IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

AMGEN INC. and AMGEN MANUFACTURING, LIMITED, Plaintiffs, v. HOSPIRA, INC., Defendant.	)	C.A. No. _____ **DEMAND FOR JURY TRIAL**

COMPLAINT

Amgen Inc. and Amgen Manufacturing, Limited (collectively "Amgen"), by and through their undersigned attorneys, for their Complaint against Hospira, Inc. ("Hospira"), hereby allege:

THE PARTIES

1. Amgen Inc. is a corporation existing under the laws of the State of Delaware, with its principal place of business at One Amgen Center Drive, Thousand Oaks, California, 91320.

2. Amgen Manufacturing, Limited ("AML") is a corporation existing under the laws of Bermuda with its principal place of business in Juncos, Puerto Rico.

3. Amgen discovers, develops, manufactures, and sells innovative therapeutic products based on advances in molecular biology, recombinant DNA technology, and chemistry. Founded in 1980, Amgen is a pioneer in the development of biological human therapeutics. Today, Amgen is the largest biotechnology company in the world, fueled in part by the success of its first therapeutic product EPOGEN® (epoetin alfa).

4. On information and belief, defendant Hospira is a corporation existing under the laws of the state of Delaware, with its principal place of business at 275 North Field Drive, Lake Forest, Illinois 60045.

5. On information and belief, Hospira, founded in 2004, is in the business of manufacturing and selling generic injectable products, and is seeking to expand its U.S. business into the manufacture and sale of biosimilar biologic therapeutics.

NATURE OF THE ACTION

6. This is one of the first actions for patent infringement under 35 U.S.C. § 271(e)(2)(C), which was enacted in 2010 as part of the Biologics Price Competition and Innovation Act ("the BPCIA"), and is the first such action in this District.

7. This is also one of the first actions seeking to give meaning and force to the disclosure and notice provisions of the BPCIA.

8. By amendment to the Public Health Service Act ("the PHSA"), the BPCIA created a new, abbreviated pathway for the approval of biological products that are highly similar to previously-licensed innovative biological products. The abbreviated pathway (42 U.S.C. § 262(k), often referred to as "the subsection (k) pathway") allows a biosimilar applicant to secure a license from the Food and Drug Administration ("the FDA") by relying on the prior license granted to the innovator company ("the Reference Product Sponsor" or "RPS") for its innovative biological product ("the reference product"), provided that the reference product had been licensed by the FDA under the innovator pathway (42 U.S.C. § 262(a), often referred to as "the subsection (a) pathway"), which has traditionally required proof of safety and efficacy through a series of phased clinical trials.

9. In addition to creating an abbreviated pathway for approval, the BPCIA amended the PHSA to create an intricate and carefully orchestrated set of procedures for the biosimilar applicant and the Reference Product Sponsor to engage in a private and confidential disclosure of information, exchange of contentions, conduct of negotiations, and notice of commercial marketing to identify patents in dispute, resolve or narrow those disputes, and, if court

intervention is necessary, to facilitate an informed and orderly preliminary injunction practice after FDA licensure of the biosimilar product but before the status quo in the marketplace is disturbed. These procedures are set forth in 42 U.S.C. § 262(*l*) ("the patent provisions" of the BPCIA).

10. Seeking the benefits of the subsection (k) pathway, Hospira submitted its Biologic License Application ("BLA") No. 125545 ("the Hospira BLA") to the FDA, requesting that its biological product ("the Hospira Epoetin Biosimilar Product") be licensed by relying on Amgen's demonstration of the safety and efficacy of EPOGEN® (epoetin alfa).

11. Despite seeking the benefits of the subsection (k) pathway by relying on Amgen's EPOGEN® license, Hospira has repeatedly refused to comply with its obligations under the patent provisions of the BPCIA.

12. In part, this lawsuit is necessary because Hospira has chosen to withhold the manufacturing information that 42 U.S.C. § 262(*l*)(2)(A) required Hospira to provide to Amgen within 20 days of the FDA having accepted Hospira's biosimilar application for review. Hospira has thereby limited Amgen's ability to identify patents that could reasonably be asserted against Hospira, forcing Amgen to initiate this lawsuit to get the withheld information through discovery.

13. In part, this lawsuit is necessary because Hospira has refused to engage in the good-faith negotiations with Amgen required by 42 U.S.C. § 262(*l*)(4), thereby necessitating this Court's intervention to resolve the patent disputes identified so far.

14. In part, this lawsuit is necessary because Hospira has declared that it will not comply with 42 U.S.C. § 262(*l*)(8)(A), which requires Hospira to provide Amgen with 180 days'

notice of its first commercial marketing, on or after FDA licensure of the Hospira Epoetin Biosimilar Product.

15. Further, this lawsuit is necessary because Hospira has infringed patents that Amgen has identified under 42 U.S.C. § 262(*l*)(3)(A) and, upon information and belief, Hospira will infringe one or more claims of these patents should it commercially manufacture, use, offer for sale, sell, or import into the United States the Hospira Epoetin Biosimilar Product.

JURISDICTION AND VENUE

16. This is an action to declare the rights and obligations of the parties under Section 262 of the PHSA, Title 42, United States Code, and for patent infringement under the patent laws of the United States, Title 35, United States Code. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338(a), 2201(a), and 2202.

17. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391 (b) and (c), and 28 U.S.C. § 1400(b). On information and belief, Hospira manufactures, seeks regulatory approval to market, distribute, and sell pharmaceutical products, and markets, distributes, and sells pharmaceutical products for use throughout the United States, including in this District.

18. This Court has personal jurisdiction over Hospira by virtue of, among other things, Hospira being a Delaware corporation, having conducted business in this District, having availed itself of the rights and benefits of Delaware law, and having engaged in substantial and continuing contacts with Delaware.

BACKGROUND

A. Amgen's innovative biological product, EPOGEN® (epoetin alfa)

19. The active ingredient in Amgen's innovative drug EPOGEN® (epoetin alfa) is recombinant human erythropoietin, a 165-amino-acid glycoprotein that is produced by genetically modified animal cells grown in culture vessels. By binding to specific receptors on

the surface of certain types of cells in the bone marrow, EPOGEN® (epoetin alfa) stimulates the production of red blood cells, known as erythrocytes. EPOGEN® (epoetin alfa) is used to treat anemia. Patients with anemia have a lower-than-normal level of red blood cells. EPOGEN® (epoetin alfa) is used to reduce or avoid the need for red blood cell transfusions in patients, for example, with chronic kidney disease.

20. Amgen is the recognized pioneer for developing therapeutically effective biological products to treat, ameliorate, or prevent disease. The availability of EPOGEN® represented a major advance in the treatment of anemia.

21. Biological products for human therapeutic use are regulated by the FDA under the PHSA. (In contrast, chemical pharmaceuticals are regulated by the FDA under the Food, Drug and Cosmetic Act.) A company seeking to market a biological product for human therapeutic use in the United States must first submit a BLA to obtain a license from the FDA. Developers of innovative biological products typically go through three clinical development phases to develop evidence of the safety and efficacy of the biological product for use in defined disease states before seeking FDA approval: Phase I, which typically tests safety, tolerability, and pharmacologic properties on healthy human volunteers, and Phases II and III, which typically test safety and efficacy on, respectively, a small and then a larger group of afflicted patients. If testing in each phase succeeds, the innovator may be in a position to submit a BLA under 42 U.S.C. § 262(a) seeking FDA approval. The BLA includes, among other things, technical data on the characterization and composition of the biological product, toxicology studies of the product in animals, the means for manufacturing the product, clinical trial results to establish the safety, efficacy, and dosing of the product for specific patient populations and disease states, and labeling for use of the product for which approval is requested. 21 C.F.R. §§ 601 *et seq.*

22. After submission of the BLA, innovators must pass demanding stages of clearance. For example, innovators are required to demonstrate to the FDA that "the biological product that is the subject of the application is safe, pure, and potent" (42 U.S.C. § 262(a)(2)(C)(i)(I)); and "the facility in which the biological product is manufactured, processed, packed, or held meets standards designed to assure that the biological product continues to be safe, pure, and potent." 42 U.S.C. § 262(a)(2)(C)(i)(II). If the FDA determines that the biological product or the facility does not meet the requirements, the BLA will be denied.

23. Not surprisingly, the development of innovative pharmaceutical products requires the investment of enormous amounts of time and money. For example, it typically takes ten years to develop a drug, and the average cost to develop a drug (including the cost of failures) has been estimated at $2.6 billion. *See* PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, 2015 PROFILE: BIOPHARMACEUTICAL RESEARCH INDUSTRY at 35.[1]

24. Amgen went through each of the requirements of the subsection (a) pathway to obtain a license from the FDA for its innovative biological product EPOGEN® (epoetin alfa). As a result, in 1989, the FDA approved EPOGEN® (epoetin alfa) pursuant to BLA No. 103234, for the treatment of anemia associated with chronic renal failure ("CRF") (including end-stage renal disease). The initial approval of EPOGEN® (epoetin alfa) for use in treating anemia due to chronic renal failure was followed by approvals for additional indications: for use in patients with certain cancers suffering from anemia due to concomitant chemotherapy, in patients with HIV-infection with anemia due to anti-viral drugs, and to decrease the need for transfusion in patients scheduled for certain types of surgery. Since being granted approval, Amgen has

[1] *Available at* http://www.phrma.org/sites/default/files/pdf/2015_phrma_profile.pdf.

manufactured and sold EPOGEN® (epoetin alfa) in the U.S. for the treatment of anemia associated with chronic kidney disease in patients on dialysis. Amgen also manufactures and supplies epoetin alfa to Ortho Biotech, a division of Johnson & Johnson, for sale in the United States under the tradename PROCRIT® for the treatment of anemia in chronic kidney disease patients who are not receiving dialysis, as well as for other FDA-approved therapeutic indications.

B. Hospira seeks approval to market a biosimilar version of EPOGEN® (epoetin alfa) by taking advantage of the abbreviated subsection (k) pathway of the BPCIA

25. Hospira is seeking approval from the FDA to sell a "biosimilar" version of EPOGEN® (epoetin alfa) by taking advantage of a new, abbreviated approval pathway under the BPCIA.

26. But Hospira has chosen to ignore certain statutory requirements of the BPCIA that Congress put in place to protect innovators such as Amgen. Rather than follow the requirements of the BPCIA, Hospira has selectively decided to comply with certain provisions while refusing to comply with others.

C. The BPCIA reflects Congress's balancing of the interests of innovators and biosimilar applicants

27. Congress enacted the BPCIA on March 23, 2010. The purpose of the BPCIA is to establish "a biosimilars pathway balancing innovation and consumer interests." Biologics Price Competition and Innovation Act of 2009, Pub. L. No. 111-148, § 7001(b), 124 Stat. 119, 804 (2010) (amending 42 U.S.C. § 262). The statutory requirements of the BPCIA reflect Congress's intent to achieve this balance.

28. On one side of the balance, the BPCIA created an abbreviated approval pathway, 42 U.S.C. § 262(k), for FDA licensure of biological products upon a determination that the

biological product is "biosimilar" to a previously-licensed "reference product." The BPCIA defines a "biosimilar" to be a biological product that: (1) is "highly similar to the reference product notwithstanding minor differences in clinically inactive components," and (2) has "no clinically meaningful differences between the biological product and the reference product in terms of the safety, purity, and potency of the product." 42 U.S.C. §§ 262(i)(2)(A) and (B). The BPCIA defines a "reference product" to be "a single biological product licensed under subsection (a) against which the biological product is evaluated in an application submitted under subsection (k)." 42 U.S.C. § 262(i)(4).

29. As opposed to applicants following the § 262(a) pathway, biosimilar applicants following the § 262(k) pathway have the advantage of referencing the innovator's license—the FDA evaluates the safety and efficacy of the applicant's biological product by relying on the innovator's prior demonstration of safety, purity, and potency of the reference product. Specifically, the § 262(k) pathway may only be used where the prior applicant for the reference product ("the Reference Product Sponsor," or "RPS") has submitted an application under 42 U.S.C. § 262(a) for approval of a reference product, and the FDA has determined that the RPS has demonstrated that "the biological product that is the subject of the application is safe, pure, and potent." 42 U.S.C. § 262(a)(2)(C)(i)(I).

30. Before the BPCIA, reference to another's biological license could be made only with the permission of the innovator RPS. An innovator RPS enjoyed permanent and exclusive rights to its clinical trial data and FDA license. The BPCIA advanced the public's interest in price competition in part by diminishing these rights, allowing a biosimilar applicant to "reference" the innovator RPS's license rather than incurring the delay and costs of generating its own clinical data.

31. Consequently, the § 262(k) pathway allows the biosimilar applicant to avoid the time and expense incurred by the RPS for development and clinical testing, and to gain licensure to commercialize its biological product in the market sooner as a biosimilar than it could have done through an independent demonstration of safety, purity, and potency under the § 262(a) pathway. The § 262(k) pathway is thus referred to as an "abbreviated" approval pathway.

32. In addition to providing these benefits, approval under the § 262(k) pathway offers another benefit to the biosimilar applicant: a product that is approved as a biosimilar can take advantage of the existing market for the reference product created by the RPS.

33. On the other side of the balance, Congress implemented a detailed procedure to protect the interests of the RPS, tying this procedure to the biosimilar applicant's choice to submit a BLA under, and gain the benefit of, the abbreviated § 262(k) pathway. 42 U.S.C. § 262(*l*)(1)(B)(i). This procedure compels biosimilar applicants that choose the abbreviated § 262(k) pathway to provide the RPS with a defined set of information shortly after the FDA accepts the biosimilar applicant's BLA for review.

34. Of particular relevance here, in 42 U.S.C. § 262(*l*), the BPCIA sets forth requirements that the biosimilar applicant must follow to obtain the benefits of filing its BLA under the § 262(k) pathway. Specifically, 42 U.S.C. § 262(*l*) provides the following series of steps for the disclosure of information, the exchange of contentions, the resolution or narrowing of patent disputes, and, if necessary, the commencement of litigation, all within specified times triggered initially by the biosimilar applicant's submission and the FDA's acceptance of a BLA under the § 262(k) pathway:

> ***a.*** ***Within 20 days*** after the FDA has accepted its abbreviated application, the biosimilar applicant must provide the Reference Product Sponsor: (i) a copy of the biosimilar application and (ii) other information describing the

process(es) for manufacturing the biosimilar product. 42 U.S.C. § 262(*l*)(2).

b. ***Within 60 days*** after receiving the BLA and manufacturing information, the Reference Product Sponsor must provide the biosimilar applicant with a list of all patents that the Reference Product Sponsor believes a claim for patent infringement could reasonably be asserted by either the Reference Product Sponsor or a patent owner that has granted exclusive rights to the Reference Product Sponsor. 42 U.S.C. § 262(*l*)(3)(A). The Reference Product Sponsor must also identify which, if any, of these patents it would be prepared to license to the biosimilar applicant. 42 U.S.C. § 262(*l*)(3)(A)(ii).

c. ***Within 60 days*** after receiving the foregoing list from the Reference Product Sponsor, the biosimilar applicant may provide to the Reference Product Sponsor a list of patents that the biosimilar applicant believes could be subject to a claim of patent infringement, 42 U.S.C. § 262(*l*)(3)(B)(i), and with regard to any patents listed by the Reference Product Sponsor or the biosimilar applicant, the biosimilar applicant must also provide: (I) a statement describing, on a claim-by-claim basis, a factual and legal basis for an opinion that a patent is invalid, unenforceable, or not infringed; or (II) a statement that the biosimilar applicant does not intend to market until the patent expires. 42 U.S.C. § 262(*l*)(3)(B)(ii). The biosimilar applicant must also provide a response to the Reference Product Sponsor's identification of any patents it would be prepared to license. 42 U.S.C. § 262(*l*)(3)(B)(iii).

d. ***Within 60 days*** after receiving the information described immediately above, the Reference Product Sponsor must provide, regarding each patent discussed in (I) above, a reciprocal statement describing, on a claim by claim basis, a factual and legal basis for an opinion that a patent will be infringed as well as a response to any statement regarding validity and enforceability. 42 U.S.C. § 262(*l*)(3)(C).

e. After this exchange of information, both parties must engage in good-faith negotiations to identify which patents, if any, should be subject to patent infringement litigation. 42 U.S.C. § 262(*l*)(4)(A). If the parties reach agreement ***within 15 days*** of starting negotiations, the Reference Product Sponsor must bring a patent-infringement action against the biosimilar applicant on the negotiated list of patents ***within 30 days*** of such agreement. 42 U.S.C. § 262(*l*)(6)(A). If the parties do not reach agreement ***within 15 days*** of starting negotiations, the biosimilar applicant must notify the Reference Product Sponsor of the number of patents it will provide in a second list, and the parties then simultaneously exchange within five days of this notice a list of patents that each party believes should be the subject of infringement litigation. 42 U.S.C. § 262(*l*)(5). ***Within 30 days*** after exchanging these lists, the Reference Product

Sponsor must bring an "immediate" patent infringement action against the biosimilar applicant on all patents on these simultaneously exchanged lists. 42 U.S.C. § 262(*l*)(6)(B).

f. Even after the litigation contemplated by 42 U.S.C. § 262(*l*)(6)(B) has commenced, the Reference Product Sponsor must identify additional patents that are newly issued or licensed after the Reference Product Sponsor provided its patent list under 42 U.S.C. § 262(*l*)(3)(A). Specifically, the Reference Product Sponsor must, not later than 30 days after the issuance or licensing, supplement that list with the newly issued or licensed patent(s). 42 U.S.C. § 262(*l*)(7).

35. Section 262(*l*) also requires the biosimilar applicant to provide the RPS with at least 180 days' notice before the biosimilar applicant's first commercial marketing of the biosimilar product. 42 U.S.C. § 262(*l*)(8)(A) (the "subsection (k) applicant shall provide notice to the Reference Product Sponsor not later than 180 days before the date of first commercial marketing of the biological product licensed under subsection (k)"). The notice of commercial marketing can only be provided *on or after* the biosimilar applicant has received FDA approval to market its product. *Amgen Inc. v. Sandoz, Inc.*, 794 F.3d 1347, 1357 (Fed. Cir. 2015) ("[U]nder paragraph (*l*)(8)(A), a subsection (k) applicant may only give effective notice of commercial marketing after the FDA has licensed its product."). The biosimilar applicant's obligation to provide this advance notice of commercial marketing is mandatory; it is not conditioned on performance of any act by the RPS, nor exempted if the biosimilar applicant fails to make the initial disclosures under 42 U.S.C. § 262(*l*)(2)(A). *Amgen*, 794 F.3d at 1359 ("A question exists, however, concerning whether the 'shall' provision in paragraph (*l*)(8)(A) is mandatory. We conclude that it is."); *id.* at *1359-60 ("Paragraph (*l*)(8)(A) is a standalone notice provision in subsection (*l*). . . . Unlike the actions described in paragraphs (*l*)(3) through (*l*)(7), which all depend on, or are triggered by, the disclosure under paragraph (*l*)(2)(A), nothing in paragraph (*l*)(8)(A) conditions the notice requirement on paragraph (*l*)(2)(A) or other provisions of subsection (*l*).").

36. The 180-days' notice of commercial marketing enables the RPS to seek a preliminary injunction before the biosimilar applicant commences commercial marketing of the biosimilar product, enjoining the biosimilar applicant from commercially manufacturing or selling the biosimilar product until the court decides any disputed patent issues. Accordingly, this provision gives the courts an opportunity to consider the RPS's motion for preliminary injunction when the issues are fully crystallized and before the status quo has changed.

D. Hospira seeks the benefits of the BPCIA pathway under 42 U.S.C. § 262(k) but refuses to comply with all of its obligations under § 262(*l*)

1. The Hospira BLA

37. In December 2014, Hospira submitted the Hospira BLA to the FDA under the abbreviated § 262(k) pathway to obtain approval to commercially manufacture, market, and sell the Hospira Epoetin Biosimilar Product, a biosimilar version of EPOGEN® (epoetin alfa) (which Hospira refers to as "Hospira Epoetin") for treating particular diseases in the United States.

38. The Hospira Epoetin Biosimilar Product is designed to copy and compete with Amgen's EPOGEN® (epoetin alfa). Hospira will instruct or direct others to administer the Hospira Epoetin Biosimilar Product to certain patients in the U.S. to treat particular diseases in the same way that Amgen's EPOGEN® (epoetin alfa) is administered. Hospira is seeking FDA approval for one or more indications for which EPOGEN® (epoetin alfa) is already approved.

39. Hospira does not seek to independently demonstrate to the FDA that its biological product is "safe, pure, and potent" pursuant to 42 U.S.C. § 262(a), as Amgen did in its BLA for its innovative biological product EPOGEN® (epoetin alfa). Rather, Hospira has requested that the FDA evaluate the suitability of its biological product for licensure by expressly referencing EPOGEN® (epoetin alfa) and thereby relying on the data supporting Amgen's FDA license for EPOGEN® (epoetin alfa) 42 U.S.C. § 262(k)(2)(A)(iii)(I).

40. On February 23, 2015, Hospira notified Amgen that the Hospira BLA had "recently been accepted for filing by FDA." On information and belief, the FDA has not yet approved the Hospira BLA or given any indication whether it will be approved, when it will be approved, or what the scope of any approval will be. Under the Biosimilar Biological Product Authorization Performance Goal and Procedures, which sets forth FDA goals for fiscal years 2013-2017, the FDA is committed to reviewing and acting "on 70 percent of original biosimilar biological product application submissions within 10 months of receipt" for biosimilar biological product applications filed in 2014.[2] Therefore, the FDA may complete its final review of the Hospira Epoetin Biosimilar Product before November, 2015.

41. Hospira's choice to submit its BLA using the abbreviated subsection (k) pathway triggered its mandatory obligation to also comply with the disclosure obligations at the outset of FDA review. 42 U.S.C. § 262(*l*)(1)(B)(i).

42. Hospira's receipt of FDA notification that its BLA had been accepted for review triggered the 20-day deadline to provide its BLA and manufacturing information to Amgen as required by 42 U.S.C. § 262(*l*)(2)(A).

43. Purporting to comply with § 262(*l*)(2)(A), on March 3, 2015, Hospira provided a copy of its BLA for the Hospira Epoetin Biosimilar Product to Amgen.

2. Hospira violated § 262(*l*)(2)(A)

44. Although Hospira provided a copy of the Hospira BLA to Amgen, it did not provide Amgen with the other information describing the processes used to manufacture the Hospira Epoetin Biosimilar Product as required by § 262(*l*)(2)(A).

[2] FDA, Biosimilar Biological Product Authorization Performance Goals and Procedures Fiscal Years 2013 through 2017, *available at* http://www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/TherapeuticBiologicApplications/Biosimilars/UCM281991.pdf.

45. In correspondence dated March 31, April 17, April 27, and May 1, 2015, Amgen specifically identified for Hospira the manufacturing information that was missing from the Hospira BLA. Amgen repeatedly requested that Hospira comply with § 262(*l*)(2)(A) and provide that information.

46. In correspondence dated March 5, April 21, April 30, August 19, and September 15, 2015, Hospira repeatedly refused to provide Amgen with the other information describing the processes used to manufacture the Hospira Epoetin Biosimilar Product as required by § 262(*l*)(2)(A).

47. Hospira deliberately decided not to provide Amgen with the information necessary to describe the processes for manufacturing the Hospira Epoetin Biosimilar Product within 20 days of receiving notification of FDA acceptance of its application for review.

48. To date, Amgen still has not received this manufacturing information, while Hospira continues to enjoy the benefit of FDA review of its application in reliance on Amgen's prior biological product license for EPOGEN® (epoetin alfa).

49. In *Amgen Inc. v. Sandoz, Inc.*, 794 F.3d 1347 (Fed. Cir. 2015), the Federal Circuit held that Sandoz's failure to provide its BLA and other manufacturing information to Amgen as required by 42 U.S.C. § 262(l)(2)(A), did not violate the BPCIA. The panel majority held that because the BPCIA provides consequences for a biosimilar applicant's failure to comply with § 262(*l*)(2)(A), the word "'shall' in paragraph § 262(*l*)(2)(A) does not mean 'must.'" *Id.* at 1355. The majority held instead that if the applicant fails to provide the required information, the RPS may bring a declaratory-judgment action under 42 U.S.C. § 262(*l*)(9)(C) or a patent-infringement action under 35 U.S.C. § 271(e)(2)(C)(ii), and obtain the required information through discovery. *Id.* at 1356. Judge Newman dissented, because the BPCIA "leaves no uncertainty as to which of

its provisions are mandatory and which are permissive," with § 262(*l*)(2)(A) being mandatory, and because § 262(*l*)(2)(A) is central to the entire BPCIA: "Subsection (k) and subsection (*l*) are components of an integrated framework; to enjoy the benefits of subsection (k), the biosimilar applicant is obligated to comply with subsection (*l*)," and an applicant that fails to provide the required information violates the "explicit balance of obligations and benefits" of the BPCIA. *Id.* at 1365-66. Amgen is currently seeking *en banc* review of the panel majority's erroneous decision.

50. Receipt of the required manufacturing information would have given Amgen the opportunity to evaluate the manufacturing processes used by Hospira to determine whether those processes would infringe any patents held by Amgen, including under 35 U.S.C. § 271(a), (b), (c), (e), or (g). The purpose of the statutory requirements of 42 U.S.C. § 262(*l*)(2) is, among other things, to permit such an evaluation. In the absence of such a disclosure, the Reference Product Sponsor has no access to the manufacturing information.

51. Had Hospira provided Amgen with the required manufacturing information, Amgen would have been in a position: (1) to provide to Hospira a list of all patents for which Amgen believes a claim of patent infringement could reasonably be asserted as to the Hospira Epoetin Biosimilar Product, and (2) to identify to Hospira whether Amgen would be prepared to grant a license to Hospira under each of the patents included on such a list. 42 U.S.C. § 262(*l*)(3)(A). Amgen has an extensive portfolio of patents relating to various aspects of the manufacture of biological products. Because Hospira's manufacturing process for the Hospira Epoetin Biosimilar Product is still secret, however, without the disclosure required by 42 U.S.C. § 262(*l*)(2), Amgen cannot conduct a full and complete evaluation of its patent portfolio as to Hospira's specific processes of manufacture. By unlawfully withholding the information

required by 42 U.S.C. § 262, Hospira has thereby frustrated the statutory purpose and deprived Amgen of the opportunity to seek redress for potential infringement.

52. Amgen may therefore seek to assert additional patents following eventual receipt of Hospira's manufacturing information to be produced in discovery in this action under the Federal Rules.

53. Hospira's actions also create the substantial and continuing risk that Amgen cannot obtain manufacturing information regarding the Hospira Epoetin Biosimilar Product that would permit Amgen to assert its process patents before commercialization of that product. Forcing Amgen to assert one or more of its patents (including process patents) after Hospira's commercial entry into the market harms Amgen by, *e.g.*, diminishing the value of such patents.

3. Amgen has complied with the BPCIA procedures

54. Amgen complied (to the extent possible, given Hospira's non-compliance) with its obligations under the BPCIA.

55. Within 60 days after receiving a copy of the Hospira BLA, Amgen provided Hospira with a list of patents that Amgen believed could reasonably be asserted by Amgen if a person not licensed under the patents engaged in the manufacture, use, sale, offer for sale, or import into the United States of the Hospira Epoetin Biosimilar Product, thus satisfying 42 U.S.C. § 262(*l*)(3)(A)(i). Amgen also provided the required statement as to which, if any, of these patents it would be prepared to license to Hospira, thus satisfying 42 U.S.C. § 262(*l*)(3)(A)(ii).

56. Within 60 days after receiving Hospira's statement pursuant to 42 U.S.C. § 262(*l*)(3)(B) (which did not satisfy the statute's requirement that Hospira address each patent on a claim-by-claim basis), Amgen provided its reciprocal statement under 42 U.S.C. § 262(*l*)(3)(C), describing, on a claim-by-claim basis, the factual and legal bases for Amgen's

opinion that each patent will be infringed, as well as a response to Hospira's statement regarding validity and enforceability (to the extent Hospira provided such a statement).

4. Hospira violated § 262(*l*)(4)

57. Beginning on August 18, 2015, Amgen sought to comply with the requirements of 42 U.S.C. § 262(*l*)(4)(A) to engage in "good-faith negotiations" with Hospira to "agree on which, if any, patents . . . shall be the subject of an action for patent infringement under [42 U.S.C. § 262(*l*)(6)]."

58. Hospira refused to engage in any of the negotiations required by 42 U.S.C. § 262(*l*)(4)(A). Instead, in correspondence dated August 19, August 24, and September 15, 2015, Hospira purported to bypass its obligations by merely declaring that it was "accepting" the patents that Amgen had initially listed in accordance with § 262(*l*)(3)(A).

59. In correspondence dated August 21 and September 14, 2015, respectively, Amgen thereafter sought to gain Hospira's cooperation to commence good-faith negotiations with the goal of resolving or narrowing the issues to be put before the Court. Hospira has steadfastly refused to engage in *any* negotiation with Amgen, in violation of the statute.

5. Hospira violated § 262(*l*)(8)(A)

60. Under 42 U.S.C. § 262(*l*)(8)(A), Hospira is also required to provide Amgen with at least 180 days' notice of the date of first commercial marketing of the licensed Hospira Epoetin Biosimilar Product. At product licensure, when the issues are fully crystalized and the threat of injury is imminent, this provision will permit Amgen to assess its patent rights and seek injunctive relief before the status quo in the marketplace has changed, *i.e.*, before Hospira first markets commercially or launches the Hospira Epoetin Biosimilar Product. It avoids the need for emergency motions and the attendant disruption to the Court's administration of its docket.

61. Hospira's obligation to provide this notice of commercial marketing is not conditioned on performance of any act by Amgen, and Hospira must provide the notice *on or after* the date that the FDA approves its biosimilar application. *Amgen Inc. v. Sandoz, Inc.*, 794 F.3d 1347, 1357 (Fed. Cir. 2015) ("[U]nder paragraph (*l*)(8)(A), a subsection (k) applicant may only give effective notice of commercial marketing after the FDA has licensed its product"); *id.* at 1359-60 ("Paragraph (*l*)(8)(A) is a standalone notice provision in subsection (l). . . . Unlike the actions described in paragraphs (*l*)(3) through (*l*)(7), which all depend on, or are triggered by, the disclosure under paragraph (*l*)(2)(A), nothing in paragraph (*l*)(8)(A) conditions the notice requirement on paragraph (*l*)(2)(A) or other provisions of subsection (*l*).").

62. Despite its obligation under § 262(*l*)(8)(A), Hospira provided Amgen with a purported (8)(A) notice on April 8, 2015, *before* Amgen had provided its initial disclosure of patents under (3)(A) and *before* Hospira received FDA approval for its Hospira Epoetin Biosimilar Product. On May 8, 2015, Amgen objected to this premature attempt to provide notice, but Hospira has repeatedly refused to withdraw it.

63. On August 18, 2015, after the Federal Circuit issued its decision in *Amgen v. Sandoz* holding that the notice must be provided on or after FDA approval, Amgen renewed its objection and requested that Hospira confirm that it would follow the law.

64. But Hospira has refused to acknowledge the import of the holding in *Amgen v. Sandoz*. Instead, in correspondence dated August 19 and September 15, 2015, Hospira has taken the position that it is under no obligation to, and will not, provide *any* notice under § 262(*l*)(8)(A).

65. If Hospira is allowed to proceed based on its invalid notice of commercial marketing (or no notice at all), the 180-day period that the statute requires before commercial

marketing may begin would run when the precise nature of the dispute between the parties, and even the need for litigation on certain patents, has not yet crystallized.

66. Hospira has indicated that it intends to violate the statute by categorically refusing to provide Amgen with a legally operative notice of commercial marketing under 42 U.S.C. § 262(*l*)(8)(A). In serving a purported "notice of commercial marketing" before its biosimilar product is licensed, Hospira intends to deprive Amgen of the statutory time period for considering the need for and, if appropriate, seeking adjudication of, a potential preliminary injunction motion. Therefore, Hospira intends to continue violating this provision of the BPCIA absent an order of the Court compelling Hospira to comply.

67. Hospira's scheme to follow only those parts of the BPCIA it considers helpful to it, and to evade the parts it considers unhelpful to it, is unlawful and inequitable.

THE PATENTS-IN-SUIT

A. U.S. Patent No. 5,856,298

68. Amgen Inc. is the owner of all rights, title, and interest in U.S. Patent No 5,856,298 ("the '298 Patent").

69. The '298 Patent is titled "Erythropoietin Isoforms." The '298 Patent was duly and legally issued on January 5, 1999 by the United States Patent and Trademark Office ("USPTO"). The inventor of the '298 Patent is Dr. Thomas Strickland, a former Amgen scientist. A true and correct copy of the '298 Patent is attached to this Complaint as Exhibit A.

70. AML is an exclusive licensee under the '298 Patent.

71. The '298 Patent is directed to erythropoietin isoforms and erythropoietin compositions having specific numbers of attached sialic acid moieties, and methods for preparing the same.

B. U.S. Patent No. 5,756,349

72. Amgen Inc. is the owner of all rights, title, and interest in U.S. Patent No. 5,756,349 ("the '349 Patent").

73. The '349 Patent is titled "Production of Erythropoietin." The '349 Patent was duly and legally issued on May 26, 1998 by the USPTO. The inventor of the '349 Patent is Dr. Fu-Kuen Lin, a former Amgen scientist. A true and correct copy of the '349 Patent is attached to this Complaint as Exhibit B.

74. AML is an exclusive licensee under the '349 Patent.

75. The '349 Patent is directed to vertebrate cells which are capable of producing recombinant human erythropoietin, and processes for producing recombinant erythropoietin using such cells.

CAUSES OF ACTION

FIRST COUNT
(DECLARATORY JUDGMENT THAT HOSPIRA'S REFUSAL TO GIVE LEGALLY EFFECTIVE NOTICE OF COMMERCIAL MARKETING VIOLATES 42 U.S.C. § 262(*l*)(8)(A))

76. Amgen incorporates by reference paragraphs 1-75 as if fully set forth herein.

77. This Count arises under 42 U.S.C. § 262 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) & 2202.

78. The BPCIA, 42 U.S.C. § 262(*l*), requires Hospira to follow mandatory procedures related to the filing of a BLA under 42 U.S.C. § 262(k).

79. Hospira has failed to comply with the mandatory requirements of the BPCIA. Hospira's violations of the BPCIA have injured Amgen, for example, by depriving Amgen of the procedural protections of the statute, by diminishing the value of Amgen's patents, and by subjecting Amgen to the burden of potentially unnecessary litigation.

80. To comply with 42 U.S.C. § 262(*l*)(8)(A), Hospira must provide notice to Amgen "not later than 180 days before the date of the first commercial marketing of the biological product licensed under subsection (k)."

81. Amgen received a letter from Hospira dated April 8, 2015, in which Hospira purported to provide notice of commercial marketing of the Hospira Epoetin Biosimilar Product, which the FDA has not yet approved for licensure. This purported notice is ineffective because, among other things, a biosimilar applicant may only give effective notice of commercial marketing after the FDA has licensed its product.

82. In later letters, Hospira has indicated that it does not intend to rely upon its April 8, 2015 notice.

83. Hospira has categorically represented to Amgen that it does not intend to provide Amgen with notice of commercial marketing after the FDA licenses the Hospira Epoetin Biosimilar Product and 180 days before commercial marketing of the Hospira Epoetin Biosimilar Product is to begin.

84. Hospira's refusal to provide Amgen with commercial notice after the FDA licenses the Hospira Epoetin Biosimilar Product and 180 days before commercial marketing of the Hospira Epoetin Biosimilar Product is to commence, is a violation of 42 U.S.C. § 262(*l*)(8)(A).

85. Amgen is entitled to a declaration of its rights under the statute and injunctive relief requiring Hospira to provide Amgen with legally effective notice of commercial marketing and for such further relief as may be appropriate in equity.

SECOND COUNT
(DECLARATORY JUDGMENT THAT HOSPIRA'S FAILURE TO PROVIDE MANUFACTURING INFORMATION VIOLATES 42 U.S.C. § 262(*l*)(2)(A))

86. Amgen incorporates by reference paragraphs 1-85 as if fully set forth herein.

87. This Count arises under 42 U.S.C. § 262(*l*) and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 & 2202.

88. The BPCIA, 42 U.S.C. § 262(*l*), requires Hospira to follow mandatory procedures related to the filing of a BLA under 42 U.S.C. § 262(k).

89. Hospira has failed to comply with the mandatory requirements of 42 U.S.C. § 262(*l*). Hospira's violations of the BPCIA have injured Amgen by depriving Amgen of the procedural protections of the statute, by diminishing the value of Amgen's biological license for EPOGEN® (epoetin alfa), by diminishing the value of Amgen's patents, and by subjecting Amgen to the burden of unnecessary litigation.

90. Hospira violated 42 U.S.C. § 262(*l*)(2)(A) by failing to disclose the required "such other information that describes the process or processes used to manufacture the biological product that is the subject of such application" to Amgen within 20 days after the FDA accepted the Hospira BLA for review, and again after Amgen specifically identified the nature of the undisclosed information and requested its production.

91. Amgen is entitled to injunctive relief or other equitable relief preventing Hospira from profiting by its deliberate non-compliance with the mandatory provisions of 42 U.S.C. § 262(*l*)(2)(A) to the detriment of Amgen. Hospira must restore to Amgen the benefits afforded to Reference Product Sponsors in the BPCIA, *e.g.*, the information and time provided by the statute for evaluating Hospira's manufacturing information, exchanging patent lists and information, negotiating patent lists, receiving Hospira's notice of commercial marketing, and bringing patent infringement actions and preliminary injunction motions.

THIRD COUNT
(INFRINGEMENT OF U.S. PATENT NO. 5,856,298 UNDER 35 U.S.C. § 271(e)(2)(C))

92. Amgen incorporates by reference paragraphs 1-91 as if fully set forth herein.

93. Amgen is the owner of all rights, title, and interest in U.S. Patent No. 5,856,298 ("the '298 Patent").

94. Hospira seeks FDA approval under 42 U.S.C. § 262(k) to manufacture, use, offer to sell, or sell within the United States the Hospira Epoetin Biosimilar Product, a biosimilar version of Amgen's EPOGEN® (epoetin alfa) product.

95. Amgen included the '298 patent in its disclosure of patents pursuant to 42 U.S.C. § 262(*l*)(3)(A).

96. On information and belief (including Hospira's failure to state otherwise in its disclosures required by the BPCIA), Hospira intends to, and will, manufacture, use, offer to sell, or sell within the United States the Hospira Epoetin Biosimilar Product before the expiration of the '298 Patent.

97. On information and belief, Hospira has, intends to, and will immediately and imminently upon FDA licensure of the Hospira BLA, manufacture, use, offer to sell, or sell within the United States, or import into the United States, the Hospira Epoetin Biosimilar Product.

98. The submission of the Hospira BLA to the FDA to obtain approval to engage in the commercial manufacture, use, offer for sale, or sale of the Hospira Epoetin Biosimilar Product before the expiration of the '298 Patent is an act of infringement of one or more claims of the '298 Patent under 35 U.S.C. § 271(e)(2)(C).

99. Amgen will be irreparably harmed if Hospira is not enjoined from infringing one or more claims of the '298 Patent. Amgen is entitled to injunctive relief under 35 U.S.C.

§ 271(e)(4)(B) preventing Hospira from any further infringement. Amgen does not have an adequate remedy at law.

100. Hospira's commercial manufacture, use, offer for sale, or sale within the United States, or importation into the United States, upon FDA approval of the Hospira Epoetin Biosimilar Product and before the expiration of the '298 Patent will cause Amgen injury, entitling Amgen to damages or other monetary relief under 35 U.S.C. § 271(e)(4).

FOURTH COUNT
(INFRINGEMENT OF THE '298 PATENT UNDER 35 U.S.C. § 271(a))

101. Amgen incorporates by reference paragraphs 1-100 as if fully set forth herein.

102. Hospira seeks FDA approval under 42 U.S.C. § 262(k) to manufacture and sell the Hospira Epoetin Biosimilar Product, a biosimilar version of Amgen's EPOGEN® (epoetin alfa) product.

103. On information and belief, Hospira has, intends to, and will immediately and imminently upon FDA licensure of the Hospira BLA, manufacture, use, offer to sell, or sell within the United States, or import into the United States, the Hospira Epoetin Biosimilar Product.

104. Hospira's manufacture, use, offer to sell, or sale within the United States, or importation into the United States, of the Hospira Epoetin Biosimilar Product before the expiration of the '298 Patent, will infringe one or more claims of the '298 Patent under 35 U.S.C. § 271(a).

105. An actual controversy has arisen and now exists between the parties concerning whether the Hospira Epoetin Biosimilar Product has or will infringe one or more claims of the '298 Patent.

106. Amgen is entitled to a judgment that Hospira has or will infringe one or more claims of the ’298 Patent by making, using, offering to sell, or selling within the United States, or importing into the United States, the Hospira Epoetin Biosimilar Product before the expiration of the ’298 Patent.

107. Amgen is entitled to injunctive relief prohibiting Hospira from making, using, offering to sell, or selling within the United States, or importing into the United States, the Hospira Epoetin Biosimilar Product before the expiration of the ’298 Patent. Amgen does not have an adequate remedy at law.

108. Hospira’s manufacture, use, offer for sale, or sale within the United States, or importation into the United States, of the Hospira Epoetin Biosimilar Product before the expiration of the ’298 Patent will cause Amgen injury, entitling Amgen to damages under 35 U.S.C. § 284.

FIFTH COUNT
(INFRINGEMENT OF U.S. PATENT NO. 5,756,349 UNDER 35 U.S.C. § 271(a))

109. Amgen incorporates by reference paragraphs 1-108 as if fully set forth herein.

110. On information and belief, Hospira infringed one or more claims of the ’349 Patent under 35 U.S.C. § 271(a) by engaging in the manufacture or use of the vertebrate cells claimed in the ’349 patent before the expiration of the ’349 Patent.

111. Hospira’s infringement of one or more claims of the ’349 Patent before the expiration of the ’349 Patent entitles Amgen to damages under 35 U.S.C. § 284.

112. Hospira’s infringement of one or more claims of the ’349 Patent before the expiration of the ’349 Patent entitles Amgen to an injunction prohibiting Hospira from exporting, using, offering for sale, or selling any infringing vertebrate cells produced or used before the expiration of the ’349 patent, and from exporting, using, offering for sale, or selling any Hospira

Epoetin Biosimilar Product manufactured by an infringing process prior to the expiry of the '349 patent. Amgen does not have an adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Amgen respectfully requests that this Court enter judgment in its favor against Hospira and grant the following relief:

A. An order enjoining Hospira from commercially marketing the Hospira Epoetin Biosimilar Product until Amgen is restored to the position it would have been in had Hospira met its obligations under the BPCIA;

B. An order enjoining Hospira from continuing to seek FDA review of its § 262(k) application and/or compelling Hospira to suspend FDA review of its § 262(k) application until Hospira has obtained permission from Amgen to use the EPOGEN® (epoetin alfa) license or Hospira has restored to Amgen the benefits afforded to Reference Product Sponsors in the BPCIA;

C. A declaration that the notice of commercial marketing that Hospira provided on April 9, 2015 is ineffective under 42 U.S.C. § 262(*l*)(8)(A);

D. A declaration of Amgen's rights under 42 U.S.C. § 262(*l*)(8)(A);

E. An injunction requiring Hospira to provide Amgen, on or after FDA licensure of the Hospira Epoetin Biosimilar Product, notice of the date of the first commercial marketing of the Hospira Epoetin Biosimilar Product thereby complying with 42 U.S.C. § 262(*l*)(8)(A) and prohibiting Hospira from commencing first commercial marketing of the licensed Hospira Epoetin Biosimilar Product until a date that is 180 days after Hospira provides this notice to Amgen;

F. A declaration that Hospira has violated 42 U.S.C. § 262(*l*)(2)(A) by failing to provide to Amgen by the statutory deadline "such other information that describes the process or processes used to manufacture the biological product that is the subject of" the Hospira BLA;

G. An order requiring Hospira to provide Amgen "such other information that describes the process or processes used to manufacture the biological product that is the subject of" the Hospira BLA;

H. A judgment that Hospira has infringed one or more claims of the '298 Patent under 35 U.S.C. § 271(e)(2)(C)(i), by submitting to the FDA BLA No. 125545 to obtain approval of the Hospira Epoetin Biological Product under the Public Health Service Act to engage in the commercial manufacture, use, or sale of the Hospira Epoetin Biosimilar Product before the expiration of a patent that claims the product or use of the product;

I. A judgment that Hospira has or will infringe one or more claims of the '298 Patent by engaging in the manufacture, use, offer for sale, or sale within the United States, or importation into the United States, of the Hospira Epoetin Biosimilar Product before the expiration of the '298 Patent;

J. A judgment that Hospira has infringed one or more claims of the '349 Patent by engaging in the manufacture or use of the vertebrate cells claimed in the '349 patent before the expiration of the '349 Patent and by engaging in a process claimed in the '349 patent to produce Hospira Epoetin Biosimilar Product before the expiration of the '349 patent;

K. An order enjoining Hospira, its officers, partners, agents, servants, employees, attorneys, affiliates, divisions, subsidiaries, other related business entities, and those persons in active concert or participation with any of them from infringing the '298 Patent, or contributing to or inducing anyone to do the same, including the manufacture, use, offer to sell, or sale within

the United States, or importation into the United States, of any current or future versions of the Hospira Epoetin Biosimilar Product;

L. An order enjoining Hospira, its officers, partners, agents, servants, employees, attorneys, affiliates, divisions, subsidiaries, other related business entities, and those persons in active concert or participation with any of them from exporting, using, offering for sale, or selling any infringing vertebrate cells produced or used before the expiration of the ’349 patent, and from exporting, using, offering for sale, or selling any Hospira Epoetin Biosimilar Product manufactured by an infringing process before the expiration of the ’349 patent;

M. A judgment compelling Hospira to pay to Amgen damages or other monetary relief adequate to compensate for Hospira’s infringement, in accordance with 35 U.S.C. § 271(e)(4)(C) and § 284;

N. A declaration that this is an exceptional case and awarding to Amgen its attorneys’ fees and costs pursuant to 35 U.S.C. § 285; and

O. Such other relief as this Court may deem just and proper.

DEMAND FOR A JURY TRIAL

Amgen hereby demands a jury trial on all issues so triable.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Jack B. Blumenfeld

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