

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

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

**PLAINTIFFS' UNOPPOSED MOTION TO TAKE DEPOSITIONS OF THIRD-PARTY  
GOVERNMENT WITNESSES AFTER THE CLOSE OF FACT DISCOVERY**

Pursuant to the Court's instruction provided at the Status Conference held August 15, 2024, Arbutus Biopharma Corporation and Genevant Sciences GmbH ("Plaintiffs") submit the following unopposed Motion and respectfully request the Court grant Plaintiffs permission to depose certain third-party government witnesses identified below after the close of fact discovery.

WHEREAS, on March 20, 2023, Plaintiffs served subpoenas for documents and/or testimony on the Department of Health and Human Services ("HHS"), the Administration of Strategic Preparedness and Response ("ASPR"), and the Centers for Disease Control and Prevention ("CDC");

WHEREAS, on March 24, 2023, Plaintiffs served subpoenas for documents and testimony on the Department of Army ("Army");

WHEREAS, Plaintiffs also served requests for authorization of testimony pursuant to *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), on HHS, ASPR, CDC, and the Army,

(collectively, with the Department of Justice,<sup>1</sup> the “Government”) between March 2023 and May 2023;

WHEREAS, Plaintiffs and the Government then undertook a protracted process of meeting and conferring about the scope and timing of the Government’s document production and testimony that spanned more than a year and involved Plaintiffs sending at least fifty letters and emails to the Government regarding the scope and timing of the production and depositions, and having at least eight meet-and-confer calls;

WHEREAS, the Government initially agreed to produce limited documents in response to Plaintiffs’ subpoenas and *Touhy* requests and refused to authorize deposition testimony;

WHEREAS, beginning as early as July 2023, Plaintiffs negotiated with the Government to obtain additional documents and for the Government to authorize deposition testimony;

WHEREAS, the Government began producing documents in July 2023 but did not complete its production until June 2024, notwithstanding Plaintiffs’ diligent efforts to obtain expeditiously all requested documents;

WHEREAS, Plaintiffs and the Government engaged in good-faith negotiations to reach agreement on the scope of authorized deposition testimony, starting as early as July 2023 and continuing with diligence through July 2024;

WHEREAS, over Plaintiffs’ objection, the Government maintained that the issue of deposition testimony should be addressed only after the Government completed its production of documents, notwithstanding the amount of time it was taking for such production to be completed;

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<sup>1</sup> On a meet-and confer call on June 28, 2024, the Government indicated, for the first time, that certain requested testimony was more properly sought from the Department of Justice, and so Plaintiffs served a request for such testimony on July 3, 2024.

WHEREAS, after the Government completed its document productions, the parties engaged in further meet-and-confer calls and correspondence regarding the scope and timing of deposition testimony;

WHEREAS, after those discussions were complete, the Government requested that Plaintiffs serve updated *Touhy* requests so that the respective Government agencies could review and issue decisions either approving or declining to approve the requested testimony;

WHEREAS, on July 31, 2024, and August 2, 2024, ASPR and CDC, respectively, authorized Plaintiffs to take depositions of agency witnesses;

WHEREAS, on August 15, 2024, the Army denied Plaintiffs' request to authorize testimony, but the request is still outstanding and Plaintiffs are considering whether a motion to compel is needed;

WHEREAS, Plaintiffs are awaiting authorization from the Government to depose an agency witness from the Department of Justice;

WHEREAS, depositions of Government witnesses could not be accomplished before the close of fact discovery, notwithstanding Plaintiffs' extensive efforts and diligence;

WHEREAS, despite ongoing negotiations with the Army and the Department of Justice, Plaintiffs seek leave to depose witnesses from these agencies, to the extent such testimony is authorized or compelled by the Court, to avoid burdening the Court with a second, and potentially third, request;

WHEREAS, Plaintiffs conferred with Moderna, Inc. and ModernaTX, Inc. ("Defendants") regarding this request, and Defendants indicated that they do not oppose Plaintiffs seeking leave to take the depositions of ASPR, CDC, the Army, and the Department of Justice after the close of fact discovery if those depositions are completed on or before October

25, 2024, but reserve all rights to oppose any motion to compel the depositions of the Army and the Department of Justice; and

WHEREAS, Plaintiffs reserve the right to request additional extensions, should they be necessary, and understands that Defendants reserve all rights to oppose such an extension.

NOW THEREFORE, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion to depose third-party Government witnesses from ASPR, CDC, the Army, and the Department of Justice (to the extent such testimony is authorized or compelled by the Court) on or before October 25, 2024.

Pursuant to D. Del. LR 16.4, counsel certifies that copies of this Motion have been sent to their clients.

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