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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 : CIVIL ACTION
OF HOPE, :
Plaintiff, :
vs. :
AMGEN INC., :
Defendant : NO. 17-1407 (CFC)

- - -

Wilmington, Delaware
Thursday, May 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 GENENTECH, INC. And CITY OF: CIVIL ACTION
 HOPE, :
 2 :
 3 Plaintiffs, :
 4 Vs. :
 5 AMGEN INC., :
 6 :
 7 Defendant and :
 Counterclaim :
 Plaintiff : NO. 18-00924 (CFC)
 8 ----- :
 9 GENENTECH, INC., : CIVIL ACTION
 10 Plaintiff and :
 Counterclaim :
 Defendant, :
 11 :
 12 VS. :
 13 SAMSUNG BIOEPSIS CO., LTD., :
 14 :
 15 Defendant and :
 Counterclaim Plaintiff : NO. 18-1363 (CFC)
 16 :
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1 APPEARANCES (Continued):
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1 PROCEEDINGS
 2
 3 (Proceedings commenced in the courtroom,
 4 beginning 9:00 a.m.)
 5
 6 THE COURT: Good morning. Please be seated.
 7 All right. Mr. Kelly, good morning.
 8 MS. KELLY: Good morning, Your Honor. I
 9 apologize for that phone issue earlier this morning. That
 10 was actually a landline.
 11 THE COURT: Mr. Falgowski set you up.
 12 MS. KELLY: Yes. I think the Honorable
 13 Falgowski set me up. Thank you, Your Honor.
 14 THE COURT: Incidentally, just so the record is
 15 clear, I just got off the phone in another patent case
 16 Mr. Kelly was on. He couldn't be heard because he decided
 17 to make a phone call from within this building, which he now
 18 knows is not a good idea.
 19 MS. KELLY: I didn't want to be late for the
 20 Court because it was 9:30.
 21 THE COURT: All right.
 22 MS. KELLY: Anyway, it's always a pleasure, Your
 23 Honor.
 24 I am hear on behalf of plaintiffs in the two
 25 consolidated cases, 17-1407, 18-924. And with me from

1 been, proposed orders that have been submitted for guidance.
 2 All right.
 3 MS. KELLY: Thank you, Your Honor.
 4 THE COURT: Thank you, Mr. Kelly.
 5 And then I guess, let's see. Why don't we start
 6 with Mr. Belgam.
 7 MS. ORMEROD: Good morning, Your Honor.
 8 THE COURT: Oh, Ms. Ormerod.
 9 MS. ORMEROD: Eve Ormerod from Smith Katzenstein
 10 on behalf of Amgen in the 18-924 action, and today I'm
 11 joined by Michelle Rhyu and Eamonn Gardner from Cooley and
 12 Neal Belgam from Smith Katzenstein as well.
 13 THE COURT: All right. Great. And then let's
 14 see. We have Mr. Higgins?
 15 MR. HIGGINS: Yes. Good morning, Your Honor.
 16 THE COURT: Good morning.
 17 MR. HIGGINS: Jim Higgins from Young Conaway on
 18 behalf of Amgen in the 17-1407 case, and with me is Melanie
 19 Sharp also from Young Conaway.
 20 MS. SHARP: Good morning, Your Honor.
 21 THE COURT: And I guess that's all the
 22 defendants. Right? Accounted for, I believe?
 23 MR. HIGGINS: Correct.
 24 THE COURT: So then, Mr. Gattuso. There you
 25 are. Okay.

1 Williams & Connolly a David Berl and Teegan Gregory and
 2 also Daralyn Durie, the Durie Tangri firm, and they're in
 3 17-14 -- sorry. 17-1407 and 18-924.
 4 Robert Gunther and Andrew an forth from Wilmer
 5 Hale. Daralyn Durie as well. And who am I missing? Okay.
 6 And with Your Honor's permission, I guess Mr. Berl will be
 7 making the argument. Okay. Mr. Berl.
 8 THE COURT: In both cases. Right? I just want
 9 to make sure. We're dealing with both consolidated cases.
 10 Is that right?
 11 MR. BERL: Just to be clear, I don't think the
 12 cases are consolidated formally.
 13 THE COURT: Okay.
 14 MR. BERL: So to the --
 15 THE COURT: Those two are not, but one of them,
 16 there are consolidated --
 17 MR. BERL: Correct. We're arguing there. To
 18 the extent there are overlapping issues, I'm happy to
 19 address them. If there are Herceptin-specific issues,
 20 Mr. Durie will address those.
 21 THE COURT: Okay.
 22 MS. KELLY: And we did file under both captions,

1 MR. GATTUSO: Good morning, Your Honor.
 2 Dominick Gattuso Heyman Enerio Gattuso & Hirzel on behalf of
 3 Pfizer and Hospira. I have with me Michael Johnson from
 4 Willkie, Farr & Gallagher.
 5 THE COURT: Okay.
 6 MR. GATTUSO: Thank you.
 7 THE COURT: Thank you. And Mr. Lennon.
 8 MR. LENNON: Good morning, Your Honor. Jim
 9 Lennon from the Devlin law firm on behalf of Mylan. With me
 10 is Lara Fitzsimmons from Rakoczy Molino.
 11 THE COURT: Good morning. And Mr. Hoeschen.
 12 MR. HOESCHEN: Good morning, Your Honor. Nathan
 13 Hoeschen from Shaw Keller on behalf of Teva and Celltrion,
 14 and with me is Linnea Cipriano from Goodwin Procter. And in
 15 the gallery is Lori chambers from Teva.
 16 THE COURT: All right.
 17 MS. CIPRIANO: Good morning, Your Honor.
 18 THE COURT: Is there anybody else that needs to
 19 be identified? All right. Great.
 20 All right. What I would like to do is, I want
 21 to begin with the proposed order, which is docketed at
 22 191-1. So this is the Herceptin order, is it. Correct?

1 trying to focus on the record in the case as to what the
2 claims and defenses are in the same way Your Honor is
3 looking at the form of order to decide what you have to
4 decide. And what's in the complaint is a request for an
5 injunction.

6 THE COURT: I hear you.

7 MR. BELGAM: Preliminary injunction. They've
8 raised that.

9 THE COURT: Okay.

10 MR. BELGAM: They've sued us. I've got a trial
11 in December. If Your Honor doesn't allow me to get access
12 to those documents now, I will not have them for trial, and
13 I will not have them to defend my client in whatever
14 preliminary post-trial proceeding we have. And certainly
15 there would be a laches problem that the plaintiff would
16 have to deal with, and maybe Your Honor would be convinced
17 at that point that, you know, because I didn't give them to
18 Mr. Belgam in May, you know, I'm not going to put a
19 preliminary injunction in place, but that's a big risk for a
20 company to take.

21 THE COURT: All right. I'm worried about time.
22 So we've got launch dates as an issue.

23 MR. BELGAM: Can I make one other point on
24 launch date?

25 THE COURT: Yes.

1 case. You know, what do we do with respect to this issue,
2 what expert do we hire, what's our position on commercial
3 success, how are we going to defend against the injunction.
4 These people are functioning as lawyers.

5 So in the case law where the Court has said,
6 let's not create two classes of outside counsel, right, the
7 settlement negotiator outside counsel and the litigation
8 outside counsel, I think that there's an analog for Amgen
9 here and maybe it's their unique business structure, but
10 what Your Honor would be doing would be forcing us to create
11 in-house lawyers that are settlement only and in-house
12 lawyers that are litigation only.

13 And the point that we made at the end of our
14 letter was not that we were seeking the documents for the
15 purposes of settlement. That was sort of a gross leap, but
16 what we said was, if Your Honor draws that line for us,
17 these documents are so important to our people who are
18 running and working on these cases that we're probably going
19 to put the senior people who would otherwise be negotiating
20 on the litigation side, and then somebody else would have to
21 come in and do the settlement negotiation, and that might
22 have a chilling effect.

23 That was the point we were making. It was sort
24 of a non-argument. You know, they saw the word settlement
25 and they thought, Starfish wants tuna that tastes good, and

1 MR. BELGAM: The injunction part is really only
2 part of it. It's a critical term of the license, and as I
3 understand it, it's hard to understand how the patent has
4 been valued or treated by Genentech without that component.
5 In other words, the launch date reflects their perception of
6 which patents they are willing to --

7 THE COURT: See, the problem is, that just seems
8 so speculative to me. I mean, they're figuring a launch
9 date also based on the revenue that would follow. I mean,
10 their ability to launch.

11 MR. BELGAM: It's complicated.

12 THE COURT: Yes. I'm just worried about time.

13 MR. BELGAM: Sure.

14 THE COURT: What about access to the in-house
15 versus the outside counsel issue?

16 MR. BELGAM: Yes. I think my argument on that
17 is no different than the argument that was made by
18 Mr. Higgins, so I won't belabor the point.

19 I guess the only -- I don't know exactly how the
20 case is staffed in the Avastin case, but I can tell Your
21 Honor that with respect to the Herceptin case, Amgen's model
22 is a little different, so they have lawyers that are pro hac

1 they saw --

2 THE COURT: Well, I will test them on that. I
3 didn't find it too compelling, so let me ask them.

4 MR. BELGAM: All right.

5 THE COURT: So anything else? You will get a
6 chance to reply.

7 MR. BELGAM: Yes. That's it's, Your Honor.

8 THE COURT: All right.

9 MR. BELGAM: Thank you.

10 THE COURT: Go ahead, Mr. Berl. All right. Mr.
11 Berl, you already agreed to produce the settlement
12 agreement.

13 MR. BERL: Not unredacted.

14 THE COURT: I didn't say that. You agreed to
15 produce it?

16 MR. BERL: Right. I think that's most of my
17 response today. If there is certain information that is
18 relevant to the case and outweighs the risks, we're willing
19 to produce that.

20 THE COURT: All right.

21 MR. BERL: For example, and I think this deals
22 with all the damages argument and all this commercial