

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ARBUTUS BIOPHARMA CORPORATION)
and GENEVANT SCIENCES GMBH,)
)
Plaintiffs,)
)
v.) C.A. No. 22-252 (MSG)
)
MODERNA, INC. and MODERNATX, INC.,)
)
Defendants.)

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR PARTIAL MOTION TO
DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)**

OF COUNSEL:

James F. Hurst
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

Patricia A. Carson, Ph.D.
Jeanna M. Wacker, P.C.
Mark C. McLennan
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

June 24, 2022

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Jack B. Blumenfeld (#1014)
Brian P. Egan (#6227)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@morrisnichols.com
began@morrisnichols.com

Attorneys for Defendants

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

 A. Moderna Supplied Doses to the U.S. Government “for the Government” 2

 B. Moderna Had “the Authorization and Consent of the Government” 6

 C. Plaintiffs’ Indirect Infringement Allegations Are Subject to Section
 1498(a) 7

 D. Moderna’s Motion Is Not “Premature” 9

III. CONCLUSION 10

TABLE OF AUTHORITIES¹

| | Page(s) |
|---|----------------|
| Cases | |
| <i>Advanced Software Design Corp. v. Fed. Rsrv. Bank of St. Louis</i> , 583 F.3d 1371 (Fed. Cir. 2009)..... | 5, 10 |
| <i>ALA, Inc. v. CCAIR, Inc.</i> , 29 F.3d 855 (3d Cir. 1994)..... | 9 |
| <i>Astornet Techs. v. BAE Sys., Inc.</i> , 802 F.3d 1271 (Fed. Cir. 2015)..... | 9 |
| <i>Carrier Corp. v. United States</i> , 534 F.2d 244 (Ct. Cl. 1976) | 4, 5 |
| <i>D3D Techs., Inc. v. Microsoft Corp.</i> , No. 6:20-CV-1699, 2021 WL 2194601 (M.D. Fla., Mar. 22, 2021)..... | 6, 7, 9, 10 |
| <i>Delgado v. ILWUPMA Welfare Plan</i> , No. 2:18-CV-5539, 2019 WL 2864427 (C.D. Cal. Apr. 26, 2019)..... | 7 |
| <i>IRIS Corp. v. Japan Airlines Corp.</i> , 769 F.3d 1359 (Fed. Cir. 2014)..... | 5, 9 |
| <i>IV Sols., Inc. v. United HealthCare Servs., Inc.</i> , No. CV 16-09598, 2017 WL 3018079 (C.D. Cal. July 12, 2017)..... | 7 |
| <i>John J. McMullen Assocs., Inc. v. State Bd. of Higher Ed.</i> , 268 F. Supp. 735 (D. Or. 1967) | 3 |
| <i>Larson v. United States</i> , 26 Cl. Ct. 365 (1992) | 3, 4 |
| <i>Leupold & Stevens, Inc. v. Lightforce USA, Inc.</i> , 449 F. Supp. 3d 1015 (D. Or. 2020) | 7 |
| <i>M.D.C.G. v. United States</i> , No. 7:15-CV-552, 2016 WL 6638845 (S.D. Tex. Sept. 13, 2016), <i>aff'd in part</i> , 956 F.3d 762 (5th Cir. 2020) | 7 |

¹ Unless otherwise indicated, internal quotation marks and citations have been omitted from quoted material.

Madey v. Duke Univ.,
307 F.3d 1351 (Fed. Cir. 2002).....10

Merrell & Garaguso, Inc. v. Sunoco, Inc.,
No. Civ.A. 04-1770, 2004 WL 1849705 (E.D. Pa. 2004)10

Molinaro v. Watkins-Johnson CEI Div.,
359 F. Supp. 467 (D. Md. 1973).....5

Morpho Detection, Inc. v. Smiths Detection Inc.,
No. 2:11CV498, 2013 WL 5701522 (E.D. Va. Oct. 17, 2013)8

Omega Advisors, Inc. v. Fed. Ins. Co.,
No. CIV.A. 10-912 JAP, 2010 WL 4941457 (D.N.J. Nov. 30, 2010).....9

Phillips v. Ochoa,
No. 2:20-cv-00272-JAD-VCF, 2020 WL 3128595 (D. Nev. June 12, 2020).....7

Richmond Screw Anchor Co. v. United States,
275 U.S. 331 (1928).....8, 10

Riles v. Amerada Hess Corp.,
999 F. Supp. 938 (S.D. Tex. 1998)4, 5

Saint-Gobain Ceramics & Plastics, Inc. v. II-VI Inc.,
369 F. Supp. 3d 963 (C.D. Cal. 2019)5

Sevenson Env't Servs., Inc. v. Shaw Env't, Inc.,
477 F.3d 1361 (Fed. Cir. 2007).....5

Se. Ready Mix, LLC v. Argos N. Am. Corp.,
No. 1:17-CV-02792, 2018 WL 8263138 (N.D. Ga. Aug. 22, 2018)7

Thermalon Indus., Ltd. v. United States,
34 Fed. Cl. 411 (1995)4

Toxgon Corp. v. BNFL, Inc.,
312 F.3d 1379 (Fed. Cir. 2002).....9

TVI Energy Corp. v. Blane,
806 F.2d 1057 (Fed. Cir. 1986).....10

U.S. ex rel. Vampire Nation v. Citifinancial Mortg. Co.,
No. CIV A 06-936, 2007 WL 2142404 (W.D. Pa. July 9, 2007), *report and
recommendation adopted as modified*, No. CIV A 06-936, 2007 WL 2142410
(W.D. Pa. July 24, 2007).....7

Windsurfing Int'l, Inc. v. Ostermann,
534 F. Supp. 581 (S.D.N.Y. 1982)4

Rules

Fed. R. Civ. P. 127, 9, 10

Statutes

28 U.S.C. § 1498(a) *passim*

Other Authorities

48 C.F.R. § 52.104(b) (FAR 52.104(b))6

48 C.F.R. § 52.227-1 (FAR 52.227-1)6, 7

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.