IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GENENTECH, INC. and CITY OF HOPE, Plaintiffs, v. AMGEN, INC., Defendant.	C.A. No. 18-924-CFC [redacted] PUBLIC VERSION FILED: July 19, 2019

GENENTECH'S COMBINED OPENING BRIEF IN SUPPORT OF ITS EMERGENCY MOTIONS FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Amgen's trastuzumab biosimilar, Kanjinti, was approved by the FDA on June 13, 2019.

[redacted] Genentech brings this motion for a temporary restraining order ("TRO") and a preliminary injunction to preserve the status quo pending an adjudication on the merits.

[redacted] And the public interest favors encouraging investment in innovation through the enforcement of patent rights—particularly where, as here, patients already have access to Herceptin regardless of ability to pay. Amgen cannot dispute any of this. Indeed, Amgen has

argued in other cases that the equities favor injunctive relief in exactly these circumstances.

[redacted]

On June 20, 2019, the Court ordered Amgen to provide discovery concerning Amgen's own assessments of the validity of Genentech's patents addressed in this motion. [redacted]

BACKGROUND

A. Herceptin

This case involves Genentech's drug Herceptin, which treats HER2-positive breast cancer. Approximately 20-25% of breast cancer patients are HER2-positive, which means that their cancer cells produce an excessive amount of a cellular receptor known as "HER2." (D.I. 75,

¶1.) Before Herceptin, patients with HER2-positive breast cancer had a poor prognosis; patients with advanced disease had a life expectancy of only 18 months. (*Id.*, ¶2.)

Herceptin fundamentally changed the treatment of HER2-positive breast cancer. Its active ingredient is the antibody "trastuzumab," which Genentech scientists engineered to bind to HER2. (D.I. 75, ¶3.) Following its FDA approval, Herceptin was hailed as a revolution—demonstrating for the first time that solid tumors could be treated with a targeted therapy. (Tannenbaum Decl. ¶22.) Since then, Herceptin has extended and, in early breast cancer, saved the lives of hundreds of thousands of patients. (*Id.* ¶12.) Indeed, due to Genentech's research, HER2-positive breast cancer has gone from having the worst prognosis to one of the best. (*Id.* ¶¶6-9.) Herceptin is now the standard of care for HER2-positive cancer. (*Id.* ¶¶9-12.)

Genentech has invested billions of dollars and countless hours of research over more than two decades to improve therapeutic options for HER-2 positive patients. (Oliger Decl. ¶7.) This investment of resources was high risk, with failure far more likely than success. Only 1 in 20 oncology drugs make it from Phase I trials to FDA approval. (Jena Decl. ¶117.)

This research included investing in clinical trials to extend the use of Herceptin from advanced (i.e., metastatic) breast cancer to early breast cancer patients, who could be given the drug in a curative setting following surgery (referred to as "adjuvant" therapy). (Oliger Decl. ¶8.) Genentech researchers also successfully developed new dosing regimens that make Herceptin more convenient for early breast cancer patients by extending the intervals between visits to a clinic from one week to three weeks. (Tannenbaum Decl. ¶25.)

B. Genentech's Patents

Amgen infringes claims of U.S. Patent Nos. 6,627,196 (the "'196 patent"), 7,371,379 (the "'379 patent") and 10,160,811 (the "'811 patent") (the "Asserted Patents"). The Asserted

Patents relate to methods of treating cancer with a specific dosing regimen: intravenous ("IV") administration of an initial 8 mg/kg dose followed by one or more 6 mg/kg doses separated by three weeks. (Ex. 1, Cl. 11; Ex. 2, Cl. 11; Ex. 3, Cl. 6.) The '379 patent further recites co-administration with a chemotherapy agent. (Ex. 2, Cl. 6.) The '811 patent specifically claims treatment of breast cancer. (Ex. 3, Cl. 11.)[1]

Herceptin was initially approved with a weekly dosing regimen. The dosing regimen claimed in asserted claim 11 of the '196 patent, claim 11 of the '379 patent, and claim 7 of the '811 patent (the "Asserted Claims") reflects the discovery by Genentech scientists that patients could go for three weeks between doses without compromising the effectiveness of the therapy. This was a significant improvement in patient care which allowed patients to receive the same therapeutic benefits of weekly Herceptin while only going to a clinic or hospital once or twice a month. (Tannenbaum Decl. ¶¶25, 32.)

C. Amgen's Biosimilar Drug

Amgen intends to launch a biosimilar version of Herceptin called Kanjinti. Kanjinti is approved to treat the same conditions with the same doses as Herceptin, and the Kanjinti label includes the same clinical study data that Genentech provides for Herceptin, including the study that led to approval of the once-every-three-weeks dosing regimen. (Tannenbaum Decl. ¶37.)

[redacted]

[1] Genentech reserves the right to litigate all asserted claims of asserted patents at trial but has limited this motion to three claims of three patents to streamline the issues for the Court.

AMGKAN02978404; Ex. 7, AMGKAN02978529; Ex. 8 at 1.)

ARGUMENT

I. THE COURT SHOULD ENTER A PRELIMINARY INJUNCTION.

In determining whether to grant a preliminary injunction, courts consider four factors: "(1) the likelihood of the patentee's success on the merits; (2) irreparable harm if the injunction is not granted; (3) the balance of hardships between the parties; and (4) the public interest." *Tinnus Enterprises, LLC v. Telebrands Corp.*, 846 F.3d 1190, 1202 (Fed. Cir. 2017); *accord Transcontinental Gas Pipe Line Co. v. Permanent Easements*, 907 F.3d 725, 732 (3d Cir. 2018) (similar). The Federal Circuit generally "review[s] preliminary injunctions using the law of the regional circuit" but will "give[] dominant effect to Federal Circuit precedent insofar as it reflects considerations specific to patent issues." *Tinnus*, 846 F.3d at 1202-1203.

A. Genentech Is Likely to Succeed on the Merits.

To show likelihood of success, "a patentee must prove that success in establishing infringement is 'more likely than not.'" *Trebro Mfg., Inc. v. Firefly Equipment, LLC*, 748 F.3d 1159, 1166 (Fed. Cir. 2014). To show induced infringement under 35 U.S.C. § 271(b), the "patentee must establish first that there has been direct infringement, and second that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another's infringement." *ACCO Brands, Inc. v. ABA Locks Mfrs. Co.*, 501 F.3d 1307, 1312 (Fed. Cir. 2007). In "cases alleging that a proposed drug label will induce infringement by physicians, [t]he pertinent question is whether the proposed label instructs users to perform the patented method." *Sanofi v. Glenmark Pharms. Inc., USA*, 204 F. Supp. 3d 665, 673 (D. Del. 2016), *aff'd*, *Sanofi v. Watson Labs, Inc.* 875 F.3d 636 (Fed. Cir. 2017). "Statements in a package insert that encourage infringing use of a drug product are alone sufficient to establish intent to encourage direct infringement." *Abraxis Bioscience, Inc. v. Navinta, LLC*, 640 F. Supp. 2d 553, 570 (D.N.J.

2009), *rev'd & vacated on other grounds*, 625 F.3d 1359 (Fed. Cir. 2010).

1. Infringement

Amgen will infringe at least claim 11 of the '196 patent, claim 11 of the '379 patent, and claim 7 of the '811 patent. [redacted]

a. Direct infringement

As Genentech's declarant Dr. Susan Tannenbaum confirms, physicians who prescribe Kanjinti according to the approved label for Kanjinti would directly infringe the Asserted Claims. (Tannenbaum Decl. ¶¶41-58; Appx. A.)

Claim 11 of the '196 patent recites "[a] method for the treatment of a human patient diagnosed with cancer characterized by overexpression of ErbB2[2] receptor." The Kanjinti label instructs this method because Kanjinti is for the treatment of "HER2 overexpressing" breast and metastatic gastric cancer. (Ex. 4, AMGKAN02982377; Tannenbaum Decl. ¶¶44-47; Appx A.)

Claim 11 of the '196 patent further recites:

> comprising administering an effective amount of an anti-ErbB2 antibody to the human patient, the method comprising:
>
> administering to the patient an initial dose of approximately 8 mg/kg of the anti-ErbB2 antibody; and
>
> administering to the patient a plurality of subsequent doses of the antibody in an amount that is approximately the same or less than the initial dose, and wherein at least one subsequent dose is approximately 6 mg/kg, and
>
> wherein the subsequent doses are separated in time from each other by at least three weeks.

The Kanjinti label instructs this method; the approved regimens include an "[i]nitial dose of 8 mg/kg over 90 minutes IV infusion, then 6 mg/kg over 30–90 minutes IV infusion every three

[2] ErbB2 refers to HER2. (Tannenbaum Decl. ¶19.)

weeks for 52 weeks." (Ex. 4, AMGKAN02982377; Tannenbaum Decl. ¶¶47-49, Appx A.)

Claim 11 of the '379 patent is similar to claim 11 of the '196 patent and additionally recites "further comprising administering an effective amount of a chemotherapeutic agent to the patient." The Kanjinti label instructs this method because it is indicated for use "as a single agent following multi-modality anthracycline based therapy [*i.e.*, chemotherapy]." (Ex. 4, AMGKAN02982380; Tannenbaum Decl. ¶¶50-51, Appx A.)

Claim 7 of the '811 patent recites "[a] method for the treatment of a human patient diagnosed with breast cancer." As discussed above, the Kanjinti label instructs "treatment of HER2 overexpressing breast cancer." Claim 7 of the '811 patent further recites:

> administering intravenously to the patient an initial dose of 8 mg/kg of anti-ErbB2 huMAb 4D5-8 antibody
>
> and administering intravenously to the patient a plurality of subsequent 6 mg/kg doses of the antibody,
>
> wherein the initial dose is separated in time from the first subsequent dose by three weeks,
>
> and the subsequent doses are separated from each other in time by three weeks.

As discussed for '196 patent claim 11, the Kanjinti label instructs this dosing method for treating adjuvant breast cancer, including "IV infusion." (Ex. 4, AMGKAN02982377.)

Lastly, claim 7 of the '811 recites a method of treatment of a patient "diagnosed with breast cancer" that is characterized by a specific method: "2+ or 3+ overexpression of ErbB2 receptor as determined by immunohistochemistry or fluorescence in situ hybridization (FISH)." The Kanjinti label instructs the use of immunohistochemistry or FISH assays to identify patients for treatment, and illustrates the use of those assays in accordance with claim 7 in the descriptions of the clinical studies included in the Kanjinti label. (Tannenbaum Decl. ¶¶53-57; *see* Ex. 4, AMGKAN02982377; Ex. 3, Cl. 7.)

b. Inducement

Amgen has knowledge of the '196, '379, and '811 patents, including based on the Complaint in this action and Genentech's notice to Amgen of the patents pursuant to 42 U.S.C. § 262(*l*)(3)(A). (Ex. 15A at 3; Ex. 15B at 1.) [redacted] *See, e.g.*, *Sanofi*, 875 F.3d at 644-46; *AstraZeneca LP v. Apotex, Inc.*, 633 F.3d 1042, 1060 (Fed. Cir. 2010); *Eli Lilly & Co. v. Teva Parenteral Meds., Inc*., 845 F.3d 1357 (Fed. Cir. 2017) (affirming finding of induced infringement where label instructed claimed use); *Vanda Pharms. Inc. v. West-Ward Pharms. Int'l Ltd.*, 887 F.3d 1117 (Fed. Cir. 2018) (same). [redacted]

AMGKAN02833283; Ex. 6, 232:9-24; 234:5-24; 239:10-240:10.) *See AstraZeneca*, 633 F.3d at 1059 (intent to induce infringement where defendant "was aware of and certainly concerned about potential infringement problem by its label, but nevertheless decided to proceed with the label") (citation and quotation marks omitted). [redacted]

2. Validity

At the preliminary injunction stage, "the very existence of the patent satisfies [the patentee's] burden on validity." *Purdue Pharma L.P. v. Boehringer Ingelheim GMBH*, 237 F.3d 1359, 1365 (Fed. Cir. 2001). To prevail on this issue, the burden is on the infringer to show "evidence of invalidity that is sufficiently persuasive [that] it is likely to overcome the presumption of patent validity." *PPG Indus., Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1566 (Fed. Cir. 1996). Amgen bears the burden of proof to show invalidity, and Genentech will respond to any such argument in reply.

Notably, the validity of the '196 and '379 patents was recently confirmed by the Patent Office after full IPR trials. (*See* Ex. 21, at 25-26; Ex. 22, at 33-34; Ex. 23, at 15-16; Ex. 24, at 24.) The '811 patent issued after those IPRs and recites the same non-obvious dosing regimen. [redacted].) Amgen cannot show it is unlikely that Genentech will succeed on the merits by recycling art and arguments conclusively rejected in the IPRs. *See Oxford Immunotec Ltd. v. Qiagen, Inc.*, 271 F. Supp. 3d 358, 366-67 (D. Mass. 2017) (finding patentee likely to succeed on validity where infringer made validity arguments rejected in IPRs). Indeed, the technically trained three judge panel of

the Patent Trial and Appeal Board applied a ***lower*** burden of proof (preponderance of the evidence) than Amgen will need to meet to show invalidity (clear and convincing evidence).[3]

B. Amgen's Infringement Will Irreparably Harm Genentech.

Proof of irreparable harm in a patent case requires two elements. First, the patentee must establish there is a likelihood "that absent an injunction, it will suffer irreparable harm." *Apple Inc. v. Samsung Elecs. Co.*, 695 F.3d 1370, 1374 (Fed. Cir. 2012) (*Apple I*). Second, the patentee must also demonstrate "that a sufficiently strong causal nexus relates the alleged harm to the alleged infringement." *Apple I*, 695 F.3d at 1374. That is, it must show "some connection" between the irreparable harm suffered and the infringement alleged. *Apple Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 641 & n.1 (Fed. Cir. 2015) (*Apple II*).

1. Genentech will suffer irreparable harm.

The Federal Circuit has explained that patent infringement can irreparably harm a patentee through, at least, price erosion, lost market share, and damage to the patentee's reputation. *See, e.g.*, *Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1361-62 (Fed. Cir. 2008). Amgen's infringement will cause Genentech to suffer each of those categories of harms if an injunction does not issue. [redacted]

a. Price erosion

The Federal Circuit has repeatedly held that price erosion—*i.e.*, the decrease in the

[3] The Court ordered Amgen to provide discovery concerning its assessments of the validity of these patents (D.I. 259 at 1-2), but Amgen has refused to comply, as discussed in more detail below. Genentech reserves the right to supplement this motion after receiving that discovery.

amount of money the patentee can charge for its product due to the infringer's launch—constitutes irreparable harm. *E.g.*, *Celsis in Vitro, Inc. v. Cellzdirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (collecting cases). Amgen has consistently agreed, for example, arguing in this District that "[p]rice erosion ***alone*** is sufficient to establish irreparable harm." *See* Ex. 26, Plaintiffs' Opening Brief at 6, *Amgen Inc. et al. v. Sanofi et al.*, No. 14-cv-1317-SLR, D.I. 340 (D. Del. April 27, 2016) ("*Sanofi I* Brief") (emphasis added). And in a separate biosimilar litigation in this District, ***Amgen conceded*** that an offer of discounts or rebates by a biosimilar maker ***in the oncology market*** "will irreparably harm" the reference product sponsor, there Amgen, by causing price erosion that will have "irreversible effects" on price and the market. *See* Ex. 28, Opening Brief at 16-17, *Amgen Inc. et al. v. Hospira, Inc.*, No. 1:15-cv-839-RGA, D.I. 230 (D. Del. June 5, 2017) ("*Hospira* Brief").

Genentech will suffer those same irreparable injuries if Amgen launches Kanjinti.

[redacted]

The price erosion caused by an Amgen entry will be irreversible, including because any attempt to raise prices to pre-entry levels will be met with severe backlash and loss of goodwill. (Jena Decl. ¶¶99-100.) Genentech will not be able to recoup loss due to price erosion by future, higher prices or reduced discounts. *See Sanofi-Synthelabo v. Apotex*, 470 F.3d 1368, 1382 (Fed. Cir. 2006) (irreparable harm due to "irreversible price erosion"); *see also Hoffman-La Roche, Inc. v. Cobalt Pharms., Inc.*, 2010 WL 4687839 at *12 (D.N.J. Nov. 10, 2010) ("phenomenon of price erosion in the pharmaceutical industry is well known"); *Momenta Pharms., Inc. v.*

Amphastar Pharms., 882 F. Supp. 2d 184, 197 (D. Mass. 2011) ("'Requiring purchasers to pay higher prices after years of paying lower prices to infringers is not a reliable business option.'").

The specific harm to Genentech as a result of price erosion is difficult to quantify. Genentech's responses to Amgen's entry will be multi-faceted and complex, and the specific effects of Amgen's activity will be difficult to unravel from other market conditions. (Jena Decl. ¶¶65-67.) *See Sanofi-Synthelabo*, 470 F.3d at 1372 ("complex pricing scheme" for prescription drugs means additional entrants have potential to irreversibly erode prices in unpredictable ways); *Hoffman-La Roche Inc.*, 2010 WL 4687839, at *12.

The price erosion that Genentech would suffer from Amgen's launch would be particularly severe because [redacted]. (Oliger Decl. ¶53; Jena Decl. ¶59.) The harms from Amgen's entry would continue even if Amgen were later removed from the market because Genentech would be unable to raise prices to pre-entry levels. (Jena Decl. ¶99-101.) [redacted]. Indeed, once other biosimilars are on the market, isolating the impact of Kanjinti as opposed to other biosimilars on the price of Herceptin will be even more complex. (*Id.* ¶¶70-72.)

b. Lost market share

It is well-established that a patentee's loss of market share can constitute irreparable harm. *See, e.g., Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1361-62 (Fed. Cir. 2008); *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1368 (Fed. Cir. 2001). As ***Amgen itself***

has stated in seeking a preliminary injunction in a biosimilar case, "[c]ourts have repeatedly held that the steep loss of market share and revenue…caused by the introduction of a generic drug constitute irreparable harm justifying the entry of injunctive relief." Ex. 28, at 15; *see also* Ex. 30, *Amgen Inc. v. Amneal Pharms. LLC, et al.*, No. 1:16-cv-853-MSG, D.I. 440 at 12-13 (D. Del. Mar. 26, 2019) ("*Amneal* Brief") ("loss of market share…[is an] accepted form[] of irreparable harm");[4] *see also* 4 Robert A. Matthews, Jr., *Annotated Patent Digest* § 32:44 (June 2019 update) (collecting cases).

Amgen's launch of Kanjinti undisputedly will reduce Genentech's market share. [redacted].) It will be difficult for Genentech to recapture market share from Amgen. [redacted] And even if Amgen were later removed from the market, Genentech is unlikely to recapture its pre-entry market share. (Jena Decl. ¶98.) [redacted] Indeed, [redacted], Genentech will continue to be irreparably harmed because the percentage of the loss of market share attributable to Amgen will become even harder to quantify and thus fully compensate. (*Id.*, ¶¶70-72.)

c. Effect on other products

[4] Amgen's acknowledgement of these well-accepted types of irreparable harm is equally relevant from small-molecule cases (such as *Amneal*) and biosimilar cases (such as *Hospira*). Indeed, Amgen relied on precedent regarding small-molecule generics in seeking an injunction in the *Hospira* biosimilar case. (*See* Ex. 28, at 15-16.)

The irreparable injuries that Genentech will suffer from Amgen's infringement are not limited only to Herceptin, but would also extend to other Genentech products.

First, Amgen's biosimilar launch would likely have an incalculable but material negative effect on the market for Genentech's Perjeta and Kadcyla products. Like Herceptin, Perjeta and Kadcyla are antibodies that treat breast cancer. Perjeta has been approved for use at the same time as Herceptin and is thought to have synergistic effects with Herceptin. (Oliger Decl. ¶¶11, 22.) Kadcyla is used for certain patients who have already been treated with Herceptin and chemotherapy and has also been newly approved as an alternative to Herceptin for some patients. (Oliger Decl. ¶¶11, 24.) Amgen's launch of Kanjinti is likely to have significant adverse effects on Perjeta and Kadcyla for two reasons.

Second, Amgen's launch would likely result in lost sales and price erosion for two other Genentech biologic drugs, Avastin and Rituxan, which are likely to face threats of biosimilar competition now or in the near future. These harms are difficult to quantify and therefore irreparable. Indeed, Amgen itself has acknowledged that irreparable harm can be shown where launch of an infringing drug will affect the market for a patentee's other products, arguing that

the launch of a biosimilar to one of Amgen's products would irreparably harm the market for two other Amgen products as well. (Ex. 28, at 14-15.)

Third, Genentech is a research-based company, and Amgen's launch will hinder Genentech's ability to fund research and development for new therapies. (Oliger Decl. ¶20; Jena Decl. ¶¶117-119.) The consequences of those lost research opportunities are impossible to know or quantify and are thus irreparable. *See BioTechnology Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1566 (Fed. Cir. 1996) (affirming irreparable harm based in part on reductions to research and development spending); *Vanda Pharm. Inc. v. Roxane Labs., Inc.*, 203 F. Supp. 3d 412, 436 (D. Del. 2016) (finding irreparable harm "from being unable to use lost [product] revenue to invest in research and development of new clinical indications for and formulations of [product] and development of other drugs"); *Pozen Inc. v. Par Pharm., Inc.*, 800 F. Supp. 2d 789, 824 (E.D. Tex. 2011) (finding irreparable harm when "a reduction of revenue would subsequently impact [a pharmaceutical company's] ability to allocate its resources to product development"). Indeed, Amgen itself has argued in these circumstances that lost research opportunities are an irreparable harm supporting injunctive relief. *See* Ex. 76, Motion at 19, *Amgen Inc. et al. v. Sandoz Inc.*, No. 3:14-cv-04741-RS, 2015 WL 11652704 (N.D. Cal. Feb. 5, 2015).

d. Reputational harm

Amgen's launch [redacted] will irreparably injure Genentech [redacted] (Ex. 28, at 17; Jena Decl. ¶102-104; *see also* Ex. 26, at 14.) The reputational injury that Genentech would suffer from enforcing its patents after Amgen has launched further supports entry of a

preliminary injunction to maintain the status quo pending an adjudication on the merits. *See Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1344-45 (Fed Cir. 2013) (harm to "perception in the marketplace by customers … and distributors" is irreparable).

2. Genentech's irreparable harm is connected to Amgen's infringement.

A patentee must also establish that its irreparable injuries are linked to the infringing behavior—i.e., "that there is 'some connection' between the harm alleged and the infringing acts." *Apple II*, 809 F.3d at 640.

Amgen's own actions confirm the nexus between its infringing inducement of the three-week-interval claims and the irreparable harm to Genentech. [redacted]

This course of conduct, driven by Amgen's understanding of market demand, is overwhelming proof of nexus. *See Apple II*, 809 F.3d at 643 (market demand for infringing features and infringer's belief that infringing features were driver of sales "establishes a causal nexus").

Further, most of the uses described in the Herceptin label are covered by the Asserted Claims, which together cover all approved uses of 8 mg/kg / 6 mg/kg / three-week-interval dosing. The claimed dosing regimens, which are more convenient and less expensive for patients than more frequent dosing, are used in connection with a substantial majority of Herceptin prescriptions. (Tannenbaum Decl. ¶32) This dosing is the only approved regimen for gastric cancer, and [redacted]

Thus, there is unquestionably a nexus between Amgen's infringement and Genentech's irreparable harm.

C. The Balance of Hardships Favors Genentech.

The balance of hardships factor "assesses the relative effect of granting or denying an injunction on the parties." *Apple II*, 809 F.3d at 645; *accord Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 727 (3d Cir. 2004). "The balance considered is only between a plaintiff and a defendant[;] … the effect on customers and patients is irrelevant." *Acumed LLC v. Stryker Corp.*, 551 F.3d 1323, 1330 (Fed. Cir. 2008).

This factor favors Genentech. If Genentech's request for a preliminary injunction is denied, it will be "requir[ed] to compete against its own patented invention, with the resultant [irreparable] harm." *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1156 (Fed. Cir. 2011). Moreover, because Kanjinti has not entered the market, granting injunctive relief will achieve the "goal[] of the preliminary injunction analysis [of] maintain[ing] the status quo, defined as the last peaceable, noncontested status of the parties." *Kos Pharms.*, 369 F.3d at 729.

Amgen, in contrast, will suffer no prejudice from an injunction. Because its product is not yet on the market, it does not face the same harms as Genentech. *See Impax Labs. Inc. v. Aventis Pharms, Inc.*, 235 F. Supp. 2d 390, 396 (D. Del. 2002) (infringer who has not yet entered the market will suffer "only minimal hardship" from a preliminary injunction). "[A]n alleged infringer's loss of market share and customer relationships, without more, does not rise to the level necessary to overcome the loss of exclusivity experienced by a patent owner due to infringing conduct." *Pfizer, Inc. v. Teva Pharms., USA, Inc.*, 429 F.3d 1364, 1382 (Fed. Cir. 2005). Moreover, Genentech has reached settlements with respect to the other approved trastuzumab biosimilars, [redacted] (Oliger Decl. ¶45.) [redacted].

[redacted]

D. Granting A Preliminary Injunction Serves The Public Interest.

"A party seeking a preliminary injunction must establish that … an injunction is in the public interest," with a "focus on whether a critical public interest would be injured by the grant of injunctive relief." *Metalcraft of Mayville, Inc. v. The Toro Co.*, 848 F.3d 1358, 1369 (Fed. Cir. 2017); *see also Pappan Enters, Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 807 (3d Cir. 1998). Here, the public interest is best served by "the enforcement of [Genentech's] patent rights." *Celsis In Vitro*, 664 F.3d at 931-32. As the Federal Circuit has explained, "investment in drug research and development must be encouraged and protected by the exclusionary rights conveyed in valid patents." *Id.* at 931; *see also Sanofi-Synthelabo*, 470 F.3d at 1383-84.

Indeed, Amgen has consistently agreed that enjoining infringing conduct by generic or biosimilar developers serves the public interest. *See, e.g.*, Ex. 26, at 20-21 ("The Public Has a Strong Interest in a Robust Patent System that Maintains the Incentives for Pharmaceutical Innovation"); Ex. 28, at 19 ("There is a strong public interest in encouraging investment in the research and development to create novel biological therapeutics that treat human disease. The fact that a copyist may sell at a lower price does not override this important public interest."). Genentech agrees. (*See* Jena Decl. ¶¶111-124.)

There is no question that Genentech can continue to supply the market with Herceptin so that no patient will be deprived of therapy. And Genentech is committed to ensuring patient access by providing Herceptin free of charge to patients who are uninsured or cannot afford treatment and employing over 350 people to support a patient-support program to further assist

patients with its products. (Jena Decl. ¶123; Oliger Decl. ¶¶19, 31-33.) Indeed, rather than expand care, Amgen's launch might actually have the opposite effect of discouraging the use of Genentech's other drugs (Kadcyla and Perjeta) in patients that could significantly benefit from those therapies. (Jena Decl. ¶¶111-114.) An injunction here would thus serve the public interest in robust and enforceable patent rights to encourage and sustain pharmaceutical innovation without a resultant loss in access for patients.

II. THE COURT SHOULD ENTER A TEMPORARY RESTRAINING ORDER.

The purpose of a TRO "is to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction." *Tootsie Roll Indus., Inc. v. Sathers, Inc.*, 666 F. Supp. 655, 658 (D. Del. 1987). The same equitable factors discussed above overwhelmingly favor entering a TRO to maintain the status quo to permit this motion to be heard. *See In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 2011 WL 1980610, at *1-3 (D. Del. May 20, 2011) (entering TRO against generic launch).

The consequences of Amgen's launch will be immediate and irreversible. As discussed above, Genentech will suffer irreparable price erosion, lost market share, and reputational harm that will persist even if Kanjinti were subsequently removed from the market. Those injuries are not fully quantifiable or compensable after the fact. Genentech therefore cannot obtain effective relief [redacted] *Syntex (USA) LLC v. Apotex Inc.*, No. C 01-02214 MJJ, 2006 WL 1390435, at *3 (N.D. Cal. May 18, 2006) (entering TRO where "competitive position" and "pricing structure" could not be repaired following generic entry).

By contrast, Amgen would suffer no prejudice [redacted] Kanjinti is not currently on the market in the United States, and no other trastuzumab biosimilars will launch before this motion can be decided. Genentech has reached

settlements with respect to the other approved trastuzumab biosimilars, [redacted] (Oliger Decl. ¶45.) Amgen therefore will be at no competitive disadvantage from a TRO to maintain the status quo. *See Cyclobenzaprine*, 2011 WL 1980610, at *4 (no harm to defendant where "market will not collapse"). [redacted]

Finally, Amgen's refusal to comply with the Court's June 20, 2019 order (D.I. 259) requiring discovery concerning Amgen's internal assessments of the validity of the patents addressed in this motion is a further reason to maintain the status quo. Amgen has moved for reargument of that order (D.I. 266), but never sought to stay it. Instead, Amgen effectively undertook to grant itself a stay by refusing to produce any documents by the Court's deadline and unilaterally cancelling depositions of relevant witnesses. (*See* D.I. 270 at 9.) That discovery is directly relevant to this motion; it relates to Amgen's assessment of the validity of the patents underlying this motion. As a matter of fairness, Amgen should not be permitted to oppose this motion by attempting to raise a substantial question as to the validity of the underlying patents while at the same time unilaterally withholding discovery on that issue that it has been ordered to provide. A TRO will permit the Court to decide the issues with the benefit of all of the discovery that Amgen has already been ordered to provide.

CONCLUSION

Genentech respectfully requests that this Court issue a TRO and a preliminary injunction precluding Amgen from launching Kanjinti pending a full trial on the merits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that true and correct copies of the foregoing document were caused to be served on July 10, 2019 on the following counsel in the manner indicated:

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