.

4 -and-

5

6 WILLIAMS & CONNOLLY LLP
 7 BY: PAUL B. GAFFNEY, ESQ.,
 8 DAVID J. BERL, ESQ.,
 9 THOMAS S. FLTECHER, ESQ.,
 10 TEAGAN J. GREGORY, ESQ.,
 11 CHARLES McCLOUD, ESQ.,
 12 ANDREW DANFORD, ESQ.
 (Washington, D.C.)

13 -and-

14 DURIE TANGRI
 15 BY: DARALYN DURIE, ESQ.

16 Counsel for Plaintiffs

17 YOUNG CONAWAY STARGATT & TAYLOR, LLP
 18 BY: MELANIE K. SHARP, ESQ. and
 19 JAMES L. HIGGINS, ESQ.

20 -and-

21 PROSKAUER ROSE LLP
 22 BY: SIEGMUND Y. GUTMAN, ESQ.,
 23 AMIR NAINI, ESQ. and
 24 DAVID HANNAH, ESQ.
 (Los Angeles, California)

25 -and-

1 PROCEEDINGS

2

3 (Proceedings commenced in the courtroom,
 4 beginning at 9:00 a.m.)

5

6 THE COURT: Good morning. Please be seated.
 7 (Counsel respond, "Good morning, Your Honor.")

8 THE COURT: Mr. Silver?

9 MR. SILVER: Good morning, Your Honor.

10 THE COURT: How are you?

11 MR. SILVER: I'm good. Thanks. How are you?

12 THE COURT: Good.

13 MR. SILVER: Your Honor, with me on behalf of
 14 Genentech today are Thomas Fletcher from Williams &
 15 Connolly, Paul Gaffney from Williams & Connolly, David Berl
 16 from Williams & Connolly, Luke McCloud from Williams &
 17 Connolly, Andrew Danford from Wilmer Hale, Daralyn Durie
 18 from Durie Tangri, and we've got Rebecca Grant from
 19 Genentech.

20 THE COURT: All right. Thank you very much.
 21 Ms. Ormerod, how are you?

22 MS. ORMEROD: Eve Ormerod on behalf of Amgen in
 23 the 18-924 case.

24 With me today from Cooley are Michele Rhyu,
 25 Eamonn Gardner and Phillip Mao, and from Amgen we Lois

1 APPEARANCES (Continued):

2

3 AMGEN INC.
 4 BY: DREW DIAMOND, ESQ.

5 Counsel for Defendant
 6 Amgen Inc.
 (CA No. 17-1407-CFC)

7 SMITH KATZENSTEIN & JENKINS LLP
 8 BY: NEAL C. BELGAM, ESQ. and
 9 EVE H. ORMEROD, ESQ.

10 -and-

11 COOLEY LLP.
 12 BY: MICHELLE RHYU, ESQ.,
 13 PHILIP S. MAO, ESQ. and
 14 DANIEL KNAUSS, ESQ.

15 Counsel for Defendant Amgen
 16 (CA 18-924-CFC)

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1 Cosigrove and Nancy Goettel. We also have Neal Belgam from
 2 my office.

3 THE COURT: All right. Thank you.

4 Ms. Sharp?

5 MS. SHARP: Good morning, Your Honor. Melanie
 6 Sharp from Young Conaway Stargatt & Taylor for Amgen in the
 7 17-14-07-case. Also Jim Higgins from Young Conaway. With
 8 me are my colleagues Your Honor has met, Siegmund Gutman,
 9 Amir Naini, David Hanna, and Drew Diamond from Amgen.

10 THE COURT: All right. Thank you.

11 All right. I guess let's begin. You know, the
 12 declarations were largely about the intrinsic evidence and
 13 the briefing. As far as I'm concerned, that is already
 14 dealt with. You can address it real quickly if you want,
 15 but I thought the purpose of this hearing was to adduce
 16 extrinsic evidence so I can make a decision. I think I've
 17 already ruled that I'm unable based on the intrinsic
 18 evidence to construe the terms.

19 MR. FLETCHER: Yes, Your Honor.

20 THE COURT: All right.

21 MR. FLETCHER: And I think we will go through
 22 the extrinsic evidence today.

1 and after that hearing, Your Honor ordered that the
2 agreements had to be produced and the only thing that could
3 be redacted were launch dates and irrelevant information
4 dates, but nothing that had to do with consideration.

5 They produced the documents, very heavily
6 redacted, including provisions in the settlement agreement
7 and licenses that we do believe weigh heavily on
8 consideration, including acceleration clauses and provisions
9 dealing with pre-market activities that are permitted under
10 the agreements.

11 Maybe the easiest way to visualize this is if
12 you look at Exhibit 4 to our letter at page 4-68 --

13 THE COURT: Four-dash what?

14 MR. HIGGINS: 4-68 and subsequent pages.

15 THE COURT: Yes.

16 MR. HIGGINS: If you compare that to Exhibit 7,
17 which is a more recently produced settlement agreement
18 that is much more appropriately redacted, and if you look
19 at page 7-60 and subsequent pages, both of these -- are you
20 there?

21 THE COURT: Yes. I have not done the
22 comparison, so hold on. Do you want me to compare them?

23 MR. HIGGINS: I will talk about it, but you can
24 visualize the extent of their redactions.

25 These are basic --

1 case, while they're not revealing their launch dates, these
2 have timing provisions that my understanding is, I confess
3 I've not seen this document or program or spreadsheet that
4 was produced in the litigation, but Genentech has an
5 internal way of plugging in periods of time in the future
6 that can sort of anticipate the impact of biosimilar
7 competition. So the idea here is that our damages expert is
8 going to need to know this sort of information so that we're
9 able to put together, you know, a theory, a defensive theory
10 on reasonable royalty or whatever other damages theory they
11 bring out.

12 THE COURT: Okay. So there are two things.
13 There were multiple references to third-party licenses.

14 So is this the one where folks wrote letters, third parties?

15 MR. HIGGINS: Yes. If I can address that very
16 briefly.

17 THE COURT: Yes. You need to address it. And
18 then you last night said, well, guess what? We'd like to
19 table this.

20 MR. HIGGINS: Okay. So the third parties were
21 heard fully on this back in May, and as a result of that,
22 Genentech implemented redactions -- well, purportedly
23 pursuant to Your Honor's order, produced the licenses. We
24 complained about them a month-and-a-half ago, that they were
25 severely over-redacted.

1 THE COURT: You mean these redactions?

2 MR. HIGGINS: No. Actually maybe you're on the
3 wrong page. Which exhibit are you on?

4 THE COURT: You tell me.

5 MR. HIGGINS: Okay. Well, I'm on Exhibit 4 at
6 page 4-68.

7 THE COURT: All right. I'm there.

8 MR. HIGGINS: And then compare that to Exhibit 7
9 at 7-68.

10 THE COURT: All right. Hold up. All right.

11 MR. HIGGINS: And what you will see is that --

12 THE COURT: Wait. This is supposed to be the
13 same license?

14 MR. HIGGINS: No, it's not the same license.

15 THE COURT: Okay.

16 MR. HIGGINS: But they're very similar. All of
17 these licenses are very similar.

18 THE COURT: Okay.

19 MR. HIGGINS: What you will see is that Section
20 2.2, for instance, in Exhibit 7 and 2.3 in Exhibit 7 appear
21 to be redacted in Exhibit 4, and these are acceleration
22 provisions. And as I said earlier, a provision dealing with

1 We met and conferred with Genentech. They
2 refused to reduce the redactions, so at that point, we were
3 at an impasse with Genentech on their implementation of Your
4 Honor's order, basically.

5 During that meet and confer, at no point did
6 Genentech suggest that we should be looping in these third
7 parties. We didn't feel it necessary because this was no
8 longer an issue with the third parties. They've been heard
9 in May and Your Honor had ruled.

10 In light of the fact that there were two
11 letters submitted by I believe it was Mylan on Friday and
12 Celltrion/Teva on Monday, and in light of, candidly, the
13 amount of things that were on the calendar for today, I made
14 a judgment, and if it was wrong, I apologize.

15 THE COURT: Don't apologize.

16 MR. HIGGINS: That Your Honor would be more
17 bothered by a dispute about a meet and confer than about
18 pushing it off for a few days or what have you, but I
19 understand that's not an option, so here we are.

20 THE COURT: It's not a question of bothering me.
21 It's a question of, we have to address these things, and I
22 don't have enough time.

1 counsel and experts only, and then if you need further
 2 production, then an application can be made at that point.
 3 MR. HIGGINS: I think that would be okay.
 4 THE COURT: So let me hear then from the other
 5 side and see if that is okay with them.
 6 MR. HIGGINS: I do want to confirm that.
 7 MS. DURIE: And, Your Honor, Daralyn Durie for
 8 Genentech. I am be addressing this issue in the Avastin
 9 case.
 10 From our perspective, this really is a
 11 third-party confidentiality issue. We were even deferring
 12 to implement what we understood the redaction guidance to be
 13 in view of the third-party confidentiality concerns. We
 14 think we got it right.
 15 To the extent that Amgen thinks we got it wrong,
 16 we just want to make sure the third parties have an
 17 opportunity to be heard, because it's fundamentally their
 18 issue. We have a contractual obligation to raise the
 19 issue, but the substantive is concern is the third-party
 20 issue.
 21 THE COURT: Right. We don't have time.
 22 MS. DURIE: Completely understood.
 23 THE COURT: Wait. Hold on. This is Avastin.
 24 MS. DURIE: I'm counsel in Avastin as well. I'm
 25 actually counsel in both cases, so I'm appearing on the

1 And then to the extent Amgen wants to offer some
 2 sort of compromise proposal, Mylan just wants time to
 3 consider that. So really, we're just asking for an
 4 opportunity to meet and confer with Amgen on this.
 5 THE COURT: Okay. All right. Thank you.
 6 MR. JOHNSON: Very briefly, Your Honor. Michael
 7 Johnson from Willkie Farr & Gallagher on behalf of
 8 third-party Pfizer. We submitted a letter on Friday.
 9 THE COURT: Yes.
 10 MR. JOHNSON: We had a little bit more of a meet
 11 and confer with them.
 12 THE COURT: Right.
 13 MR. JOHNSON: The concern here is simply nothing
 14 has changed since the May hearing. It's ironic to us that
 15 Amgen in the trastuzumab case is not seeking further
 16 disclosure of the agreement, but rather only seeking it in
 17 the Avastin case where there's very little overlap and
 18 therefore very little relevance. In fact, I think the
 19 primary patent that overlaps it is the one that you spent
 20 today hearing about whether or not it's indefinite.
 21 We don't think there's any relevance to these,
 22 the trastuzumab agreement and bevacizumab. We don't think
 23 any other redactions -- un-redactions are necessary. We
 24 would be willing I think to consent to a disclosure on an
 25 outside counsel basis provided that for the agreement to

1 Avastin issue.
 2 THE COURT: All right. Got it. So is the third
 3 party here?
 4 MR. LENNON: Your Honor, Jim Lennon on behalf of
 5 Mylan.
 6 THE COURT: Mylan. Okay.
 7 MR. LENNON: So Mylan hasn't really had an
 8 opportunity to really consider what Mr. Higgins just raised,
 9 the exhibits, the examples of redactions. We have not seen
 10 those. We weren't invited to participate in the meet and
 11 confer. We weren't aware of this issue.
 12 As soon as we became aware of this issue, we
 13 asked the Court if we could be heard on it, but we still
 14 have not had a substantive opportunity to meet and confer.
 15 I think Mr. Higgins acknowledges that a meet and confer
 16 would be appropriate at this time.
 17 So I guess all I can raise at this point is that
 18 we don't understand anything to have changed substantively
 19 since the May hearing, that the redacted copies were already
 20 produced. You know, we understood those to be worked out
 21 with Genentech to be sufficient.
 22 Mylan's agreement is with respect to matuzumab,

1 have both U.S. and foreign stuff, is that the foreign dates
 2 and the settlement of foreign litigation can still be
 3 removed.
 4 THE COURT: I'm not going to do that. So with
 5 Pfizer I can rule because you're here, and I mean, I guess
 6 maybe you could -- is there some technical issue you could
 7 raise? No, because Genentech has it. You've got it.
 8 Right.
 9 **So here's what I'm going to do. With Pfizer,**
 10 **Genentech must produce to outside counsel unredacted**
 11 **versions, okay, of the agreement. And then if counsel wants**
 12 **to make an application that there's a need to further**
 13 **disseminate it, we can deal with it at that point.**
 14 MR. JOHNSON: I guess, Your Honor, I just would
 15 like to be heard then on why there's any relevance to the
 16 foreign documents.
 17 THE COURT: I read your letter. I mean, you
 18 know, there is -- we've already in this case addressed
 19 the issue of foreign sales being relevant, and Mr. Gaffney
 20 was heard and persuaded me that that information was
 21 relevant. So I don't want to revisit that issue. I decided
 22 it. I think it is relevant and it's going to outside

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