Appeal No. 2015-1499

United States Court of Appeals

for the

Federal Circuit

AMGEN INC., AMGEN MANUFACTURING LIMITED,

Plaintiffs-Appellants,

– v. –

SANDOZ INC.,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA IN CASE NO. 3:14-CV-04741-RS, JUDGE RICHARD SEEBORG

NON-CONFIDENTIAL REPLY BRIEF FOR PLAINTIFFS-APPELLANTS AMGEN INC. AND AMGEN MANUFACTURING LIMITED IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

NICHOLAS GROOMBRIDGE
ERIC ALAN STONE
JENNIFER H. WU
JENNIFER GORDON
PETER SANDEL
MICHAEL T. WU
ARIELLE K. LINSEY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

VERNON M. WINTERS
ALEXANDER D. BAXTER
SIDLEY AUSTIN LLP
555 California Street, Suite 2000
San Francisco, California 94104
(415) 772-1200

WENDY A. WHITEFORD
LOIS M. KWASIGROCH
KIMBERLIN L. MORLEY
AMGEN INC.
One Amgen Center Drive
Thousand Oaks, California 91320
(805) 447-1000

Attorneys for Plaintiffs-Appellants

April 28, 2015

CERTIFICATE OF INTEREST

1. The full name of every party represented by me is:

   AMGEN INC. and AMGEN MANUFACTURING LTD.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   AMGEN INC. and AMGEN MANUFACTURING LTD.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me are:

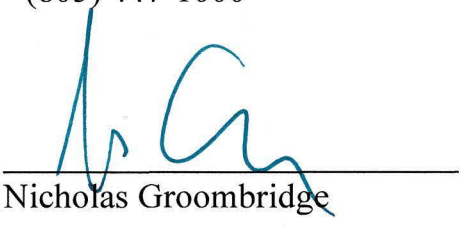
   AMGEN INC.

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or are expected to appear in this Court are:

Nicholas Groombridge
Eric Alan Stone
Jennifer H. Wu
Jennifer Gordon
Peter Sandel
Michael T. Wu
Arielle K. Linsey
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

Vernon M. Winters
Alexander D. Baxter
SIDLEY AUSTIN LLP
555 California Street, Suite 2000
San Francisco, CA 94104
(415) 772-1200

Wendy A. Whiteford
Lois M. Kwasigroch
Kimberlin L. Morley
AMGEN INC.
One Amgen Center Drive
Thousand Oaks, CA 91320
(805) 447-1000



Nicholas Groombridge

TABLE OF CONTENTS

Page

CONFIDENTIAL MATERIAL

Pursuant to Federal Circuit Rule 27(m), materials that were designated as confidential pursuant to the district court's Protective Order have been redacted from the non-confidential version of the reply brief. Specifically, the material omitted on pages 7 and 8 contains references to Amgen's confidential information regarding pricing strategy; and the material omitted on pages 1, 7, 9, 10 contains references to Sandoz's confidential information regarding pricing strategy and marketing and sales strategy.

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTRODUCTION

Sandoz had a choice: apply for FDA approval of its biological product under the traditional pathway, 42 U.S.C. § 262(a), supported by its own clinical data, or apply under the BPCIA's abbreviated pathway, 42 U.S.C. § 262(k), referencing Amgen's license for its filgrastim product and accepting the obligations set forth in the BPCIA. Sandoz chose the BPCIA's abbreviated pathway, but then refused to comply with BPCIA provisions in § 262(*l*) that protect Amgen's rights as the RPS. Sandoz nevertheless pressed on with its § 262(k) application, securing an FDA "biosimilar" license. It is now poised to introduce its biosimilar competitor to Amgen's NEUPOGEN® product as soon as May 11, 2015. There is no dispute that [redacted]. The price erosion and other harms that Amgen will suffer are irreparable and immediate. Amgen's motion seeks to maintain the status quo until this Court has rendered a decision in Amgen's appeal. The injunction will be short: briefing is complete and argument is scheduled for June 3, 2015. Amgen respectfully requests this injunction to preserve this Court's ability to issue meaningful relief.

I. Amgen is Likely to Succeed on the Merits

A. Subsection (*l*)(2)(A) is Mandatory

Subsection 42 U.S.C. § 262(*l*)(2)(A), enacted with the BPCIA's abbreviated approval pathway, requires the Applicant to provide its BLA and manufacturing

information to the RPS. The statute includes the mandatory command "shall," and Congress described non-provision of that information as "fail[ure]" and the information itself as "required." Mot. at 10-11. None of Sandoz's arguments shows otherwise.

In § 262, Congress set forth two alternative pathways for FDA approval of biologic products. A Biologics License Application must be submitted under either §262(a) or (k). *See* 42 U.S.C. § 262(a)(1); (k)(1). While approval under § 262(a) requires the submission of independent clinical trial data, a subsection (k) Applicant may rely on the clinical trial data and approval of a previously approved product, the "reference product." *See* 42 U.S.C. § 262(a)(2)(C), (i)(4), and (k)(2)(A)(i). The choice between subsections (a) and (k) has consequences: "when a subsection (k) applicant submits an application under subsection (k), such applicant shall provide to the [RPS] . . . confidential access to the information required to be produced pursuant to paragraph (2)." 42 U.S.C. § 262(*l*)(1)(B)(i) (emphasis added).

Sandoz argues that the BPCIA provides the Applicant with different a choice: the choice to engage in part, all, or none of the patent-exchange process. It argues that the use of "shall" in § 262(*l*)(2)(A) denotes only a condition precedent to engaging in the next step of the patent-exchange process. Opp. at 10. That construction affords no help to Sandoz, which omits that § 262(*l*)(2)(A) itself has a

condition precedent that has been satisfied, obligating Sandoz to provide Amgen with a copy of its BLA and manufacturing information: "Not later than 20 days after the Secretary notifies the subsection (k) applicant that the application has been accepted for review . . ." 42 U.S.C. § 262(*l*)(2)(A). It is undisputed that Sandoz received such notice from FDA on July 7, 2014. And the subsection continues in mandatory language: "the subsection (k) applicant—(A) shall provide to the" RPS a copy of its BLA and manufacturing information (emphasis added). Thus, the § 262(*l*)(2)(A) disclosure became a mandatory obligation that Sandoz was required to fulfill within 20 days, but deliberately did not fulfill.

Sandoz further argues that "shall" cannot be mandatory because Congress contemplated that the parties might fail to comply. The fact that Congress may have contemplated bad behavior and set forth a consequence does not suggest that Congress permitted such behavior. Nor is Sandoz correct that for "each subsection (*l*) step [that] begins with 'shall,' the BPCIA contemplates that the applicant or sponsor might not pursue the patent-exchange to completion and expressly provides the consequences for not doing so." *Id*. at 9 (citing to A2050-51). Sandoz omits the "shall" commands in § 262(*l*)(3)(A)(ii), (*l*)(3)(B)(iii), (*l*)(3)(C), and (*l*)(8)(C), none of which has any corresponding "consequence."

Finally, to blunt the impact of the "shall" in § 262(*l*)(2)(A), Sandoz analogizes to the "shall" in § 262(*l*)(6)—the RPS "shall bring an action for patent

infringement"—which Sandoz says must be optional. *Id*. at 11. The statute proves Sandoz wrong. Subsection 262(*l*)(6) commands that suit be brought, and that it be brought within 30 days. If an Applicant is harmed by an RPS's failure to meet that obligation, the Applicant can seek relief to remedy that harm.

B. A Subsection (k) Applicant May Not Provide Effective Notice of Commercial Marketing Before Licensure

Amgen showed that the 180 days' notice of commercial marketing required by § 262(*l*)(8)(A) may not be given until the FDA has licensed the biosimilar. The statute refers to the commercial marketing of a "product licensed," whereas in every other instance the statute refers to the "product that is the subject of the subsection (k) application." Mot. at 12-13.

Sandoz argues that notice can be given before licensure because § 262(*l*)(8)(A) refers to notice being given by the "'subsection (k) *applicant'*—not the 'holder' of an approved application." Opp. at 12 (emphasis in original). But Sandoz omits that "subsection (k) applicant" is a <u>defined</u> term: Subsection (*l*) begins by stating the "person that submits an application under subsection (k)" is "referred to in this subsection as 'the subsection (k) applicant.'" 42 U.S.C. § 262(*l*)(1)(A). Congress's use of that defined term in § 262(*l*)(8)(A) signifies nothing about the <u>timing</u> of notice, only who has to give that notice: the Applicant. Sandoz also argues that Congress used "product licensed" to recognize that a product may not be marketed until it is licensed. Opp. at 12. That would be just as

true if Congress had said "product that is the subject of the subsection (k) application," however.

Finally, Sandoz argues that requiring notice after licensure would give the RPS an extra six months of market exclusivity, the functional equivalent of an "automatic, bondless six-month inunction." *Id.* at 13. Sandoz is incorrect. Nothing in the BPCIA provides market exclusivity, only data exclusivity. Any party may seek approval of a copy of the reference product under subsection (a), supported by clinical trial data, as Teva did with its filgrastim product, GRANIX®. And the 180-day period serves a very different function—providing time to bring a preliminary injunction—as is demonstrated by the statutory structure. The 180-day notice provision is provided in subsection (*l*)(8)(A). The very next subsection, (*l*)(8)(B), provides that the RPS can bring a motion for a preliminary injunction on patents that were identified but not selected for immediate litigation.

C. Subsection 262(*l*)(9) is Not the Exclusive Remedy for Failure to Comply with Subsections 262(*l*)(2)(A) or (*l*)(8)

Amgen explained how the district court had erred in finding that a declaratory judgment under § 262(*l*)(9)(C) was the exclusive remedy for an Applicant's failure to provide the required information or proper notice. Mot. at 13-15. Sandoz does not defend that finding. Instead, Sandoz argues that Amgen's exclusive remedy for Sandoz's failure to provide its application and manufacturing information is an infringement suit under § 271(e)(2)(C)(ii), limited to the

remedies provided in § 271(e)(4). Opp. at 13-14. But nothing in the BPCIA says that an infringement suit is the sole procedural device available where an Applicant violates the statute, and § 271(e)(4) provides the exclusive remedies "for an act of infringement," not for failing to provide the required information by § 262(*l*)(2)(A). 35 U.S.C. § 271(e)(4) (emphasis added).

Sandoz argues there should be no implied federal cause of action to compel compliance with the BPCIA (Opp. at 15), citing *Alexander v. Sandoval*, 532 U.S. 275 (2001). But Sandoz itself brought three counterclaims seeking declarations that its conduct under the BPCIA is lawful. Mot. at A0006. Those counterclaims necessarily require a cognizable claim that an RPS could bring under the BPCIA to remedy the conduct in which Sandoz engaged, if that conduct is indeed unlawful. Otherwise, Sandoz's counterclaims presented no justiciable case or controversy. Sandoz cannot now argue that the BPCIA forecloses a federal remedy.

II. Amgen Faces Irreparable Harm Without an Injunction Pending Appeal

A. The Harm Amgen Seeks to Avoid by this Injunction is Not Predicated on Patent Infringement

Sandoz argues that there can be no irreparable harm without a showing of patent infringement. Opp. at 16-17. Not so. Amgen has been and will be irreparably harmed if Sandoz's product enters the market without affording Amgen the process due it under the BPCIA. By refusing to provide the required BLA and manufacturing information, Sandoz converted Amgen's property and is poised to

compete directly with Amgen. Sandoz materially prejudiced Amgen, depriving it of the time—up to 230 days—and information needed to detect Sandoz's infringement and commence a § 262(*l*)(6) action. By refusing to provide 180-day advance notice after FDA licensure, Sandoz further denied Amgen the statutory period to seek a preliminary injunction on the licensed product.

B. Amgen Will Suffer Price Erosion and Loss of Goodwill

Sandoz does not dispute that it will [redacted] NEUPOGEN®. Sandoz nevertheless argues that price erosion is speculative and unfounded. First, Sandoz says that Amgen's witnesses testified only that Amgen "might" or "may" have to lower prices. Opp. at 17. But when those witnesses testified, it was still unclear whether Sandoz would price ZARXIO® above, at parity with, or below NEUPOGEN®. Mot. at A0478. Sandoz had said publicly it might price at parity. Ex. 16 at A0591. It was only later that [redacted] NEUPOGEN® (Mot. at A1444; Mot. at A1682-83), confirming the price erosion and loss of goodwill that Amgen will suffer. Mot. at A0477-79; Mot. at A0516-17.

Finally, Sandoz suggests that Amgen's internal forecasts show that Amgen planned to [redacted], despite the launch of ZARXIO®. But Sandoz omits that those same documents show that Amgen also [redacted]. Ex. 17 at A1999-2000; Ex. 18 at A1996-

97. Indeed, internal forecasting documents state the "[redacted]" Ex. 18 at A1997. Sandoz also omits that the planned [redacted]. *Id*. at A1996 ([redacted]).

C. Amgen Faces Patent Uncertainty

Sandoz suggests that Amgen's assertion that, without the BLA, it was "impossible for Amgen to determine which of its patents read on the manufacture of Sandoz's product" is belied by the fact that Amgen was able to bring an action for patent infringement. Opp. at 18 (quoting Mot. at 18). Sandoz omits that the patent Amgen was able to assert is directed to methods of treatment, not methods of manufacturing. Mot. at A0072. Amgen has more than 400 manufacturing patents, but could not assess potential infringement of those patents without disclosure of Sandoz's BLA and manufacturing information as required by § 262(*l*)(2)(A). Mot. at 18.

D. Amgen Did Not Delay in Seeking Relief

Sandoz accuses Amgen of taking too long to obtain Sandoz's BLA and to sue, suggesting that Sandoz timely offered its BLA and Amgen refused. There is no issue of delay here: the district court made no findings of delay. Moreover, Sandoz omits that (i) Amgen consistently stated it was ready to receive Sandoz's

BLA and manufacturing information under the confidentiality provisions set forth in the BPCIA; and (ii) Sandoz's offer for confidential access was limited to the BLA, did not include "such other information that describes the process or processes used" as required by § 262(*l*)(2)(A), and would have precluded Amgen from bringing suit under 35 U.S.C. § 271(e) or 271(g). Ex. 19 at A1465-68; Ex. 20 at A1484; Opp. at A1481-82, A1505-07. That Amgen instead insisted on the rights provided to it by the BPCIA itself is hardly a basis for accusations of delay.

III. Scope of Injunction and Bond Amount

Sandoz attempts to limit the scope of any injunction pending appeal to California, and to "shipping its product to customers in commercial quantities." Opp. at 20. That is, Sandoz wants to promote, market, offer to sell, and even sell ZARXIO® while an injunction is in place, as long as it does not actually ship the product. But the harm to Amgen is not limited to Sandoz's shipment of product. Price erosion, for example, will begin as soon as Sandoz begins promoting, marketing, offering to sell, and selling [redacted] Nor is the harm limited to California. While *Allergan Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350 (Fed. Cir. 2013), cited by Sandoz, limited an injunction based on violation of California's Unfair Competition Law to the state of California, it placed no such territorial restrictions on common law conversion claims, which Amgen has pleaded here.

Sandoz's suggestion that the bond be set at [redacted] is excessive and without merit. That estimate is predicated on an injunction lasting at least 410 days, while Amgen here seeks an injunction only until the resolution of this appeal, in which briefing will be complete today and oral argument will be held on June 3, 2015. Sandoz's [redacted] figure also assumes that Sandoz would have launched on [redacted] which it already agreed not to do and did not do, and—inexplicably—assumes damages through 2020. Opp. at A1063.

Amgen respectfully suggests that the bond for this injunction should be set at [redacted]. That amount would be more than adequate to cover net sales revenue for ZARXIO® through August 2015, and is based on Sandoz's own sales forecasts (Ex. 21 at A2014), revised to account for commercial sales beginning on May 11, 2015, the date to which Sandoz agreed to stay off the market absent an injunction.

CONCLUSION

For the foregoing reasons, Amgen respectfully requests that the Court enjoin Sandoz from marketing, selling, offering for sale, or importing into the United States its ZARXIO® biosimilar product during this appeal.

Dated: April 28, 2015

Respectfully submitted,

Nicholas Groombridge
Eric Alan Stone
Jennifer H. Wu
Jennifer Gordon
Peter Sandel
Michael T. Wu
Arielle K. Linsey
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

Vernon M. Winters
Alexander D. Baxter
SIDLEY AUSTIN LLP
555 California Street, Suite 2000
San Francisco, CA 94104
(415) 772-1200

Wendy A. Whiteford
Lois M. Kwasigroch
Kimberlin L. Morley
AMGEN INC.
One Amgen Center Drive
Thousand Oaks, CA 91320
(805) 447-1000

Attorneys for Plaintiffs-Appellants