IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ARBUTUS BIOPHARMA CORPORATION and GENEVANT SCIENCES GmbH, Plaintiffs, v. MODERNA, INC. and MODERNATX, INC. Defendants.	**Redacted - Public Version** C.A. No. 22-252 (MSG) [redacted]
MODERNA, INC. and MODERNATX, INC., Counterclaim-Plaintiffs, v. ARBUTUS BIOPHARMA CORPORATION and GENEVANT SCIENCES GmbH, Counterclaim-Defendants.	

LETTER TO THE HONORABLE MITCHELL S. GOLDBERG REGARDING MODERNA'S MOTION TO COMPEL DISCOVERY FROM PLAINTIFFS AND ROIVANT SCIENCES

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Dear Judge Goldberg:

Moderna seeks the Court's assistance in fully resolving the discovery disputes between Moderna and Plaintiffs, and Moderna and third party Roivant Sciences Ltd. ("Roivant"), which were previously raised at the March 26, 2024 discovery hearing regarding lobbying materials.[1] *See* D.I. 223; D.I. 264 ("Mar. 26, 2024 Hr'g Tr.") at 13:21–16:7 (inviting Moderna to re-raise this issue with the Court pending more information from Plaintiffs regarding the existence of lobbying materials).

Discovery has confirmed that Plaintiffs and Roivant have engaged in a years-long effort to sway the public against Moderna, including by influencing members of Congress. Ex. 1 (GENV-00508209; GENV-00508210); Mar. 26, 2024 Hr'g Tr. at 9:10–14; Ex. 2 (Feb. 27 to Apr. 30, 2024 Email Chain) at 3–4; Ex. 3 (Zorn Rough Dep. Tr.) at 196:17–207:1. Moderna has sought production of these "lobbying" communications and associated materials from both Plaintiffs and Roivant as they are highly relevant to the hypothetical negotiation analysis associated with Plaintiffs' damages claim. *See* Ex. 4 (Moderna RFP No. 108 to Plaintiffs) at 4; Ex. 5 (Moderna RFP No. 16 to Roivant) at 8. For example, statements made by Plaintiffs or Roivant to members of Congress in an effort to tilt licensing positions more favorably towards Plaintiffs are at least relevant to *Georgia-Pacific* Factors 10 (nature and benefits of patented invention) and 11 (extent to which accused infringer made use of invention). *Georgia–Pacific Corp. v. U.S. Plywood Corp.*, 318 F.Supp. 1116, 1120 (S.D.N.Y. 1970). Such communications are also relevant to the extent they undercut Plaintiffs' unfounded assertions that Moderna improperly influenced the U.S. Government regarding the application of 28 U.S.C. § 1498 and the pricing of Moderna's COVID-19 vaccine. Indeed, Plaintiffs and Roivant do not dispute the relevance of lobbying materials. *See* Mar. 26, 2024 Hr'g Tr. at 10:25–11:14. And their shared counsel, Williams & Connolly, ***conceded*** at the March 26 hearing that "there ha[ve] been general efforts" concerning lobbying, but could not confirm at the hearing which entity had retained the lobbyists. *Id.* at 9:10–14; *see also* Ex. 6 (Genevant's 2023 lobbying expenditures); Ex. 7 (Roivant's annual lobbying expenditures). This resulted in the Court directing the parties at the March 26 hearing to meet and confer on the scope and search terms for production of lobbying materials.

Unfortunately, Moderna's good faith efforts following the March 26 hearing to negotiate a resolution have been met by a stone wall, with Plaintiffs and Roivant inappropriately agreeing to engage in such discovery only if, in return, Moderna provides expansive discovery far beyond lobbying related materials. *See generally* Ex. 2 (Feb. 27 to Apr. 30, 2024 Email Chain). Specifically, in line with the discussion with the Court during the March 26 hearing, on April 2, Moderna requested that Plaintiffs and Roivant "perform a targeted collection and production of documents and communications with lobbyists and political consultants concerning Moderna, Spikevax®, This Action, the U.S. Government's Statement of Interest (D.I. 49), and/or the C0100 contract." *Id.* at 13. The same day, Plaintiffs requested that Moderna "confirm that Moderna will be providing the same discovery that Moderna is requesting from Plaintiffs." *Id.* at 11. Moderna promptly agreed on April 3 to produce, to the extent they exist, any non-privileged lobbying communications and documents concerning "This Action (*i.e.*, *Arbutus v. Moderna*, No. 22-252

[1] Roivant owns a majority interest in Plaintiff Genevant and a minority interest in Plaintiff Arbutus. D.I. 240 at 1.

(D. Del.))," "Contract No. W911QY20C0100 ('C0100 Contract'), executed August 2020, between Moderna and U.S. Government for the supply of Moderna's COVID-19 Vaccine," "[a]pplication of 28 U.S.C. § 1498 to Moderna's C0100 Contract," and "[t]he U.S. Government's February 2023 Statement of Interest (D.I. 49) filed in This Action concerning Moderna's C0100 Contract." *Id.* at 10.

The dispute should have ended there. But five days later, Plaintiffs changed their demand and argued that Moderna's production should include swaths of non-lobbying materials, including Moderna's communications with all federal agencies and communications not relevant to this case. Ex. 2 (Feb. 27 to Apr. 30, 2024 Email Chain) at 8–9. In doing so, Plaintiffs' counsel also fabricated a new definition for "lobbying," which is both inconsistent with the discussion at the March 26 hearing, Mar. 26, 2024 Hr'g Tr. at 6:20–9:2; 9:22–24, and extends far beyond lobbying members of Congress with respect to legislation, capturing essentially any communications any employee of Moderna has had with any federal agency or government department concerning its COVID-19 vaccine. Moderna subsequently attempted to navigate Plaintiffs' efforts to shift and expand the scope of "lobbying materials" beyond the limited set of documents discussed at the March 26 hearing, Mar. 26, 2024 Hr'g Tr. at 10:25–11:14, and even agreed to produce communications between Moderna's Government Affairs Department and the executive branch, Ex. 8 (May 28 to June 6, 2024 Email Chain) at 2. But Plaintiffs still found this compromise insufficient and demanded that Moderna produce "all documents and communications with the Government regarding the U.S. Government's February 2023 Statement of Interest (D.I. 49) and the application/non-application of § 1498, and ***not assert any privilege including the common interest privilege over such documents***." *Id.* at 1 (emphasis added). In effect, Plaintiffs have conditioned their production of lobbying materials on Moderna's agreement to ***waive privilege*** over its common interest communications with the U.S. Government. Such a condition is inappropriate, and in any event, the requested communications are far beyond the scope of "lobbying."

Moreover, discovery has further confirmed the relevance of Plaintiffs' lobbying materials. Peter Zorn, Genevant's President and Chief Legal Officer, testified on June 5, 2024 that Genevant began engaging lobbyists after filing suit against Moderna and that Genevant's lobbying efforts have related to "the negative implication of the application of Section 1498 to divert responsibility for patent infringement to the government"—an issue indisputably relevant to this case. Ex. 3 (Zorn Rough Dep. Tr.) at 197:8–23.

Given the relevance of the lobbying related materials sought by Moderna and Plaintiffs' and Roivant's ever-expanding and changing scope of materials they maintain Moderna must produce, Moderna seeks the Court's assistance in bringing this dispute to a close. Specifically, Moderna moves for an order compelling Plaintiffs and Roivant to produce documents and communications with lobbyists and political consultants concerning Moderna, Spikevax®, this Action, the U.S. Government's Statement of Interest (D.I. 49), and/or the C0100 contract. As previously agreed, Moderna will reciprocate and produce the same scope of documents and communications.

Respectfully,

/s/ Travis Murray

Travis Murray (#6882)

Attachments

cc: All Counsel of Record (via CM/ECF and electronic mail; w/attachments)

EXHIBIT 1
Redacted in its Entirety

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