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GENENTECH, INC. and CITY OF HOPE

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SANOFI-AVENTIS U.S. LLC and REGENERON PHARMACEUTICALS, INC.,

Plaintiffs,

v.

GENENTECH, INC., and CITY OF HOPE

Defendants.

GENENTECH, INC., and CITY OF HOPE,

Counterclaim Plaintiffs,

v.

SANOFI-AVENTIS U.S. LLC and REGENERON PHARMACEUTICALS, INC.,

Counterclaim Defendants.

Case No. 2:15-CV-05685-GW-AGR

REPLY IN SUPPORT OF GENENTECH, INC. AND CITY OF HOPE'S MOTION FOR REVIEW OF ORDER COMPELLING PRODUCTION OF SETTLEMENT AGREEMENTS

Date: April 14, 2016
Time: 10:00 a.m.
Ctrm: 10, Spring Street Floor
Judge: George H. Wu

[REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL]

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Sanofi and Regeneron's opposition brief confirms two points that show the Magistrate's order compelling production of certain settlement agreements rests on legal error.

First, Plaintiffs' opposition confirms that their motion is about timing. Their point is that "recent licenses are likely to most closely reflect the value of the Cabilly patents at the time of the hypothetical negotiation dates with Plaintiffs—here, July 2015." Opp'n at 10:23-25. Yet Plaintiffs do not dispute that the license closest in time to the hypothetical negotiation is *not* a settlement. [redacted]

Under the Federal Circuit's case law, [redacted] is the most probative license in the case. The order granting the motion to compel therefore conflicts with Judge Pfaelzer's rulings in two prior Cabilly patent cases that settlement agreements are not a proper subject of discovery because evidence of relevant Cabilly licenses is available. Judge Pfaelzer's conclusion was informed by long experience with litigation over the Cabilly patents. She presided over five cases involving those patents, over a period of nine years. In her words, she was a "student" of those patents. Over that time Judge Pfaelzer was able to study first-hand the repeated filing of challenges to the Cabilly patents, often employing the same counsel and experts, and subsequent settlements. Her rulings reflect her assessment of a pattern that reflects an effort to evade the law relating to the use of settlement agreements in patent cases.

Plaintiffs do not even acknowledge [redacted], though it undermines their attempt to distinguish Judge Pfaelzer's decisions on timing grounds. Plaintiffs contend that Magistrate Judge Rosenberg's Order does not conflict with Judge Pfaelzer's prior rulings because, in the prior cases, the plaintiffs sought production not just of these same settlement agreements, but also the negotiation history pertaining to them. But in those prior cases Judge Pfaelzer could have granted the motion to compel in part. She did not, and she refused to compel production of the settlement agreements themselves. The record supports her conclusion even more strongly in this case.

Notwithstanding their insistence that recent agreements matter most, Plaintiffs insist that the general rules of discovery compel production of settlement agreements dating as far back as 2008. But Plaintiffs cannot condemn reliance on "old, stale licenses," Opp'n at 10:25, while insisting on production of old, stale settlements that are, by definition, even less reliable. At a minimum, Plaintiffs' insistence that recency matters shows that the Magistrate erred in ordering production of settlement agreements dating to 2008 and 2010 which, by Plaintiffs' own reasoning, are not probative of conditions on the date of first infringement.

Plaintiffs respond that Genentech and City of Hope should be required to produce those old settlements because they produced the old license agreements. The reverse is true. Producing commercial agreements the Federal Circuit has held are probative does not compel production of settlements that court has held are not. Unlike settlements, license agreements from earlier dates are not skewed by the litigation context. Even if agreements from the earlier timeframe were to prove relevant, the license agreements would necessarily be the more reliable evidence and would foreclose reliance on settlements. *ResQnet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 872 (Fed. Cir. 2010).

Second, Plaintiffs' opposition confirms (though they deny) that they effectively propose a *per se* rule that settlements regarding a patent in suit are always discoverable. Opp'n at 8:15-16. Plaintiffs insist that this rule is correct because evidence need not be admissible to be discoverable. In general that is true. But it is also true that most evidence is not singled out for particular disapproval by the Federal Circuit, as is the case with the settlements Plaintiffs seek.

Plaintiffs contend that Magistrate Judge Rosenberg did not apply a *per se* rule because the settlement agreements at issue here are roughly equal in number to the license agreements that were produced. But Plaintiffs fail to explain why that might matter. The problem with settlement agreements—that they are inherently infected by a litigation cost and uncertainty—is true regardless of the number of settlement agreements at issue. We are aware of no case holding that settlement agreements become more relevant simply by

virtue of their numerosity.

Plaintiffs' *per se* approach, like the Magistrate's order, misapprehends the relationship between the general rule of discovery and the Federal Circuit's law on settlement agreements. *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 77 (Fed. Cir. 2012), and *ResQnet*, 594 F.3d at 872, do not invite expert opinion, they limit it. They do not hold that expert testimony is required to determine whether a settlement is admissible; they condemn the use of settlement agreements in general and hold that settlements may be admissible only if no more reliable evidence is available. *ResQnet*, 594 F.3d at 872. The court itself—not experts—determined that settlements are inherently suspect. In this context, the general rule of discoverability does not entail that evidence should be discovered where the law explicitly precludes its use.

Plaintiffs insist that settlements are relevant because *ResQNet* holds they are not categorically inadmissible. But evidence is relevant only where it tends "to make a fact more or less probable than it would be without the evidence. . . ." Fed. R. Evid. 401(a). The fact to be established by the hypothetical negotiation method is the reasonable royalty a willing licensor and licensee would agree to based on the assumption that the patent was valid and infringed. Settlements reflect litigation factors these assumptions are designed to remove; that is why the law disfavors their use. A settlement cannot make a reasonable royalty number more or less probable—and thus satisfy the definition of relevance—unless there is no evidence that better reflects the assumptions that better reflects the fact the reasonable royalty is meant to determine. That is in fact what *ResQNet* holds, and Plaintiffs' failure to come to grips with this fact undercuts their relevance arguments.

Plaintiffs point out that some district courts order settlement agreements produced. Opp'n at 7:17-8:14. That is true. Other courts disagree. *E.g. Bascom Global Internet Servs., Inc. v. AOL LLC*, No. CV 08-1765, slip op. at 2 (E.D.N.Y Sept. 8, 2011) (declining to order production of settlement agreement and noting "in *ResQNet.com, Inc.*, the litigation-related license agreements were voluntarily produced, were part of the record and their admissibility was not before the court."); *Software Tree, LLC v. Red Hat, Inc.*,

No. 6:09-CV-097, 2010 WL 2788202, at *1 (E.D. Tex. June 24, 2010). But counting cases is not a reliable guide to the law on this point. At present there is no categorical rule, either for admissibility or, contrary to Plaintiffs' position, for discovery. Instead, under the Federal Circuit's cases, what matters is the other evidence is in the record. As Judge Pfaelzer held twice before, the commercial Cabilly licenses place the Cabilly settlements well outside the narrow exception the Federal Circuit maintains for cases in which a settlement is the most reliable evidence of patent value.

Plaintiffs do not and could not dispute the Federal Circuit's holding that factors relevant to litigation settlements tend to skew such settlements away from the principles of patent damages, which presume commercial negotiation between willing parties who assume validity and infringement. *Cf. ResQnet*, 594 F.3d at 872. For this reason it is not clear what point Plaintiffs think they make when they argue that Genentech and City of Hope receive more money from settlement licenses than from non-settlement licenses. Opp'n 12:20-21. But Genentech and City of Hope cannot dictate how a licensee approaches them. Some companies proceed on a commercial basis. Others, such as Sanofi and Regeneron, prefer to go to court.

For this reason, Plaintiffs have it backwards when they assert that Genentech and City of Hope have a "business model . . . of litigating and licensing. . . ." Opp'n at 13:7. In fact, Genentech has a long history of broadly licensing the Cabilly patents, as shown by the extensive licenses that have already been produced. It is Plaintiffs hired lawyers who have turned Cabilly litigation into a niche business, and Plaintiffs then insist that it is Genentech and City of Hope who pursue a litigation model. This ironic assertion is not true.

Plaintiffs also assert that many licensees pay no royalties, Opp'n at 13:1-4, but Plaintiffs do not argue that these licensees successfully brought to market drugs on which they would owe royalty payments. Plaintiffs do not dispute that some licensees, unlike Plaintiffs, take licenses before they begin infringing rather than after they sell infringing product. Some of those licensees do not make it all the way through the FDA approval

process to commercial launch of a drug. But these licenses, and the numerous licenses pursuant to which licensees ***are*** currently paying royalties, all provide insight into what royalty rate a willing licensee would have been willing to pay in the absence of ongoing litigation.

The Cabilly patent at issue in this case was licensed [redacted] Evidence of patent value does not get any stronger. Plaintiffs' conspicuous silence regarding that license proves that they know it is both the most recent and most probative agreement in the record. Only a *per se* rule compelling production in all cases could justify production in the face of such evidence. There is no such rule, as even Plaintiffs agree. The order granting Plaintiffs' motion to compel production of settlement agreements therefore should be reversed.[1]

Dated: April 12, 2016

DURIE TANGRI LLP

By: */s/ Adam R. Brausa*
ADAM R. BRAUSA

Attorneys for Defendants and Counterclaim Plaintiffs GENENTECH, INC. and CITY OF HOPE

[1] Plaintiffs complain about the timing of this motion. Genentech and City of Hope previously sought to move the date for the hearing before Magistrate Judge Rosenberg to accommodate counsel's travel out of the country. Plaintiffs expressed concerns about timing, and Genentech and City of Hope agreed that they would not delay the production of the settlement agreements and would be prepared to produce them within a day of an order directing them to do so. Judge Rosenberg's order set a deadline for production of April 14, and Genentech and City of Hope did not intend to forego their right to seek review of that order simply by virtue of agreeing to a prompt schedule for production. Moreover, there is no prejudice to Plaintiffs. Their expert reports on damages are not due until May 13, which gives them ample time to address the settlement agreements, in the event that the Court denies Genentech and City of Hope's motion.

CERTIFICATE OF SERVICE

I certify that all counsel of record is being served on April 12, 2016 with a copy of this document via the Court's CM/ECF system.

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