IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JANSSEN BIOTECH, INC.,

Plaintiff,

v.

CELLTRION HEALTHCARE CO., LTD., CELLTRION, INC., and HOSPIRA, INC.,

Defendants.

Civil Action No. l:17-cv-11008-MLW

CONFIDENTIAL - FILED UNDER SEAL

JOINT REPORT

Pursuant to the Court's Order of June 21, 2017 (No. 15-10698 Dkt. 574), the parties jointly submit this report regarding: (a) their respective positions on whether discovery regarding damages should be stayed until the Defendants' motion to dismiss the 2017 action is decided; and (b) their respective proposed pretrial schedules and trial dates. As noted below, a report on the status of the parties' resumed settlement discussions has been submitted separately, under seal.

A. Whether Discovery Regarding Damages Should Be Stayed Until the Defendants' Motion to Dismiss the 2017 Action Is Decided

1. Defendants' Position Is That Discovery Should Be Stayed[1]

Defendants continue to believe that discovery on damages should remain stayed until the Court decides Defendants' motion to dismiss, for at least three reasons.

[1] As of Thursday, August 17, 2017, the parties planned to exchange their respective sections of the joint report on Monday, August 21st. On the morning of August 21st, Janssen indicated that it no longer wished to exchange position statements in advance of the joint filing.

First, as explained more fully in Defendants' briefing, their motion to dismiss is meritorious. Janssen has been changing positions on standing since January, necessitating multiple rounds of briefing, only to finally capitulate and dismiss both its 2015 and 2016 complaints. *See* No. 15-10698 Dkt. 584. Janssen originally claimed that "COMPANY" in the employment agreements, "correctly construed," meant "any company to which I become transferred while I'm employed," such that the agreement "travel[s] with the employee if he or she is transferred to another J&J company," despite acknowledging that the form agreement "doesn't literally say that." 2/8/17 Hr'g Tr. at 47:15–23. But discovery (which Janssen opposed) revealed that Janssen's parent and sister companies have repeatedly interpreted "COMPANY" in the same or similar agreements much more broadly, as including more than a person's employer(s)—even telling one court that "plaintiffs" J&J and Cordis "own all inventions" an employee developed, pursuant to his employment agreement. Dkt. 14 at 7–8. Faced with this problem, Janssen now leaves the law of contract interpretation and common sense even further behind, arguing that "COMPANY" means whatever J&J or any of its family companies say it means, which may depend not only on "the facts of a given case," but also on what may have happened since the signing of a particular contract or "on the terms of the particular contract provision at issue" to which the term "COMPANY" would apply. Dkt. 26 at 6.

To be clear, Janssen asks this Court to rule that a defined term in a form agreement, which expressly applies "[a]s used in this Agreement," means whatever Janssen or J&J or any other enforcing company deems to be "applicable" in any particular circumstance. *Id*. Janssen's position runs contrary to the most fundamental concept of contract law, namely the "essential characteristic" of a contract that the "obligations be specifically described in order to enable a court or a trier of fact to ascertain what it was the promisor undertook to do." *Malaker Corp.*

Stockholders Protective Comm. v. First Jersey Nat. Bank, 163 N.J. Super. 463, 474 (N.J. Super. Ct. App. Div. 1978). Indeed, Janssen's proposed non-definition of "COMPANY" would render J&J's form agreement unenforceable, putting at risk all of the J&J family's proprietary assets, including patents and confidential information. *Id*. at 474 ("An agreement so deficient in the specification of its essential terms that the performance by each party cannot be ascertained with reasonable certainty is not a contract, and clearly is not an enforceable one."). Janssen's approach cannot be the correct interpretation of the agreements. "[D]oubt or difference"—the consequences of Janssen's non-definition—are "incompatible with agreement." *Borough of W. Caldwell v. Borough of Caldwell*, 26 N.J. 9, 25 (1958).

Yet simultaneously—and conveniently—Janssen argues that, with respect to Paragraph 1 of the agreements regarding assignment of inventions, inventions are always "unmistakably assigned to the J&J company employing the inventor." *Id.* at 8. The plain language of the agreements say no such thing. And achieving this result, such as by substituting "EMPLOYER" for "COMPANY" as J&J did in its more recent version of the employment agreements (Dkt. 14 at 10) would have been simple, but was not the choice the drafter made.

Janssen complains about negative consequences its chosen contract language purportedly would have [redacted] or undergo reissue proceedings at the U.S. Patent Office (which it has not done). But New Jersey law is clear that the court "cannot make … a better or more sensible contract than the one [drafters] made for themselves." *Kotkin v. Aronson*, 815 A.2d 962, 963 (N.J. 2003); *see also Abbott Point of Care Inc. v. Epocal, Inc.*, 666 F.3d 1299, 1302 (Fed. Cir. 2012) (applying New Jersey law and explaining that "it is well-settled ... that when the terms of a contract are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties.")

(internal citations and quotation marks omitted); *City of Orange Twp. v. Empire Mortg. Servs., Inc.*, 341 N.J. Super. 216, 224 (N.J. Super. Ct. App. Div. 2001) ("The court has no right to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently.") (internal quotations omitted). Where "the language of a contract is plain and capable of legal construction, the language alone must determine the agreement's force and effect." *Manahawkin Convalescent v. O'Neill*, 217 N.J. 99, 118 (2014) (internal quotations omitted).

Additionally, Janssen and J&J's so-called "disclaimer" agreement cannot fix the standing problem. Under Federal Circuit law, which governs standing in patent cases, it is a "settled principle" that "[a]n action for infringement must join as plaintiffs all co-owners." *Ethicon, Inc. v. U.S. Surgical Corp.*, 135 F.3d 1456, 1467 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 923 (1998). The Federal Circuit has recognized only two exceptions to this rule, neither of which apply here. *See* Dkt. 14 at 25–26; *STC.UNM v. Intel Corp.*, 754 F.3d 940, 946 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1700 (2015). First, *Ethicon* recognizes that a missing co-owner can be compelled to join a suit against his will if the co-owner "waive[d] his right to refuse to join suit." *Ethicon*, 135 F.3d at 1468 n.9. That is, all co-owners have a right to refuse to join a lawsuit, and they may exercise that right, in which case they cannot be joined, or they may waive that right, in which case they can be joined in order for there to be standing. *Id.*; *see also STC.UNM*, 754 F.3d at 946. Janssen does not argue that J&J and its subsidiaries have waived their right to refuse to join the suit. Second, *Ethicon* recognizes that "when any patent owner has granted an exclusive license, he stands in a relationship of trust to his licensee and must permit the licensee to sue in his name"—another exception that Janssen does not even contend applies here (nor could it, given the lack of any licenses related to the '083 patent). *Id.* Rather than argue either exception

applies, Janssen's most recent brief ignores *Ethicon*, despite it being the key authority on joinder of co-owners. Janssen attempts to lead the Court astray, pointing to *IpVenture*,[2] which found that a third party was ***not*** a co-owner, and thus did not reach the question of joinder or the rule of *Ethicon*, and *Enovsys*,[3] which gave *res judicata* effect to a state court divorce decree, likewise concluding that there was no co-ownership and not thus addressing the question of joinder. Worse, Janssen argues that "a half-dozen cases hold that a purported co-owner's disclaimer of ownership is sufficient to cure a prudential standing problem" (Dkt. 26 at 28), but those cases, as Defendants will explain in their reply brief, likewise did not reach the question of whether a co-owner must be joined, are not good law in view of recent Federal Circuit precedent, or both.

Finally, even if agreeing not to assert patent ownership rights was a recognized exception to *Ethicon*—and it is not—Janssen has not shown that J&J has acted on behalf of all its subsidiaries, much less companies who were J&J subsidiaries when legal title to the invention was assigned, but ***were not part of the J&J family*** as of the time of the so-called "disclaimer" agreement. According to public records, there are at least five such companies. It is ***Janssen's*** burden to prove that there are no unjoined co-owners, which it has failed to do. *Sicom Sys., Ltd. v. Agilent Techs., Inc.*, 427 F.3d 971, 976 (Fed. Cir. 2005) ("The party bringing the action bears the burden of establishing that it has standing."); *see also Abbott*, 666 F.3d at 1302 ("[The plaintiff] has the burden to show necessary ownership rights to support standing to sue.").

The requirements for filing a patent case are few. A plaintiff must have a basis to believe its patent is infringed and valid, and must have standing to sue. It is entirely reasonable for the Court and Defendants to hold Janssen to these requirements. Despite ample time and numerous half-attempts to fix its standing problems, Janssen has yet to meet the basic requirements to bring

[2] *IpVenture, Inc. v. Prostar Computer, Inc.*, 503 F.3d 1324 (Fed. Cir. 2007).
[3] *Enovsys LLC v. Nextel Commc'ns, Inc.*, 614 F.3d 1333 (Fed. Cir. 2010).

a patent lawsuit. Indeed, it appears to Defendants that it cannot do so. Unless and until Janssen has proven that it meets the requirements for standing, the parties and the Court should not expend substantial resources on wide-ranging, burdensome, and expensive discovery, or on resolving discovery disputes (discussed in more detail below).

Second, the down-side of staying discovery is very minor. As of the submission of this report, the motion to dismiss is scheduled to be resolved in just over seven weeks. This pales in comparison to the delay Janssen has created in this case. After submission of six briefs on standing issues in January and February, Janssen requested that the parties start the process over with a motion to dismiss. No. 15-10698 Dkt. 487 at 1. This required setting a schedule that spanned five weeks. *See* No. 15-10698 Dkt. 499 at 3. At that time, Janssen said extrinsic evidence was unnecessary,[4] and knew that adding such evidence would require additional time for Defendants to seek and take discovery. *Id*. at 3–4; 2/8/17 Lobby Conf. Tr. at 5–7. But during briefing, Janssen nonetheless reversed course and injected volumes of never-before-seen documents it selected and declarations from as yet unheard-of witnesses, then refused to allow defendants fair discovery into the new "evidence." This resulted in a two-and-a-half month delay, first because the Court ordered Janssen to provide document discovery and depositions, and then because Defendants were forced to file a motion regarding Janssen's improper assertions of privilege (issues on which the Court ruled almost entirely in Defendants' favor, or on which Janssen ultimately capitulated). No. 15-10698 Dkts. 542, 564, 568.

Then Janssen pushed the restart button yet again, capitulating to Defendants' motion to dismiss and dropping both its complaints—more than two years into the litigation—in view of the serious standing problems it faced. By all indications, Janssen knew about these problems

[4] *E.g.*, No. 15-10698 Dkt. 445 at 3 (referring to the "plain and obvious meaning of the Agreements"), 8 n.4 (arguing that the agreements are not ambiguous).

since 2015 when it executed two rounds of so-called "confirmatory assignments." *See* Dkt. 14 at 21. Janssen filed this brand new 2017 action, necessitating yet another round of briefing, with a schedule spanning fourteen more weeks. Dkt. 1. And while Defendants proposed that the renewed motion to dismiss be heard in early September, Janssen requested a hearing in October. Ex. 1 (6/15/17 counsel corresp.). In short, Janssen cannot credibly claim prejudice from waiting a few more weeks, until after the Court decides Defendants' motion (and if the Court denies the motion), before discovery begins.

Third, by contrast, the potential benefits of staying discovery are high in the event the Court grants Defendants' motion. Janssen's initial discovery requests are fulsome: 47 requests for production (41 plus multiple prior requests incorporated by reference), and 8 interrogatories. More important than the number of discovery requests is their subject matter and content. Janssen's discovery requests seek, by way of example:

- [redacted] (Ex. 2, Interrog. Nos. 1, 3; Ex. 3, RFP Nos. 5, 15, 17, 28, 29, 32, 33);
- [redacted] (Ex. 2, Interrog. Nos. 2, 4 ; Ex. 3, RFP Nos. 15, 17, 28, 33); and
- [redacted] (Ex. 2, Interrog. No. 5; Ex. 3, RFP Nos. 4, 6, 9, 11, 14, 16).

Janssen is not, under any interpretation of the law, entitled to damages for ***worldwide*** sales of infliximab, nor damages for sales of infliximab that were made using a process that involved cell culture media powder produced in ***Singapore***.[5] Although Defendants contend there has never been any infringement, it is uncontested that the patent laws do not provide "compensation for a defendant's foreign exploitation of a patented invention, which is not infringement at all." *Power*

[5] As the Court is aware, Defendants maintain that Janssen is not entitled to lost profits at all as a matter of law. *See* No. 15-10698 Dkts. 414, 441.

Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc., 711 F.3d 1348, 1371 (Fed. Cir. 2013); *see also Brown v. Duchesne*, 60 U.S. 183, 195–196 (1856) ("[T]he ***use*** of [a patented invention] outside of the jurisdiction of the United States is not an infringement of [a patent owner's] rights, and he has no claim to ***any compensation*** for the profit or advantage the party may derive from it.") (emphasis added); *WesternGeco LLC v. ION Geophysical Corp.*, 791 F.3d 1340, 1350 (Fed. Cir. 2015), *vacated sub. nom. on other grounds*, 136 S. Ct. 2486 (2016) ("It is clear that under § 271(a) the export of a finished product cannot create liability for extraterritorial use of that product."). Indeed, Janssen previously represented that it was restricting its lost profits request to "Defendants' sales [of infliximab] ***in the United States*** that are the foreseeable result of Defendants' acts of infringement ***in the United States***." *E.g.*, No. 15-10698 Dkt. 445 at 11; *see also id*. at 12–14; 2/23/17 Hr'g Tr. at 120:10–13 ("[W]e're not seeking damages for sales of Inflectra around the world, either reasonable royalty or lost profits."); *id*. at 125.

Yet Janssen reversed course entirely for its third complaint. Now, Janssen claims that it [redacted] Ex. 4 at 7–8 (Janssen Interrogatory Responses) (emphasis added). [redacted] *Id*. at 8. The examples above show that Janssen's July 11 discovery requests and subsequent discovery responses represent a drastic expansion of what Janssen itself has previously acknowledged are the boundaries of its claim for damages.

Should discovery move forward, it is likely that additional resources will be expended by the Court and the parties resolving the propriety and scope of Janssen's discovery requests and improper damages theories.

Additionally, whether Janssen's requests are narrowed or not, collecting the documents and information Janssen seeks will be time-consuming and costly.[6] The American Intellectual Property Law Association (AIPLA), which aggregates statistics on costs associated with patent litigation, reports that for a patent infringement suit where more than $25 million is at risk (far, far less than what Janssen has indicated it will request in this case), costs through the end of discovery average about $4 million. Ex. 5, *AIPLA Report of the Economic Survey 2015* at 40. A RAND Institute for Civil Justice survey of 45 cases found document production costs in intellectual property cases ranged up to almost $8 million. Ex. 6, Pace, N. and Zakaras, L., *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, RAND (2012) at 17–18. Janssen's document requests—which are only its first round of requests—are, as explained above, numerous and wide-reaching.[7] Given the amount of damages Janssen seeks, that a substantial portion of the documents will come from South Korea using foreign e-discovery vendors and likely requiring translation, and the existing cost

[6] While much technical discovery was completed in the prior phase, there has been essentially no damages discovery completed to date.

[7] *See, e.g.*, Ex. 3, Janssen RFP Nos. 2 (***all*** documents concerning FDA's postponement of the Arthritis Advisory [redacted]

experience from the liability phase of the case, there is no doubt this will be an expensive endeavor. Third party discovery will be implicated as well, for example, on the issue of the availability of non-infringing alternatives, which will impose additional costs and burdens not only on the parties, but also potentially on other courts in other judicial districts. Defendants understand that Janssen, for example, has already approached GE HyClone to make further requests for discovery. The last time Janssen pursued discovery from GE HyClone, it involved motions to quash and compel that involved six briefs and a 13-page decision from a different federal district court. *See generally*, docket for No. 1:16-mc-00027-TC (D. Utah).

Finally, much of the information Janssen seeks is of the utmost confidentiality, such as information about production costs, profits, regulatory activity, and other competitively sensitive information, which Defendants ordinarily would not share outside their respective companies. Defendants should not be required to turn over yet more of their most sensitive information as a part of this litigation unless and until Janssen has met its burden to show that it at least has the right to proceed.

2. Plaintiff's Position on Stay of Discovery

Discovery pertaining to damages should not be stayed, so that a trial in this case on both liability and damages can proceed without undue delay. The infringement claim in this case has been pending since March 2015 and the liability case has been trial ready since February 2017. Early in the predecessor case, Defendants successfully opposed Janssen's motion to stay proceedings on the '471 patent, which was then in reexamination, on the ground that it was of immense importance to Defendants to obtain patent certainty prior to their launch of their biosimilar product. In opposing that motion to stay, Defendants argued that it was the public policy of the BPCIA, the statute governing the approval of the biosimilar product at issue here, to resolve patent disputes "expeditiously." Dkt. 41 at 8. The Court agreed and denied the motion

to stay. Dkt. 157 at 1. Although Defendants are apparently no longer interested in an expeditious resolution of Janssen's patent infringement claim, the public policy of the BPCIA – as well as the policy of the Federal Rules of Civil Procedure to ensure a "just, speedy, and inexpensive determination of every action and proceeding," Fed. R. Civ. P. 1 – has not changed.

There is no good reason to stay discovery here. Defendants argue that their pending motion to dismiss for lack of subject matter jurisdiction warrants a stay. Of course, the fact that a motion to dismiss has been filed is not in itself a basis to stay discovery. *See, e.g.*, *Mun. Review Comm. Inc. v. USA Energy Grp. LLC*, No. 1:14-cv-00180-DBH, 2015 U.S. Dist. LEXIS 6491, at *2 (D. Me. Jan. 21, 2015) ("As a general rule, the fact that a party intends to file, or has filed a motion to dismiss does not warrant the entry of a stay order."). The circumstances here confirm that discovery should not be stayed. First and foremost, as the Court has repeatedly noted and Defendants have repeatedly acknowledged, it is highly unlikely that Defendants will ultimately manage to avoid discovery on damages, regardless of the outcome of their pending motion to dismiss. *See, e.g.*, 2/8/17 Lobby Conf. Tr. 7 (counsel for Defendants stating that [redacted]); 6/1/17 Teleconf. Tr. 16 (the Court recognizing that, one way or the other, "at some point we're probably going to litigate this case"); 6/21/17 Teleconf. Tr. 21 (Defendants' counsel acknowledging that damages discovery may "ha[ve] to be done at some point" and, if so, "we can do it at that point"). This is because a dismissal on standing grounds would be without prejudice to refiling the case with any purported standing defects resolved. Thus, the discovery to be taken now cannot be avoided; it can only be delayed. Delaying discovery that will take place anyway is not a good reason to grant a stay. *E.g.*, *Mun. Review Comm.*, 2015 U.S. Dist. LEXIS 6491, at *2 (denying motion to stay because "even if Defendant

prevails on its motion, Defendant undoubtedly will have to respond to most of the discovery requests that it seeks to avoid").

Furthermore, the discovery that will take place while the motion to dismiss is pending will not be unduly burdensome. Based on the Court's prior practices, it is likely that the motion to dismiss will be decided by the end of the scheduled hearing of October 13, 2017, or soon thereafter. Under Janssen's proposed schedule (set forth below), the only discovery proceedings that would take place before that motion is decided would be the production of documents, which would not need to be completed until October 31. Because the process of document collection and review is time-consuming, allowing it to proceed without delay would substantially expedite the ultimate trial date in this case. Relatively speaking, however, document production is not burdensome to the parties in a case of this nature, in that it typically does not require travel by counsel, full-day commitments by clients, or in-depth substantive analysis of the documents at issue, as depositions do.

Any complaint by Defendants regarding the cost of document production, moreover, would ring hollow "considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). This case involves highly important issues concerning intellectual property protections for biotechnological innovation, Janssen's damages claim is likely to approach $1 billion, and the parent companies of Janssen and Defendant Hospira are among the largest in the world, all factors that make the out-of-pocket costs of litigation less salient here than in typical cases. Indeed, Defendants themselves appear to recognize this point, having displayed no sign of cost-consciousness so far

in this case. They have retained a large litigation team with more than ample staffing at hearings and depositions, and they have repeatedly demanded maximal discovery and briefing whenever they believe such expensive proceedings will provide an incremental benefit to their position in this litigation.

A continued stay on discovery would serve only to needlessly delay ultimate resolution of this case. Janssen therefore respectfully requests that the Court lift the stay of discovery.

B. The Parties' Proposed Pretrial Schedules and Trial Dates

1. Defendants' Proposed Pretrial Schedule(s) and Trial Dates

Defendants present the below proposed alternate schedules depending on whether the Court orders discovery to proceed during the pendency of Defendants' motion to dismiss (and assuming solely for the purpose of this submission that the Court denies the motion to dismiss). Defendants believe a single non-phased trial will be most efficient, and trial scheduled in July or August 2018 is necessary to allow for discovery (fact and expert), briefing and argument related to dispositive motions, *Daubert* motions, and any motions *in limine*, and other pre-trial submissions such as trial brief, jury instructions, exhibit lists, verdict forms, *etc.*

a. Defendants' schedule provides time for issues to be properly presented to the Court, while Janssen seeks an unduly compressed schedule.

Plaintiff's proposal unworkably compresses discovery. It allows only three weeks to depose experts on issues related to damages. In the prior phase of the case, the parties needed seven weeks to conduct expert depositions. No. 15-10698 Dkt. 124. Given the size of Janssen's damages request and the issues surrounding lost profits and reasonable royalties, damages discovery will be expensive and likely involve a similar number of experts as the liability phase. Janssen also allows a mere ***eight weeks*** between the close of expert discovery and trial, to conduct all pretrial matters (including *Daubert* motions), and provides no time whatsoever for

briefing and hearing summary judgment motions. In the prior phase, the Court and parties spent over three months on such issues, extending the schedule multiple times, and were not yet complete. As the Court knows, one summary judgment motion is pending already (which would remove Hospira from this case),[8] and two expert-related motions likewise have not yet been resolved. Further, Defendants anticipate additional summary judgment motions on key damages-related issues, such as whether lost profits are unavailable as a matter of law (for example, due to the presence of non-infringing alternatives) and whether Janssen is limited to a reasonable royalty under the BPCIA. Defendants should not be deprived of an opportunity to narrow the case as contemplated by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 56.

b. A single non-phased trial will provide efficiencies and allow the jury to evaluate the case a whole.

Regarding trial, conducting a single trial for both liability and damages together will be more efficient than a phased trial due to the substantial overlap of issues. In addition to overlapping factual testimony, such as on issues related to intent (relevant to both inducement and willful infringement) and the development of both accused media and the media claimed in the ’083 patent (relevant to damages, invalidity, and infringement), much of the expert testimony will be relevant to both liability and damages. For instance, the existence of non-infringing alternatives, a key issue related to Janssen’s claim for lost profits, overlaps with the issue of invalidity of the ’083 patent. *See* No. 15-10698 Dkts. 441 at 13–17 (identifying prior art media as non-infringing alternatives), 414 at 18–19.

There is also a possibility for overlap between Janssen’s agency or “joint enterprise” theory of infringement and damages issues, for example, with respect to the nature of the relationship between Celltrion and Hospira and how Inflectra® was developed and is

[8] If Defendants’ motion to dismiss is not granted, they may seek to have the outstanding summary judgment motion regarding Hospira resolved earlier in the case.

manufactured, distributed and sold. There is likewise overlap between secondary considerations of obviousness (*e.g.*, the invention's commercial success (or lack thereof), the existence of an alleged long felt but unresolved need, alleged praise by others, *etc*.) and the reasonable royalty factors under a *Georgia-Pacific* analysis. *See Georgia-Pac. Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) (*e.g.*, commercial success, popularity, advantages over old modes or devices). Janssen's willful infringement allegations may overlap with Janssen's claim that the Defendants induced GE HyClone to infringe because they allegedly "knew about the 083 patent and knew or were willfully blind to the fact it is infringed." No. 15-10698 Dkt. 434 at 9.

In addition to the substantial overlap in issues, there are logistical concerns that favor a single trial. For instance, a single trial will save substantial time by not repeating openings and closings and not recalling witnesses who previously testified. This is particularly important for several witnesses Defendants expect to call regarding liability and damages related issues, who have to travel from South Korea, and third-party witness or witnesses from GE HyClone. A single trial also allows the jury to understand the entire context and picture of the case, which will allow the parties to better present their narratives. Indeed, just earlier this year Janssen argued that "[t]he jury should not consider this case in a vacuum. The witnesses at trial need to discuss Remicade to provide the jury with a basic understanding of the factual context leading to this litigation." No. 15-10698 Dkt. 419 at 6. Despite the fact that the only patent at issue in the case relates to a generic nutrient powder, Janssen's entire damages theory, based on what Defendants have seen thus far, is based not on the nutrient powder, [redacted], but on sales of Remicade®, a highly complex drug product which contains no nutrient powder and which Janssen sells to patients at a cost of up to $20,000 per year. *See* Mem. and Order, No. 15-10698 Dkt. 249 at 3. The jury should be given the benefit of

understanding the relevance of Remicade® to Janssen, the irrelevance of the '083 patent to Janssen, and the dollars Janssen claims are at stake, at one time so that the jury does not consider segments of the case in a vacuum.

Information related to how much money Janssen makes on Remicade® (and how much it claims to have lost due to the '083 patent) goes to at least the credibility of Janssen's stretched, twelve-way doctrine of equivalents theory and its position that "any" concentration of ingredients in a cell culture media is one that Janssen will consider to infringe. The damages demand gives context to Janssen's motivation for leveraging an [redacted] cell food powder patent—which, as Defendants showed in expert reports and pre-trial briefing is almost identical to precursor cell food powders known for years prior in the field—in an effort to protect its "golden goose" product Remicade®. Presentation of all these issues at once will be most fair and most efficient for the Court, the parties, third-party witnesses, and the jury.

c. Defendants' proposed schedules.

Thus Defendants propose and respectfully request a schedule for the remainder of the case as follows, with an option if discovery is stayed until Janssen has met its burden of establishing standing (consistent with Defendants' position, as discussed above) and one if discovery is not stayed:

Event	Discovery During MTD Proceedings	No Discovery During MTD Proceedings
Report on discovery positions and settlement due	August 21, 2017	
Defendants file reply re MTD	August 25, 2017	
Janssen files sur-reply re MTD	September 8, 2017	
Hearing on MTD	October 12, 2017	

Event	Discovery During MTD Proceedings	No Discovery During MTD Proceedings
Fact discovery on issues related to damages begins	September 5, 2017	To begin after the Court rules on MTD [Estimated: October 16, 2017]
Fact discovery on issues related to damages ends	December 15, 2017 [about 3.5 months after fact discovery begins]	January 26, 2018
Janssen's opening expert report(s)	January 12, 2018 [4 weeks after fact discovery ends]	February 23, 2018
Defendants' rebuttal expert report(s)	February 16, 2018 [5 weeks after opening expert reports]	March 30, 2018
Expert discovery on issues related to damages ends	March 16, 2018 [4 weeks after responsive expert reports]	April 27, 2018
Deadline for dispositive motions and *Daubert* motions	April 6, 2018 [3 weeks after expert discovery ends]	May 18, 2018
Deadline for responses to dispositive motions and *Daubert* motions	April 27, 2018 [3 weeks after opening motions]	June 8, 2018
Deadline for replies to responses to dispositive motions and *Daubert* motions	May 11, 2018 [2 weeks after responses]	June 22, 2018
Hearings on dispositive motions and *Daubert* motions	Week of May 28, 2018	Week of July 16, 2018
Parties exchange pretrial disclosures pursuant to Fed. R. Civ. P. 26(a)(3) Deadline for motions *in limine*	June 8, 2018 [4 weeks after dispositive motion and *Daubert* replies]	July 20, 2018

Event	Discovery During MTD Proceedings	No Discovery During MTD Proceedings
Deadline for responses to motions *in limine*	June 22, 2018 [2 weeks after motions *in limine*]	August 3, 2018
Due date for pretrial memorandum and parties' respective trial briefs	July 6, 2018 [2 weeks after responses to motions *in limine*]	August 17, 2018
Pretrial conference	Week of September 3 or 10, 2018	Week of September 3 or 10, 2018
Jury selection and trial begins	Week of September 10 or 17, 2018	Week of September 10 or 17, 2018

The above proposed pretrial conference and trial dates take into account Defendants' lead trial counsel's current conflicts with respect to other scheduled trials. If the Court is available to hold trial in September 2018, the parties may wish to discuss adjustment of the interim dates (*e.g.*, expert discovery, motions, etc.).

1. Plaintiff's Proposed Pretrial Schedule(s) and Trial Dates

Janssen proposes the following pretrial schedule and trial dates.

Event	Proposed Date
Completion of damages document production and interrogatory responses	October 31, 2017
Close of damages fact discovery	December 10, 2017
Janssen's opening expert reports on damages	December 22, 2017
Defendants' responsive expert reports on damages	January 29, 2018
Janssen's reply expert reports on damages	February 19, 2018
Close of expert discovery	March 12, 2018
Pretrial disclosures (Fed. R. Civ. P. 26(a)(3) and LR 16.5(c))	March 19, 2018
Pretrial memoranda (LR 16.5(d))	March 26, 2018

Motions *in limine*, including *Daubert* motions (close of briefing)	April 20, 2018
Trial briefs	April 27, 2018
Final pretrial conference	Week of April 30, 2018
Trial to commence	Week of May 7, 2018

Janssen's proposed schedule provides approximately the same amount of time to complete damages-related fact discovery as does Defendants' proposed schedule; the only difference as to fact discovery is that Defendants assume that discovery will be stayed until October 16. Janssen's schedule provides more than ten weeks from today (and over three and a half months from the service of document requests) to complete production of damages-related documents. Given that the parties have already responded to each other's document requests – which required investigating what documents they have in their possession, what it would entail to review and produce them, and whether they consider the responses objectionable in whole or in part – ten additional weeks is more than sufficient time to complete production. This is particularly true given that discovery on liability issues is closed, so the current discovery period is limited to issues of damages.[9]

The schedule also provides nearly six additional weeks after the completion of document production to conduct depositions of damages fact witnesses. Given the narrow focus of the discovery, six weeks should be more than sufficient time to complete these depositions.

Janssen has revised its proposal related to expert discovery in response to feedback provided by Defendants during the parties' meet and confer. Janssen initially proposed two rounds of simultaneous expert reports, with each side first serving opening reports and then

[9] Indeed, Janssen's damages-related discovery requests (attached hereto as Exhibits 2 and 3) are substantially less burdensome than Defendants' (attached hereto as Exhibit 7 and 8).

serving responsive reports. Defendants, however, took the position that expert reports should be exchanged sequentially in light of the burden of proof, with Janssen serving its opening reports followed by Defendants' responsive reports. Janssen believes this approach is unnecessary: in addition to responding to the opinions of Janssen's experts, Defendants will likely provide their own proposed damages calculation that will be based on their own expert's analysis, will not be responsive to the opinions of Janssen's expert in any real sense, and could be presented in an opening report. Nevertheless, by way of compromise Janssen has agreed to Defendants' proposal to have damages-related expert reports be sequential.

If expert reports are going to be sequential, however, it is necessary for Janssen to have the opportunity to reply to Defendants' responsive reports, as is reflected in Janssen's proposed schedule. This is true because of the way the burden of proof to establish damages is allocated, and it is particularly important because of the nature of damages issues that the parties have identified in prior briefing.

> When basing the alleged lost profits on lost sales, the patent owner has an initial burden to show a reasonable probability that he would have made the asserted sales "but for" the infringement. Once the patent owner establishes a reasonable probability of "but for" causation, the burden then shifts to the accused infringer to show that the patent owner's "but for" causation claim is unreasonable for some or all of the lost sales.

Grain Processing Corp. v. American Maize-Prods., 185 F.3d 1341, 1349 (Fed. Cir. 1999) (alteration, citations, and internal quotation marks omitted). Thus, in its case-in-chief, Janssen "need only show" a reasonable probability that "but for" Defendants' infringement of the '083 patent, it would have made the lost profit; it "need not negate every possibility" that it would have made the profit "absent the infringement." *See Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1545 (Fed. Cir. 1995) (en banc). The burden then shifts to the Defendants to show the unreasonableness of Janssen's causation claim, for example by establishing the availability of an acceptable non-infringing alternative to the infringing cell culture media. *See Grain Processing*,

185 F.3d at 1349 (describing the district court as accepting plaintiff's initial premise on causation, but defendant defeating lost profits by proving that a non-infringing alternative was available and acceptable).

In prior briefing, Defendants have relied heavily on the alleged existence of acceptable non-infringing alternatives, contending that they foreclose a lost profits award. In addition to being Defendants' burden under *Grain Processing*'s burden-shifting framework, any alleged acceptable non-infringing alternatives must, as a practical matter, be asserted in the first instance by Defendants, since Janssen denies that any such alternatives exist that would foreclose damages. If Defendants are not going to put in opening expert reports, then in the absence of reply reports Janssen's experts will never have the opportunity to address any allegedly acceptable non-infringing alternative defense that Defendants come forward with. Reply reports are therefore necessary.

Janssen's schedule provides for briefing on all damages-related motions *in limine* (including *Daubert* motions) to be completed several weeks in advance of trial. Defendants' proposed schedule, in contrast, provides five months between the close of discovery for "dispositive motions" and *Daubert* motions. Janssen does not believe that further dispositive motions (*i.e.*, motions on liability issues) are permitted under the Court's scheduling orders in the predecessor cases, which were incorporated into the record of this case by Court order. Case No. 15-cv-10698, Dkt. No. 584.[10] The pending motions *in limine* and *Daubert* motions on liability

[10] Indeed, in the course of negotiating the stipulation of dismissal of the prior cases, Defendants suggested that scheduling orders from the prior cases should not be made part of the record in this case. Janssen disagreed, on the express grounds that it considered all proceedings on liability issues to be closed (as they were in the prior cases) and did not believe that the filing of the new case should reopen them. The parties ultimately agreed to a stipulation that did not exclude scheduling orders from the proceedings that were made part of the record in this case.

issues, as well as the pending fully-briefed summary judgment motion pertaining to Hospira, can be decided at any convenient time between now and trial. The only additional motions to be filed would pertain to damages. Because these motions would only affect damages and cannot prevent the liability trial from going forward, it is not necessary or appropriate to build additional months into the schedule in order for them to be decided well in advance of trial.

Janssen respectfully requests that the Court adopt its proposed schedule.

C. The Status of Resumed Settlement Discussions

The parties have filed, via hand delivery contemporaneous with this filing, a separate letter to the Court from Defendants' counsel reporting the status of the parties' settlement discussions.

The Court so-ordered this stipulation. Case No. 15-cv-10698, Dkt. No. 584. Accordingly, proceedings on liability issues are closed.

Dated: August 21, 2017

/s/ Andrea L. Martin

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/s/ Alison C. Casey

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Attorneys for Janssen Biotech, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed through the electronic filing system and served electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Andrea L. Martin

EXHIBIT 1

From: Fischer, Aron (x2363)
To: Cutri, Elizabeth A.
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: Re: Janssen v. Celltrion et al.
Date: Thursday, June 15, 2017 4:45:40 PM

Liz,

Greg and I have conflicts in mid-August (Greg has a two-week trial) and Greg is out of the country the second half of September. We'd suggest the below schedule but if you want more time on the first brief and less on the second, that's fine as well:

Event	Date
Defendants file motion to dismiss	July 7
Janssen responds to motion to dismiss	August 2
Defendants file reply brief	August 25*
Janssen files sur-reply brief	September 8*
Hearing	Propose October 9-11*

We'll agree to your proposal on Dow and Martinson, subject to some provisions that we'll lay out in a joint report to be circulated within the next hour or two.

Yours
Aron

On Jun 15, 2017, at 3:42 PM, Cutri, Elizabeth A. <elizabeth.cutri@kirkland.com> wrote:

> Aron and Andrew,
>
> Further to our discussion and emails from yesterday, below is a proposed schedule for briefing related to the motion to dismiss Janssen's newly filed complaint. This is on the assumption that the parties are able to resolve the motion to compel and do not require the Court to make rulings related to those issues. If the parties do require the Court's involvement with issues related to the motion to compel, a different schedule may be appropriate.
>
> Please let us know your responses to our emails from yesterday regarding the Dow declaration and Martinson transcript. Please also let us know if you are preparing a proposed draft joint report for filing tomorrow.
>
> Regards,
> Liz

Event	Date
Defendants file motion to dismiss	July 7

Janssen responds to motion to dismiss	July 28
Defendants file reply brief	August 11*
Janssen files sur-reply brief	August 25*
Hearing	Propose week of September 11*

*Assuming Janssen does not add new or different evidence into the record, beyond what was relied upon in the motion to dismiss briefing in connection with actions 15-10698 and 16-11117, in which case Defendants may ask the Court to adjust the briefing schedule

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From: Cohen, Andrew (x2605) [mailto:acohen@pbwt.com]
Sent: Wednesday, June 14, 2017 7:09 PM
To: Cutri, Elizabeth A.
Cc: Fischer, Aron (x2363); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Yes Liz. We plan to circulate a proposed stipulation in the near future.

-Andrew

From: Cutri, Elizabeth A. [mailto:elizabeth.cutri@kirkland.com]
Sent: Wednesday, June 14, 2017 6:21 PM
To: Cohen, Andrew (x2605)
Cc: Fischer, Aron (x2363); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Andrew,

Thanks.

Will you be circulating a proposed stipulation of dismissal with respect to Case No. 16-11117 and Janssen's claim for infringement of the '083 patent in Case No. 15-10698?

Regards,
Liz

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elizabeth.cutri@kirkland.com

From: Cohen, Andrew (x2605) [mailto:acohen@pbwt.com]
Sent: Wednesday, June 14, 2017 4:44 PM
To: Cutri, Elizabeth A.
Cc: Fischer, Aron (x2363); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: Re: Janssen v. Celltrion et al.

Thank you Liz. We will discuss and get back to you.

-Andrew

Andrew D. Cohen
212-336-2605

On Jun 14, 2017, at 5:42 PM, Cutri, Elizabeth A. <elizabeth.cutri@kirkland.com> wrote:

> Andrew,
>
> Further to my email below, and in furtherance of our discussion regarding the waiver dispute, we identify the following passages of the deposition transcript of Ms. Martinson that we would propose Janssen not cite or rely upon:
>
> - 182:13–24
> - 189:20–190:2
>
> To be clear, by identifying these passages, Defendants do not make any concessions about any other portions of the transcript. Many of Ms. Martinson's statements suffer from the problem that she lacks firsthand knowledge and/or was advancing attorney argument rather than fact. If the parties reach an agreement regarding the motion to compel that involves Janssen agreeing not to rely upon certain portions of the Martinson transcript, Defendants reserve the right to challenge or object to any other portion of the transcript as purported "evidence" supporting Janssen's standing arguments.
>
> The same applies for the Dow declaration. Defendants make no concessions about Mr. Dow's declaration and reserve the right to challenge any portion of it as, for example, inadmissible, unreliable, and/or contrary to the law regarding use of extrinsic evidence in contract interpretation.
>
> Regards,

Liz

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From: Cutri, Elizabeth A.
Sent: Wednesday, June 14, 2017 3:27 PM
To: 'Cohen, Andrew (x2605)'
Cc: Fischer, Aron (x2363); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Andrew,

Attached for purposes of discussion is a copy of the Dow declaration reflecting an initial proposal for what we think Janssen should strike (shown in yellow highlighting). We will also send a highlighted copy of Ms. Martinson's deposition transcript, as well as a proposed schedule for briefing for the motion to dismiss the new complaint.

Regards,
Liz

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From: Cohen, Andrew (x2605) [mailto:acohen@pbwt.com]
Sent: Wednesday, June 14, 2017 3:17 PM
To: Cutri, Elizabeth A.
Cc: Fischer, Aron (x2363); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: Re: Janssen v. Celltrion et al.

Liz,

As discussed on our call this morning, we understand that you will be sending us an email today identifying specific portions of the Dow

Declaration and Ms. Martinson's testimony for us to consider striking and/or agreeing not to rely on in connection with your anticipated motion to dismiss the 2017 action. We look forward to receiving that soon so that we have time to fully consider it and discuss further with you in advance of the joint report due to be filed with the court Friday afternoon.

Best regards,

Andrew

Andrew D. Cohen
212-336-2605

On Jun 13, 2017, at 11:30 PM, Cutri, Elizabeth A. <elizabeth.cutri@kirkland.com> wrote:

> Aron,
>
> Wednesday morning at 8:30 am Central is fine, if that still works for you.
>
> Regards,
> Liz
>
> **Elizabeth Cutri**
> ---
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> ---
> elizabeth.cutri@kirkland.com
>
> ---
>
> **From:** Fischer, Aron (x2363) [mailto:afischer@pbwt.com]
> **Sent:** Tuesday, June 13, 2017 2:14 PM
> **To:** Cutri, Elizabeth A.; Hales, Bryan S.
> **Cc:** Cohen, Andrew (x2605); Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
> **Subject:** RE: Janssen v. Celltrion et al.
>
> Liz,
>
> Yes, let's plan to discuss the privilege log and what statements in Mr. Dow's declaration you consider to be a waiver. It's likely that any such statements can be removed or revised since, as Mr. Dow testified, his

declaration is about Janssen's patent policies and practices and not about a real-time legal opinion as to the language of the employment agreements.

I will be in Boulder, CO taking a deposition tomorrow but can talk at 7:30 am MT (8:30 central, 9:30 ET). I could also plan to talk at 5pm MT/6pm Central or later, but there's some chance I'd have to postpone if the deposition goes longer than expected.

Yours
Aron

From: Cutri, Elizabeth A. [mailto:elizabeth.cutri@kirkland.com]
Sent: Tuesday, June 13, 2017 12:46 PM
To: Fischer, Aron (x2363); Hales, Bryan S.
Cc: Cohen, Andrew (x2605); Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Aron,

We are not available today, but we are available Wednesday, morning or afternoon.

We agree that the appropriate remedy for the findings of improper assertion of privilege is provision of the information found not to be privileged. Where it seemed we had a disagreement was with respect to timing—we do not think it makes sense, as we explained, to schedule another deposition of Mr. Dow right now, before the parties work out various other things such as a schedule for Defendants' motion to dismiss and Defendants' motion seeking a finding of waiver.

As for a remedy for a possible finding of waiver, our position as to the appropriate relief is as stated in the motion to compel. Since we now have Janssen's privilege log, we may be able to identify particular withheld documents as relevant to particular issues. But we do not at this time believe there is a need for a new motion or a new or different request for relief. However, with respect to the motion, it appears from Greg Diskant's representations during the last call with the Court and your email from last week that Janssen is willing to strike or not rely upon at least certain portions of the declaration of Mr. Dow. In view of that, we think it makes

sense to determine whether an agreement by Janssen that it will not rely upon certain purported evidence can potentially resolve the dispute related to waiver, and we are willing to explore that possibility before we propose that the Court proceed to rule on the motion. Perhaps it makes sense to discuss this when we speak on the phone next.

Regards,
Liz

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elizabeth.cutri@kirkland.com

From: Fischer, Aron (x2363) [mailto:afischer@pbwt.com]
Sent: Monday, June 12, 2017 4:22 PM
To: Cutri, Elizabeth A.; Hales, Bryan S.
Cc: Cohen, Andrew (x2605); Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Liz and Bryan,

Do you have time tomorrow to follow up on our discussion of Friday?

As you see from today's order, we are supposed to state our respective positions on the remedies for the assertions of privilege that were found at the June 1 conference to be improper. Our position is that we will provide (and in the case of documents, have provided) the information found not to be privileged. Your position, as we understand it, is that it is premature to discuss a remedy with respect to Mr. Dow's deposition testimony until the issue of waiver is decided. We aren't clear, however, what specific discovery (other than the documents on our privilege log) you think you'd be entitled to if there were a waiver. If Defendants seek additional rulings from the Court on discovery, we'd like to make sure that the precise relief you are seeking has been identified in advance in written form and presented in a properly noticed motion. In particular, if you seek any discovery beyond the orders requested in your motion to compel (Dkt. 550), we think there should be a new motion.

Look forward to discussing this with you. I am available tomorrow from 12 to 5.

Yours
Aron

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From: Cutri, Elizabeth A. [mailto:elizabeth.cutri@kirkland.com]
Sent: Thursday, June 08, 2017 10:43 PM
To: Fischer, Aron (x2363); Hales, Bryan S.
Cc: Cohen, Andrew (x2605); Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Aron,

Defendants' argument regarding waiver does not arise solely, or even primarily, out of the deposition of Mr. Dow. The genesis of the waiver issue was the declaration Janssen put forth from Mr. Dow and held out as evidence. You know this, not only because we have explained it numerous times, but also because we first raised the waiver issue shortly after we received Mr. Dow's declaration. Further, the Court did not state that it considered the motion to compel to be "based on specific 'questions that Mr. Dow didn't answer,'" as you state below. In the rest of the sentence from which you quote, the Court also acknowledged, correctly, that the motion to compel relates to "certain documents that were provided [to the judge] for in camera review." Tr. at 21:8-11. And as Bryan explained to Judge Wolf, the "wall of privilege instructions" put up at the Dow deposition created a "roadblock to other areas we would want to explore" on the deposition topics. Tr. at 33:18-23. Moreover, the Court stated that it "ha[s]n't done th[e] sword-and-shield analysis" yet. Tr. at 42:20-21.

Thus, it is not correct, as you state below, that "[i]n light of Judge Wolf's ruling that 'the disputed information in Mr. Dow's deposition, with maybe an exception or two, is not privileged' (Tr. 28:16-17), there doesn't seem to [be] anything further to resolve with respect to Mr. Dow once [Janssen] provide[s] the disputed information discussed at the hearing." Nor does it resolve the dispute for you to say that Mr. Dow "knows nothing" about the documents on Janssen's log that have not been produced. Defendants' argument in the motion to dismiss was that a subject matter waiver has occurred, and all withheld responsive documents should be produced, whether privileged or not—a request that is not tied to what Mr. Dow, specifically, knows or does not know. Further, a Rule 30(b)(6) witness (as Mr. Dow was) is required to be educated about the subject matters of testimony, regardless of whether he has personal knowledge about them. If a waiver were to be found, Defendants would be entitled to testimony about information within the scope of the subject matter of the waiver, privileged or not, and whether Mr. Dow has personal knowledge about it or not.

We also do not agree that striking Paragraph 7 of Mr. Dow's declaration necessarily resolves the waiver dispute. Mr. Dow testified that the declaration reflects his attorney analysis, as we explained in the motion to compel, and other portions of the declaration make statements that are not factual in nature, but rather offer explanation of what the inventors' obligations were under their employment agreements, or how other documents and agreements purportedly support or reflect Janssen's alleged "understanding" and "intent."

In terms of a good time to begin the meet-and-confer discussions ordered by the Court, we can be available tomorrow (Friday) afternoon at 2:00 or 3:00 pm Central.

Regards,
Liz

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From: Fischer, Aron (x2363) [mailto:afischer@pbwt.com]
Sent: Wednesday, June 07, 2017 2:32 PM
To: Hales, Bryan S.; Cutri, Elizabeth A.
Cc: Cohen, Andrew (x2605); Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Bryan,

As we understand it, the sword/shield waiver issue is irrelevant to our dispute over Mr. Dow's deposition, because Judge Wolf concluded that every disputed question except one was not privileged in the first place (and that question was covered by the attorney work product privilege, which you have not asserted has been waived). Judge Wolf stated that he considered your motion as to Mr. Dow to be based on specific "questions that Mr. Dow didn't answer" and you confirmed that was correct (Tr. 21:9-12). In light of Judge Wolf's ruling that "the disputed information in Mr. Dow's deposition, with maybe an exception or two, is not privileged" (Tr. 28:16-17), there doesn't seem to anything further to resolve with respect to Mr. Dow once we provide the disputed information discussed at the hearing. Even if Judge Wolf were to conclude in the future that privilege has been waived as to the documents on our privilege log, as is evident from the log itself Mr. Dow knows nothing about those documents and cannot testify about them.

Meanwhile, as Greg said at the conference, we intend to strike existing paragraph 7 from Mr. Dow's declaration if Defendants file a new motion to dismiss. As Mr. Dow explained at his deposition, that paragraph was never meant to indicate that Mr. Dow or his colleagues had formed a legal opinion regarding the disputed language of the employment agreements. Rather, it states that Janssen's longstanding practices with respect to patent ownership reflect an understanding and intent that inventions by Janssen employees are assigned to Janssen. Those practices are detailed in the remainder of Mr. Dow's declaration and have not been disputed by Defendants. We believe that removing the paragraph should resolve the waiver issue without the need to go back to Judge Wolf.

As you note, Judge Wolf instructed us to meet and confer about a number of issues, including Defendants' position on our request to dismiss the existing actions without prejudice, whether Defendants intend to move to dismiss the new complaint, and scheduling for further proceedings in the new action, including damages discovery and trial. Please let us know when a good time would be to begin these discussions. I suggest we give ourselves at least a week so we can consult with our clients on the various issues.

Yours
Aron

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From: Hales, Bryan S. [mailto:bhales@kirkland.com]
Sent: Monday, June 05, 2017 5:20 PM
To: Fischer, Aron (x2363); Cutri, Elizabeth A.
Cc: Cohen, Andrew (x2605); Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Aron,

When I started to raise the waiver issue on the call, Judge Wolf indicated he had not considered the sword/shield issue in depth. Judge Wolf had to end the call before we were able to go through that. Thus, we do not believe your interpretation of Thursday's hearing is correct. Nor should you take the fact that we believe these issues should be resolved before continuing with Mr. Dow as an indication that we don't believe it necessary. That decision will follow the resolution of these issues, and I think Judge Wolf also indicated that we should be meeting and conferring regarding the remedy appropriate for Janssen's improper

instructions and withholding of non-privileged documents, during which we should also discuss the withheld documents that we believe are in the scope of the subject matter waiver, to see what, if anything, we can resolve.

Regards,
Bryan

Bryan S. Hales, P.C.

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---

bryan.hales@kirkland.com

From: Fischer, Aron (x2363) [mailto:afischer@pbwt.com]
Sent: Friday, June 2, 2017 4:25 PM
To: Cutri, Elizabeth A. <elizabeth.cutri@kirkland.com>
Cc: Cohen, Andrew (x2605) <acohen@pbwt.com>; Hales, Bryan S. <bhales@kirkland.com>; Kane, Ryan <ryan.kane@kirkland.com>; Sanford, Gregory B. <gregory.sanford@kirkland.com>; Andrea L. Martin <amartin@burnslev.com>
Subject: RE: Janssen v. Celltrion et al.

Liz,

Our understanding is that Judge Wolf has ruled on every specific discovery request that was before him. That said, you obviously don't have to proceed with the deposition if you don't consider it necessary; in fact, we agree that it's unnecessary. We'll look forward to discussing next steps after your clients have weighed in.

The documents that Judge Wolf determined not to be privileged were just produced, as well as the Horwitz email.

Yours
Aron

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From: Cutri, Elizabeth A. [mailto:elizabeth.cutri@kirkland.com]
Sent: Friday, June 02, 2017 1:44 PM
To: Fischer, Aron (x2363)
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Aron,

We think scheduling a time to redepose Mr. Dow right now is premature, for a few reasons. Judge Wolf has suspended, at least for the time being, remaining proceedings on Defendants' motion to dismiss (for example, by virtue of Janssen being told it does not need to file its sur-reply). In addition, the '083 portion of the 2015 complaint and the 2016 complaint may be dismissed soon. Also, I understand Judge Wolf ordered Janssen to produce certain documents from its privilege log. When can we expect to receive those? We have searched Janssen's production and have not been able to locate email correspondence between Andrew Cohen and Joseph Horwitz, which is one of the items I understand the Court determined was not privileged. If that correspondence has been produced, please identify the Bates number(s). If it has not been produced, please produce it along with the other documents on the log that the Court ordered Janssen to produce. Also, the judge did not decide the waiver aspect of the privilege issues. These are things that need to be worked out between the parties, or with the judge's help if necessary, before it makes sense to discuss additional deposition time with Mr. Dow.

We are discussing Janssen's new complaint with our clients, and then the parties need to meet and confer to discuss how things will go forward, which can include a discussion of further time with Mr. Dow, and when that would be appropriate.

Regards,
Liz

Elizabeth Cutri

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elizabeth.cutri@kirkland.com

From: Fischer, Aron (x2363) [mailto:afischer@pbwt.com]
Sent: Thursday, June 01, 2017 2:51 PM
To: Cutri, Elizabeth A.
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Liz,

As you probably heard, Judge Wolf ruled today that certain questions asked at Ken Dow's deposition that we instructed Mr. Dow not to answer were not covered by the attorney-client or attorney work product privilege. As previously offered, we will make Mr. Dow available to answer these questions at the earliest mutually convenient date. Please let us know when you are available.

Yours
Aron

Aron Fischer
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036-6710
t: 212-336-2363
f: 212-336-1240
afischer@pbwt.com

From: Cutri, Elizabeth A. [mailto:elizabeth.cutri@kirkland.com]
Sent: Tuesday, May 30, 2017 11:43 AM
To: Fischer, Aron (x2363)
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Aron,

If Janssen agrees there has been a subject matter waiver and agrees to produce all requested but withheld documents, then we can discuss taking appropriate steps to let the Court know. Otherwise Defendants' position remains the same as we have explained multiple times in the correspondence and in the motion, and Defendants continue to believe the motion requires resolution by the Court.

Please attach this correspondence to Janssen's opposition to the motion to compel.

Regards,
Liz

Elizabeth Cutri

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---

elizabeth.cutri@kirkland.com

From: Fischer, Aron (x2363) [mailto:afischer@pbwt.com]
Sent: Friday, May 26, 2017 6:56 PM
To: Cutri, Elizabeth A.
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Liz,

If you're serious about trying to resolve or narrow the dispute, we should submit a joint letter to the Court saying so, so as not to waste the Court's or Janssen's time addressing the motion to compel.

I'm in the office right now if you want to give me a call.

Yours
Aron

Aron Fischer
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afischer@pbwt.com

From: Cutri, Elizabeth A. [mailto:elizabeth.cutri@kirkland.com]
Sent: Friday, May 26, 2017 7:50 PM
To: Fischer, Aron (x2363)
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Aron,

We understand your response below to mean that Janssen is reneging on its offer to provide a privilege log. Janssen has been aware of Defendants' position with regard to waiver since mid-March. *See* my 3/13/17 email ("Having put at issue Janssen's alleged beliefs and intent regarding the employment agreements through the testimony of its attorney Mr. Dow, Defendants are now entitled to all materials, privileged or not, on the same subject matter."). Yet, the first time Janssen agreed to provide a privilege log was on the eve of Defendants filing the motion to compel. Given that Janssen believes a "review of the privilege log would indeed have narrowed and likely eliminated the dispute," as you state below, and that Defendants are willing to give due consideration to Janssen's privilege log, it appears that Janssen's recent offer was simply an attempt to avoid having the Court hear the waiver issue in a timely fashion. If Janssen truly believes that Defendants' concerns would be satisfied by reviewing the privilege log, Janssen should have provided it long ago, or at the very least should not be withdrawing its offer now.

As we said before, Defendants remain willing to consider Janssen's privilege log and give due consideration to whether it narrows or resolves the current dispute.

Please attach this correspondence to Janssen's opposition to the motion to compel.

Regards,
Liz

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elizabeth.cutri@kirkland.com

From: Fischer, Aron (x2363) [mailto:afischer@pbwt.com]
Sent: Thursday, May 25, 2017 9:54 AM
To: Cutri, Elizabeth A.
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Liz,

Thank you for your email. I am confident that your review of the privilege log would indeed have narrowed and likely eliminated the dispute, as would a further telephone deposition of Mr. Dow. Nevertheless, despite our offers, you filed a premature motion to compel. We will not engage in further attempts to resolve or narrow the dispute while the motion is pending. Unless you withdraw the motion, our next communication on these issues will be in our opposition papers.

Yours
Aron

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afischer@pbwt.com

From: Cutri, Elizabeth A. [mailto:elizabeth.cutri@kirkland.com]
Sent: Thursday, May 25, 2017 10:39 AM
To: Fischer, Aron (x2363)
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Aron,

We do not understand how you could be "at a complete loss as [to] what [Defendants] are seeking to compel." We have stated numerous times that Defendants contend there has been a subject matter waiver and that they are entitled to documents Janssen is withholding. This is reflected in the correspondence and in our motion, which you now have.

Janssen continues to maintain there has been no subject matter waiver. Janssen's proposal that we depose Mr. Dow again, previewing questions for you so that you can decide what you "agree" we may ask, all while Janssen continues to maintain that there has been no waiver—and thus has not produced the underlying documents and may continue to assert privilege in response to questions—does not resolve the parties' dispute.

We tried to seek resolution of the waiver issue in March, but the Court deferred ruling on it based on Janssen's representations. Those representations turned out to be inaccurate, or at least not fully informed. Further delay in pursuing the waiver issue would have put us at risk of not being able to get timely resolution of it under the Court's schedule for the motion to dismiss.

We look forward to receiving Janssen's privilege log by May 26 and will give it due consideration to see if it narrows the dispute.

Regards,
Liz

Elizabeth Cutri

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---

elizabeth.cutri@kirkland.com

From: Fischer, Aron (x2363) [mailto:afischer@pbwt.com]
Sent: Monday, May 22, 2017 2:38 PM
To: Cutri, Elizabeth A.
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: Re: Janssen v. Celltrion et al.

Liz,

The offer to ask further questions of Dow was first made on the record at his deposition. Furthermore, I am at a complete loss as at what you are seeking to compel if you don't want answers to questions from Mr. Dow. A motion to compel seeks information that has been withheld. There is

no basis for the motion when you have been repeatedly put on notice that we are willing to provide additional information.

I am around to discuss now at 347-731-5830. Please include this email with your motion.

Yours
Aron

On May 22, 2017, at 3:27 PM, Cutri, Elizabeth A. <elizabeth.cutri@kirkland.com> wrote:

> Aron,
>
> We disagree with Janssen's position that Defendants have not met their meet and confer obligations. Your email makes clear that the parties are at an impasse. As I have mentioned in previous emails, Defendants contend there has been a subject matter waiver and believe they are entitled to documents Janssen is withholding. And we have identified the categories of withheld documents we believe are within the scope of the waiver. Janssen has not agreed there has been a subject matter waiver and has not agreed to produce the withheld documents, and your most recent email below does not indicate otherwise. Rather, you continue to state that Janssen believes that it has *not* waived privilege and does not intend to do so. And while we are, as we have said, happy to consider the privilege log you just recently offered and determine if it narrows our dispute, we do not see how this could resolve the question of whether a subject matter waiver has occurred.
>
> We continue to believe that your offer of a "do-over" deposition of Mr. Dow—made for the

first time just before our motion to dismiss reply brief is due, and only after we informed you we intended to bring this issue to the Court's attention—does not narrow nor resolve Defendants' concerns. As we explained, a new deposition at this point does not make sense given that Janssen maintains its position that there has been no subject matter waiver. It also does not make sense in view of what we understand to be a proposal that we vet questions with you in advance of the deposition to see if you "agree" we may ask them of Mr. Dow.

Given Defendants' position regarding waiver, which Janssen does dispute, we believe the parties have met and conferred. We note as well that you did not take us up on our offer to discuss anything over the phone. In view of this and the time constraints imposed by the underlying motion to dismiss, Defendants plan to proceed with filing the motion to compel. We will attach a copy of this email thread.

Regards,
Liz

Elizabeth Cutri

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F +1 312 862 2200

elizabeth.cutri@kirkland.com

From: Fischer, Aron (x2363) [mailto:afischer@pbwt.com]
Sent: Monday, May 22, 2017 7:58 AM
To: Cutri, Elizabeth A.
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Liz,

We disagree that you have met your meet

and confer pre-motion obligations under the Federal Rules. For some reason, you seem to be intent on moving to compel without identifying the specific documents or questions as to which you believe privilege is being improperly asserted, and while refusing to accept our outstanding offers to provide further information and to work with you to clarify these issues. Although you mention timing, there is no reason you could not have brought this motion weeks ago and your delay is no excuse for bringing a motion before we have reached an impasse. Another vague motion that fails to identify what privileged information is actually at issue will not expedite anything and will create unnecessary work for Janssen and the Court.

I reiterate that in order to resolve this dispute (1) we are willing to provide a privilege log (despite the parties' agreement that a privilege log was not required) and (2) we remain willing reconsider our assertion of privilege as to certain questions asked at Mr. Dow's declaration (as I stated on the record at the deposition), if you identify the specific questions that are at issue. Once again, we did not assert privilege as to anything relied on in Mr. Dow's declaration. If you interpret his transcript as doing so, then there is a misunderstanding that can be resolved without motion practice.

The only specific questions you have identified in your email are questions about Mr. Dow's declaration: whether he drafted or was involved with the preparation of the declaration, when he was contacted about providing a declaration, whether he relied on any information given to him by Patterson Belknap in forming the statements in the declaration, whether outside counsel provided Mr. Dow with exhibits to his declaration, and whether Mr. Dow is aware of anyone else performing an analysis of the patent assignment-related provisions of the employment

agreements attached to his declaration. Without waiving any privilege, we will permit Mr. Dow to answer those questions, if you wish to ask them (and if you actually think they are relevant to any issue in this case). If there are other questions you wish to ask Mr. Dow, please let us know.

If you do file your motion tomorrow, please include this email as an exhibit.

Yours
Aron

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afischer@pbwt.com

From: Cutri, Elizabeth A. [mailto:elizabeth.cutri@kirkland.com]
Sent: Saturday, May 20, 2017 9:52 PM
To: Fischer, Aron (x2363)
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.; Andrea L. Martin
Subject: RE: Janssen v. Celltrion et al.

Aron,

Thanks for your response. However, Defendants do not believe that Janssen's offers can resolve the parties' dispute.

The last time we raised the waiver arguments, you came to us hours before our joint filing, trying to convince us that there was not yet a dispute for the Court to resolve. We expressed skepticism that Janssen would not assert privilege over the types of documents and information Defendants sought, but you assured us and

the Court that there would not be a waiver issue to resolve. The Court relied on your representations, deferred ruling on the waiver issues, and explained that after Defendants take their discovery there will be a more "concrete basis to decide whether there's been a waiver as a result of the Dow declaration…" 3/29/17 Tr. at 21–22. The Court noted that it would want to know the "question…to which attorney-client privilege is asserted or the document request to which it's asserted, to make a properly informed decision." *Id*. at 28.

The events the Court believed were necessary to inform the waiver analysis have come to pass. Janssen asserted privilege in response to all of the parties' agreed-upon discovery requests, and in response to a host of questions at Mr. Dow's deposition as Defendants tried to understand how Mr. Dow arrived at his conclusions, who he spoke to, what information he was given, etc. Janssen did not make these choices blindly. It knew heading into discovery that Defendants had raised a waiver issue. And it knew the Court's view—prompted by Janssen's own arguments—that the waiver issues would be impacted by the "question[s]…to which attorney-client privilege is asserted or the document request to which it's asserted."

Now the waiver argument is more "concrete" and we have told you we intend to re-raise it, and yet Janssen is still trying to avoid having the issue brought to the Court. But Janssen cannot reasonably expect its response below to change the circumstances that require the Court's involvement. First, Janssen cannot feign

ignorance about "what [the dispute] is." We explained long ago (and again in our email from Friday) Defendants' position that Janssen's reliance on Mr. Dow's declaration effected a waiver of privilege regarding Janssen's intent and understanding with respect to the agreements at issue. Second, telling us yet again that Mr. Dow does not have privileged documents does not resolve the dispute, because the scope of the waiver is not limited to Mr. Dow's documents—it is a subject matter waiver. Moreover, Mr. Dow's lack of privileged documents actually highlights the problem that Janssen seems to have purposely chosen an attorney who did not have prior involvement with the subject agreements and put forth his analysis and statements as "authoritative[]" on behalf of Janssen.

Also, your "offer" at the end of Mr. Dow's deposition to have me re-raise, one by one, every problematic privilege objection you made over the course of a seven-and-a-half-hour day so that you could decide whether you wanted to reconsider them, with the witness waiting to go home and the transcript not in front of me, was, as I explained on the record, entirely unreasonable. Notably, we asked if you were withdrawing the privilege objections made during Mr. Dow's deposition and you told us, "Absolutely not." Dow Tr. at 292. Equally unworkable is Janssen's new offer to have us depose Mr. Dow again, on "questions [you] agree he may answer," particularly in view of the fact that you "will continue to assert privilege over the content of attorney-client communications and work product," as you state below. It is Janssen's burden to establish that it has properly

invoked privilege. To the extent another deposition would be useful, it would be after a finding of waiver.

Your new offer to provide a privilege log also cannot resolve the dispute. Janssen did not agree to provide a log when we first asked for one in March, declined to provide the type of information that goes on a log (e.g., identities of parties to communications) when we tried to assess claims of privilege during Mr. Dow's deposition, and turned down the renewed request for a privilege log we made on May 4. Only now, with Janssen motivated to keep Defendants from getting a timely resolution of the waiver issue, has Janssen agreed to provide a log. To be clear, we are happy to have Janssen provide a log and are willing to consider in good faith whether it can help narrow any aspects of the dispute before the Court passes on them. However, unless Janssen agrees there has been a subject matter waiver—and we understand Janssen does not agree—we believe the parties are at an impasse and we must seek the Court's assistance. And we must do so promptly in order to leave enough time for a ruling on the waiver issues to be useful in resolving the standing dispute.

Finally, we do not agree with your statement that you "did not…assert privilege as to any analysis or opinions by Ken Dow that are reflected in his declaration." Janssen refused to let Mr. Dow answer questions about his declaration, such as whether he drafted or was involved with the preparation of the declaration, when he was contacted about providing a declaration, whether he relied on any information given to him by

Patterson Belknap in forming the statements in the declaration, whether outside counsel provided Mr. Dow with exhibits to his declaration, and whether Mr. Dow is aware of anyone else performing an analysis of the patent assignment-related provisions of the employment agreements attached to his declaration. Dow. Tr. at, *e.g.*, 95:7–15, 100:4–17, 145:5–11, 206:24–207:15, 211:15–212:15.

We believe this correspondence meets our obligations to meet and confer, but if you wish, we are available to speak further between now and mid-day Monday. We plan to file our motion by the close of business on Monday.

Regards,
Liz

Elizabeth Cutri

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elizabeth.cutri@kirkland.com

From: Fischer, Aron (x2363) [mailto:afischer@pbwt.com]
Sent: Friday, May 19, 2017 2:47 PM
To: Cutri, Elizabeth A.
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.
Subject: RE: Janssen v. Celltrion et al.

Dear Liz,

The Court deferred ruling on privilege issues on the ground that Defendants had not identified a specific privilege dispute that could be adjudicated. In your email, you still do not identify any specific documents or information as to which you believe privilege has been improperly

asserted or waived. As such, we do not agree that there is a particularized dispute over privilege that is properly subject to a motion to compel. We need to discuss specifics in order to identify whether a real dispute exists and if so, what it is. In particular:

1. As to documents, I previously told you that we are not withholding any documents from Ken Dow within the relevant time period. We therefore do not understand your position that Ken Dow's declaration waived privilege over any documents. Nevertheless, notwithstanding our actively negotiated agreement that we did not need to provide a privilege log, and our compliance with that agreement, instead of having you burden the Court with an unnecessary motion to compel we will provide a privilege log by Friday, May 26. If you assert that privilege has been waived as to any documents on the privilege log or that any of the documents are not privileged, we can discuss.

2. As to Ken Dow's testimony, as you recall I stated on the record at the end of his deposition that in light of the nature of your questions and the parties' prior agreements on privilege, I would give you the opportunity to ask again any questions as to which you believed privilege had been improperly asserted (Tr. 291). You declined on the ground that you could not identify any specific questions to ask without reviewing the transcript. You have now reviewed the transcript and state that you intend to move to compel. Instead of burdening the Court with that motion, we renew our offer for you to identify particular questions the responses to which you believe are not privileged. If necessary, we can make Mr. Dow available for a telephone deposition limited to any additional questions we agree he may answer. One complicating factor at Mr. Dow's deposition was that many of your questions were objectionable separately from privilege, as I repeatedly noted on the

record; some of my privilege objections were protective given the ambiguities or incorrect or misleading premises of your questions. To make our position clear, we did not, and will not, assert privilege as to any analysis or opinions by Ken Dow that are reflected in his declaration. Furthermore, although we dispute their relevance, we also will not assert privilege over any analysis or opinions by Mr. Dow (at any time) related to the subject matter of his declaration or the employment agreements attached to his declaration -- even analysis or opinions that were not relied on in his declaration. To be clear, we do not intend to waive privilege by providing this information, and in particular, we will continue to assert privilege over the content of attorney-client communications and work product.

Let me know if you would like to discuss. I am in depositions Monday and Tuesday but can make time over the weekend if necessary.

Yours
Aron

Aron Fischer
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1133 Avenue of the Americas
New York, NY 10036-6710
t: 212-336-2363
f: 212-336-1240
afischer@pbwt.com

From: Cutri, Elizabeth A.
[mailto:elizabeth.cutri@kirkland.com]
Sent: Friday, May 19, 2017 1:25 PM
To: Fischer, Aron (x2363)
Cc: Cohen, Andrew (x2605); Hales, Bryan S.; Kane, Ryan; Sanford, Gregory B.
Subject: Janssen v. Celltrion et al.

Aron,

Defendants intend to file a motion to compel

documents and information responsive to our standing-related discovery requests that Janssen is withholding based on assertions of privilege. When we raised this issue in March, Janssen represented it had "largely completed [its] search for responsive documents and ha[d] not located any privileged documents from August 2015 or earlier" and stated it "do[es] not intend to assert privilege at Mr. Dow's deposition on this subject matter." Dkt. 539 at Ex. 2; 3/29/2017 Hr'g Tr. at 27:12–14. The Court deferred ruling on the waiver issues until after Defendants took discovery at least in part based on these statements by Janssen. We later learned, from Andrew Cohen's April 26 letter, that Janssen is withholding documents based on assertions of privilege in response to all three of the parties' agreed-upon discovery requests, from at least within the time frame of December 1998 through August 2015. You also made numerous instructions not to answer on the basis of privilege during Mr. Dow's deposition, which precluded us from probing the bases for his analysis and statements that Janssen holds out as "authoritative." We also understand from our past correspondence that Janssen is unwilling to provide more information about its privilege claims or the documents it is withholding by way of a privilege log.

We assume based on our previous exchanges regarding the waiver issues that Janssen will oppose Defendants' motion, but please let us know by Monday morning if that is not the case or if there is anything you would like to discuss.

Regards,
Liz

Elizabeth Cutri

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elizabeth.cutri@kirkland.com

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CONFIDENTIAL EXHIBIT 2 REDACTED IN FULL

CONFIDENTIAL EXHIBIT 3 REDACTED IN FULL

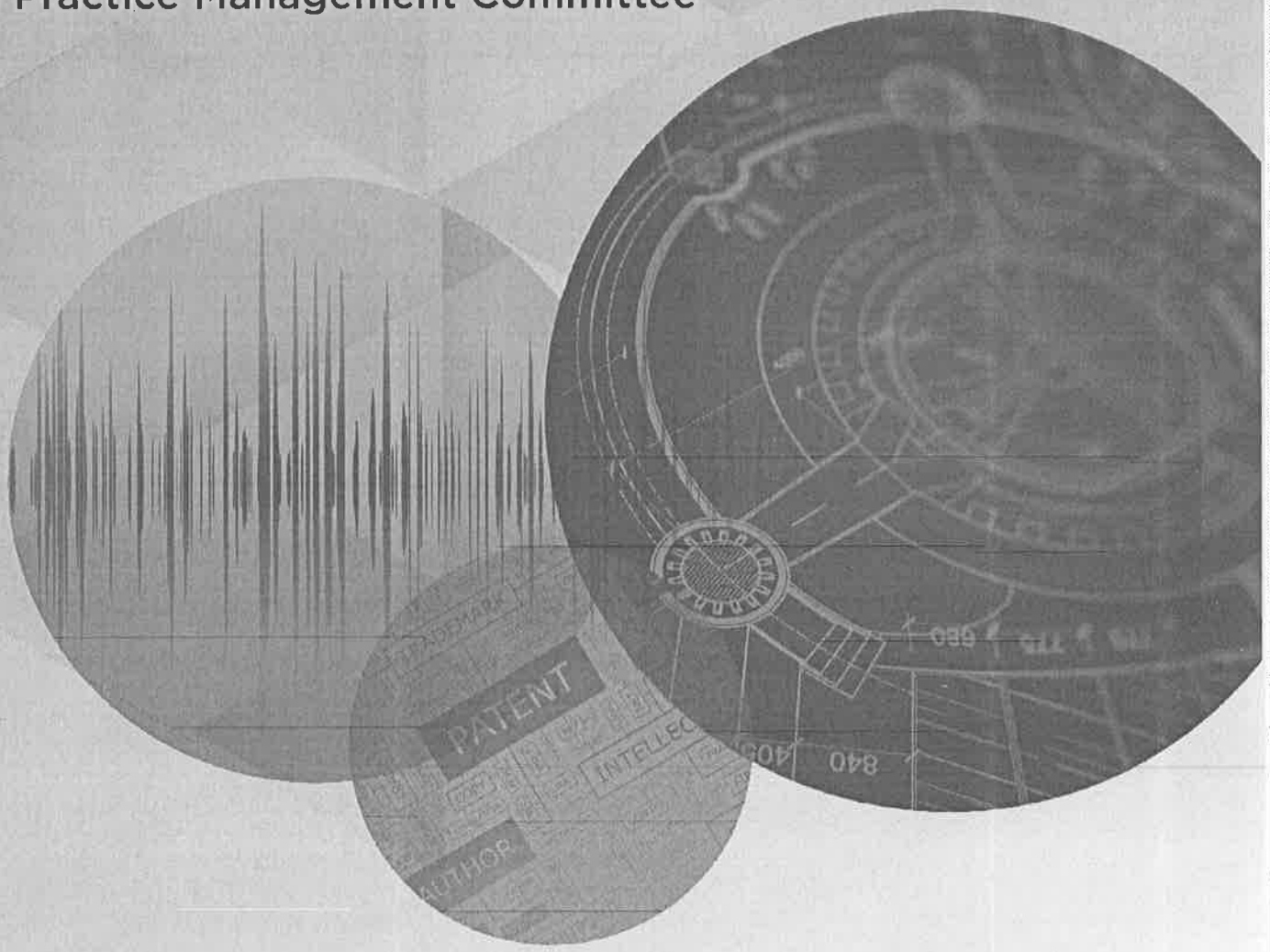
CONFIDENTIAL EXHIBIT 4 REDACTED IN FULL

EXHIBIT 5

AIPLA

2015 Report of the Economic Survey

Prepared Under Direction of
Law Practice Management Committee



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AIPLA

American Intellectual Property Law Association

Serving America's Legal and Creative Community

Report of the Economic Survey 2015

Prepared Under Direction of the
American Intellectual Property Law Association
Law Practice Management Committee

Richard W. Goldstein, Chair
Donika P. Pentcheva, Vice Chair

June 2015

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We would like to thank those who helped put together and review this year's AIPLA Economic Survey:

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Donika Pentcheva: Westman, Champlin & Koeher – Vice Chair of LPM Committee

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INTRODUCTION

The AIPLA Economic Survey, developed and directed by the Law Practice Management Committee of the American Intellectual Property Law Association (AIPLA), reports the annual incomes and related professional and demographic characteristics of intellectual property (IP) law attorneys and associated patent agents. Conducted every other year by AIPLA, this survey also examines the economic aspects of intellectual property law practice, including individual billing rates and typical charges for representative IP law services. All AIPLA members were invited to participate.

The Law Practice Management Committee took an active role in reviewing the Economic Survey with a goal of improving the usefulness and value of the data that are collected and analyzed.

DATA COLLECTION

An e-mail invitation to participate in the 2015 AIPLA Economic Survey was sent to a list of 8,860 AIPLA members; accounting for bounces and requests to be removed from the database, the actual sample surveyed was 8,485. The e-mail included an individualized direct link to the Web-based questionnaire along with an attached letter requesting additional participation in the Firm portion of the Economic Survey. The initial e-mail was followed up by several e-mail reminders. This year, additional efforts were made to collect the Firm Survey data. Contact information was collected directly from the Individual Survey respondents that was then used for distributing Firm Survey links directly to the appropriate people identified at each firm by the Individual Survey respondents.

A total of 1,366 individuals responded by completing some or all of the Individual questionnaire, yielding a 16.1% response rate, slightly higher than 2013. This is the fifth time the survey has been conducted online. The additional efforts to gather data for the Firm portion of the survey garnered 223 responses—only slightly lower than in 2013, when 244 firm representatives completed the firm questionnaire.

All data submitted by respondents were reviewed and evaluated for reasonableness and consistency; data anomalies and outliers were analyzed and corrected or deleted.

In many cases, respondents did not answer every question, so the total counts for each table may vary.

CHANGES TO THE SURVEY

A number of enhancements were made to the 2015 Individual Survey instrument. The committee worked to streamline the survey while still including new questions that explored important new areas of interest to the profession. The following demographic type questions were removed from the Individual Survey this year: percent of time devoted to IP practice, change in employment, and change in the current employer status. Also removed were questions about employer contribution to all pension and capital accumulation plans, as well as gross income from the practice of law that was not included in the [previous] gross income question.

The question about the percentage of time devoted to various types of work was revised which also allowed the question about time spent training new associates to be removed. In Part II, a follow-up question was added regarding the reasons for increases/decreases to the corporate budget. Also in this section, the question for the allocation of the annual corporate IP budget was revised to include more detail.

In Part III (Private Practitioners), the percent of billable hours actually billed to clients was removed, and the question about business development was revised.

In Part IV (Typical Charges), there was a slight change in the headings to the prosecution and client counseling questions that clarified that the data collected were charges in 2014. There were questions added to the litigation and related matters to collect mediation data, (the cost of the action up through mediation) for each of the at risk categories. Additional questions were added after the various litigation at risk questions, which required individuals to indicate if there was a strong correlation between the amount at risk and the overall attorney hours required to litigate the action. Individual respondents were also asked to report how the total cost of asserting various actions compared to the total cost of defending the actions. Two-Party Interference and Inter Partes Reexamination were removed, and data requests for Inter Partes Proceedings was added. Two questions at the end of the Individual Survey were added regarding arbitration. One compared the cost of resolving a dispute through arbitration to resolving a comparable dispute through litigation, and the other asked for the percentage of frequency that various means were initiated for mediation/arbitration.

Finally, the business development section was swapped out from the 2015 Firm Survey instrument, and two new sections on training and marketing were added. The question about minor offices was removed this year as well from the Firm Survey instrument. The questions about the report format (paper vs. electronic) were removed this year from both surveys, however, new write-in questions were added that asked respondents to explain which data have been most useful, and what else could be added to future surveys.

In the data tables in the report, a minimum of three responses was required to show composite values. **The term "ISD" is used in the tables to show insufficient data.** Similar to 2013, table rows with one or two respondents have been omitted to protect the anonymity of respondents and tables with no valid rows have likewise been omitted. Also, tables with less than 20 respondents overall were not shown in order to maintain statistical reliability of the data, however, the Corporate IP, Agent had only 15 respondents overall, so exceptions were made in this case. Additionally, for applicable tables, the 10th and 90th percentiles were added. These data could only be shown if there were 10 or more respondents.

DESCRIPTION OF STATISTICS AND FORMATTING CONVENTIONS

Quartiles: Quartiles are used to show distributions of real numbers, responses are described by three quartiles: the first quartile, the median, and the third quartile. Quartiles identify interpolated locations on a distribution of values and do not necessarily represent actual reported values. Another label for quartiles is percentiles; the first quartile is the same as the 25th percentile, the median is the 50th percentile, and the third quartile is the 75th percentile. For example, when all reported values are listed from highest to lowest, the third quartile identifies the point on the list that is equal to or greater than 75 percent (three quarters) of the reported values and equal to or less than 25 percent (one quarter).

10th Percentile: Also used to show distributions of real numbers, ninety percent of respondents reported this amount or more.

90th Percentile: Ten percent reported this amount or more. If there are fewer than 10 values, the 90th percentile cannot be calculated.

Median (midpoint): The median identifies the point in the distribution of reported values that is equal to or larger than one-half of reported values and equal to or smaller than one-half—that is, the mid-point.

A median is reported when three or more values were reported by respondents. The first and third quartiles are reported when five or more fee values were reported by respondents. Quartiles and medians based on values reported by survey respondents are estimates of the quartiles and medians that could be determined if the

characteristics of the entire population represented by survey respondents were known. In general, the more values that are reported, the more accurately quartiles estimate the distribution of values among all AIPLA members.

Mean (average): The sum of all values divided by the number of values.

It should be noted that if the mean exceeds the median, it is because high values affect the calculations. It is also possible, especially with a small number of values, for the mean to exceed the third quartile.

Percentages in some tables and some graphs may not sum to exactly 100% due to rounding.

Other definitions useful in understanding tabular information presented in this report are:

Income: Defined as *"total gross income in calendar year 2014 from your primary practice...including any partnership income, cash bonus, share of profits, and similar income you received, and any deferred compensation in which you vested in 2014."*

Typical Charges: Respondents were instructed to respond *"only if you have been personally responsible for a representative sample of the type of work to which the question pertains, either as a service provider (an attorney in private practice) or as a purchaser of such services (corporate counsel)."* In thinking of a typical charge, respondents were directed to assume *"a typical case with no unusual complications,"* and asked *"what did you charge (or would have charged) or what were you charged (or would have expected to be charged), in 2014, for legal services only (including search fees, but not including copy costs, drawing fees or government fees) in each of the following types of US matters?" Respondents were also asked to indicate the type of fee primarily used in 2014 (i.e., fixed fee, hourly, other).*

Estimated Litigation Costs: Respondents were instructed to respond to these questions *"only if you have personal knowledge either as a service provider (attorney in private practice) or as a purchaser of such services (corporate counsel) of the costs incurred within the relatively recent past, for the type of work to which the question pertains. In each of the questions, 'total cost' is all costs, including outside legal and paralegal services, local counsel, associates, paralegals, travel and living expenses, fees and costs for court reporters, photocopies, courier services, exhibit preparation, analytical testing, expert witnesses, translators, surveys, jury advisors, and similar expenses."* Respondents were further instructed to estimate these based on a single IP asset, such as one patent at issue or one trademark.

Location: The metropolitan areas of Boston, New York City, Philadelphia, Washington (DC-MD-VA), Chicago, and Minneapolis–St. Paul include all localities—central city and surrounding areas—within the primary metropolitan statistical area. One state—Texas—had sufficiently large numbers of respondents to be reported separately. There were sufficient responses to breakout Los Angeles and San Francisco separately; California firms outside of those metro areas were included in "Other West." Other categories exclude those named metropolitan areas.

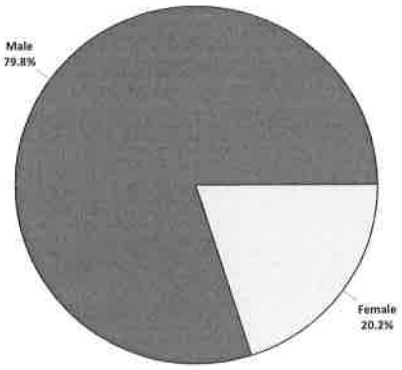
LOCATION		
METROPOLITAN AREAS	**PERCENT**	**COUNT**
Boston CMSA*	5.6%	77
New York City CMSA*	7.9%	108
Philadelphia CMSA*	3.4%	46
Washington, DC CMSA*	18.3%	250
Other East: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and West Virginia	5.4%	74
Metro Southeast: Raleigh–Durham, Greensboro–Winston-Salem, and Charlotte, NC; Atlanta, GA; and Miami–Ft. Lauderdale–West Palm Beach, FL	3.4%	47
Other Southeast: North Carolina, South Carolina, Georgia, and Florida	2.9%	40
Chicago CMSA*	5.4%	74
Minneapolis–St. Paul PMSA**	4.1%	56
Other Central: Minnesota, North Dakota, South Dakota, Wisconsin, Michigan, Ohio, Indiana, Illinois, Iowa, Nebraska, Kansas, Missouri, Kentucky, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, and Tennessee	16.2%	221
Texas	6.4%	87
Los Angeles CMSA*	2.7%	37
San Francisco CMSA*	5.2%	71
Other West: Montana, Wyoming, Colorado, New Mexico, Idaho, Utah, Nevada, Arizona, Washington, Oregon, California, Alaska, and Hawaii	13.0%	178

***CMSA:** Consolidated Metropolitan Statistical Area– a metro area with a population of one million or more.
****PMSA:** Primary Metropolitan Statistical Area– a component of a CMSA.

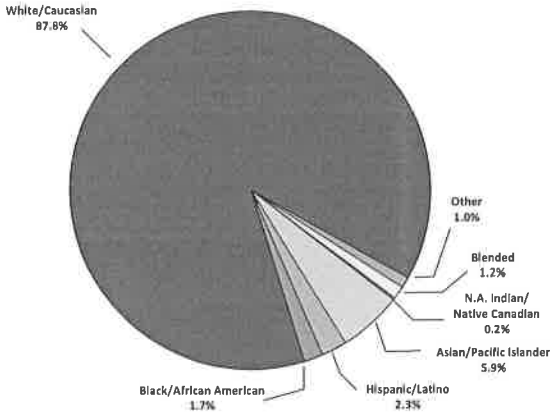
Respondent Background

- A total of 1,366 individuals participated in the survey.
- The majority of survey participants were male (79.8%) and white/Caucasian (87.8%).
- More than five in 10 respondents (53.9%) were under the age of 50, with nearly three in 10 (29.2%) ranging in age between 40 and 49. The proportion of respondents aged 60 or more was 17.9%, which has increased steadily over the past several years.
- Other than a law degree, more than one-third of all respondents (38.3%) reported holding an advanced degree such as a masters or Ph.D. A majority of respondents (57.8%) reported holding a bachelor's degree.
- Over half (54.7%) of all respondents were Private Firm, Partner and Private Firm, Associate, followed by Corporate IP Department, Attorney (10.4%), Solo Practitioner (8.9%), and Corporate IP Department, Head (8.0%). These percentages have all held steady over the past few surveys.
- An overwhelming majority (89.4%) of all respondents had been admitted to the patent bar.
- More than six in 10 respondents (61.3%) had fewer than 20 years' experience practicing Intellectual Property Law, a percentage which has decreased over the last few surveys. 12.2% reported having fewer than five years' of IP law experience in 2014, also a decline from proportions reported in previous years.
- Respondents were asked to report their percent of time spent in various areas of technical specialization. The most common IP technical specialization, representing over 50% of respondents' time, was mechanical (27.3%), followed by computer software (16.7%), chemical (15.5%), and electrical (15.1%).
- Four in 10 respondents (40.6%) practiced in the Mid-Atlantic or New England area, including 18.3% in the Washington, DC, Consolidated Metropolitan Statistical Area (CMSA). The Central region represented 25.7%, and one in five (20.9%) were located in the West—very similar to 2013.

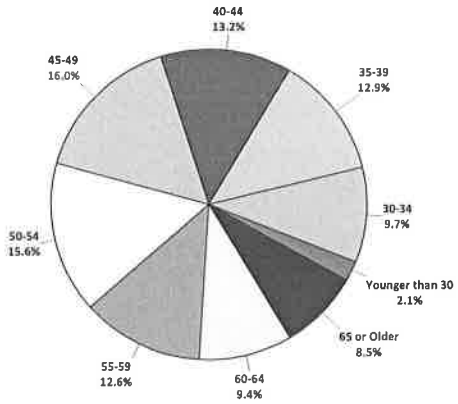
GENDER (P. I-1, Q5)



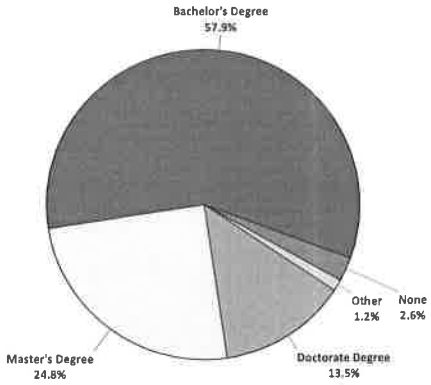
ETHNICITY (P. I-1, Q6)



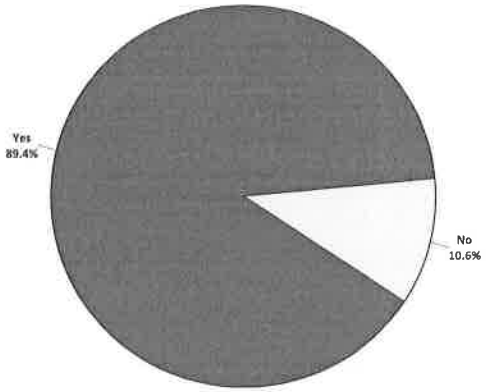
AGE (P. I-1, Q4)



HIGHEST EDUCATION OTHER THAN LAW (P. I-1, Q9)

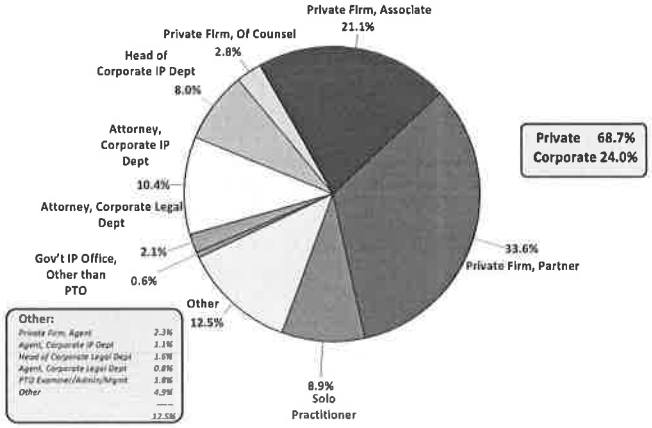


ADMITTED TO THE PATENT BAR (P. I-1, Q3)

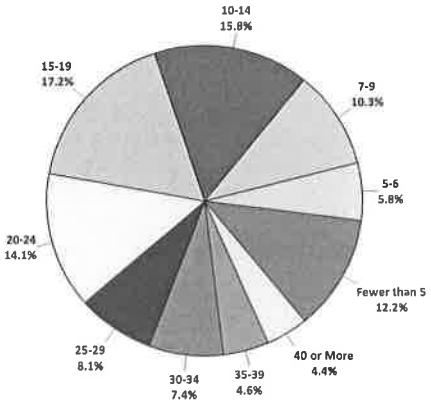


PRIMARY PRACTICE (P. I-1, Q2)

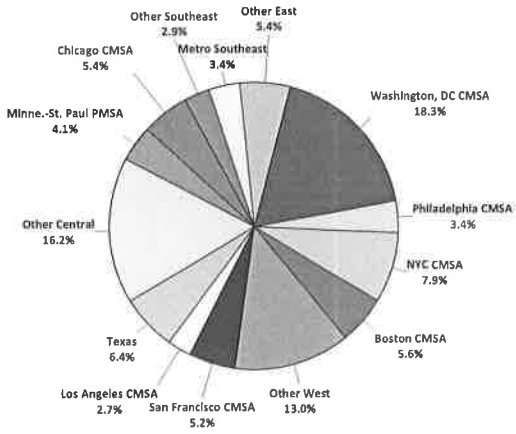
Background of All Respondents



YEARS OF INTELLECTUAL PROPERTY LAW EXPERIENCE (P. I-2, Q7)



LOCATION (P. I-2, Q1)



TYPICAL COSTS OF LITIGATION

Survey participants were asked to provide cost estimates, *but only for the types of litigation they had personal knowledge of, either as a service provider (attorney in private practice) or as a purchaser (corporate counsel), and were engaged in recently*. "Total cost" was requested, including outside legal and paralegal services, local counsel, associates, paralegals, travel and living expenses, fees and costs for court reporters, photocopies, courier services, exhibit preparation, analytical testing, expert witnesses, translators, surveys, jury advisors, and similar expenses. Participants were also asked to estimate based on a single IP asset (i.e., one patent at issue, one trademark).

The following table reports median litigation costs for Patent Infringement, All Varieties, Patent Infringement Pursuant to the Hatch-Waxman Act, Patent Infringement by Non-Practicing Entity, Section 337 Patent Infringement Action in the International Trade Commission, Inter Partes Proceedings, Trademark Infringement, Trademark Opposition/Cancellation, Copyright Infringement, and Trade Secret Misappropriation. In this year's survey, the cost of the action up through mediation was collected for the various types of litigation costs.

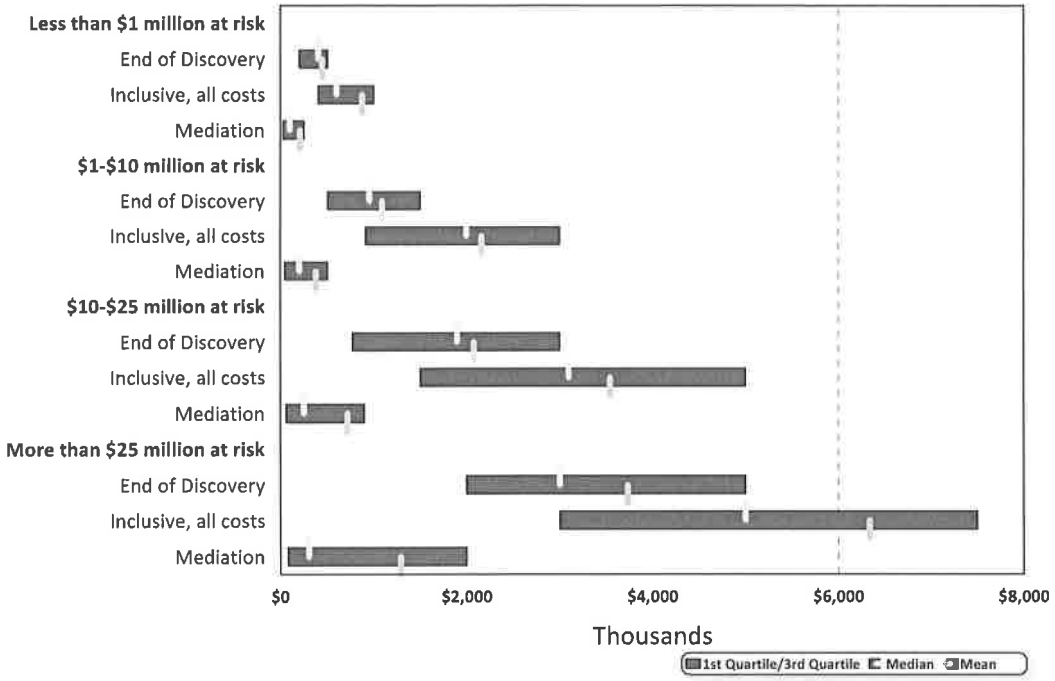
Within Patent Infringement Suits, All Varieties median costs have generally stayed the same or dropped slightly from 2013, with the exception of end of discovery for less than $1 million at risk. For Patent Infringement Pursuant to Hatch-Waxman, the median decreased for all values at risk inclusive, all costs except for when there was less than $1 million at risk. The median costs for Patent Infringement Suits, Defending Claims of Patent Infringement by Non-Practicing Entity was down from 2013 in most cases, while for Patent Infringement Suit, Section 337 litigation, the median cost is up from 2013 in nearly all cases. Median costs are also up in Trademark Infringement Suits inclusive of all costs for all values at risk except $1-$10 million. Most copyright infringement suit median costs are down from 2013, and the median trade secret misappropriation suit end of discovery costs have decreased or remained the same when compared to 2013. Mediation (median) costs, in general, rose as the value at risk rose.

MEDIAN LITIGATION COSTS	$000s					
	2005	2007	2009	2011	2013	2015
PATENT INFRINGEMENT SUIT, ALL VARIETIES						
LESS THAN $1 MILLION AT RISK						
End of discovery	$350	$350	$350	$350	$350	$400
Inclusive, all costs	650	600	650	650	700	600
Mediation	N/A	N/A	N/A	N/A	N/A	100
$1-$10 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$1,000	$950
Inclusive, all costs	N/A	N/A	N/A	N/A	2,000	2,000
Mediation	N/A	N/A	N/A	N/A	N/A	200
$10-$25 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$2,000	$1,900
Inclusive, all costs	N/A	N/A	N/A	N/A	3,325	3,100
Mediation	N/A	N/A	N/A	N/A	N/A	250
MORE THAN $25 MILLION AT RISK						
End of discovery	$3,000	$3,000	$3,000	$3,000	$3,000	$3,000
Inclusive, all costs	4,500	5,000	5,500	5,000	5,500	5,000
Mediation	N/A	N/A	N/A	N/A	N/A	300
PATENT INFRINGEMENT PURSUANT TO THE HATCH-WAXMAN ACT (I.E., "ANDA LITIGATION")						
LESS THAN $1 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$300	$350
Inclusive, all costs	N/A	N/A	N/A	N/A	513	650
Mediation	N/A	N/A	N/A	N/A	N/A	75
$1-$10 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$1,000	$1,000
Inclusive, all costs	N/A	N/A	N/A	N/A	1,800	$1,500
Mediation	N/A	N/A	N/A	N/A	N/A	200

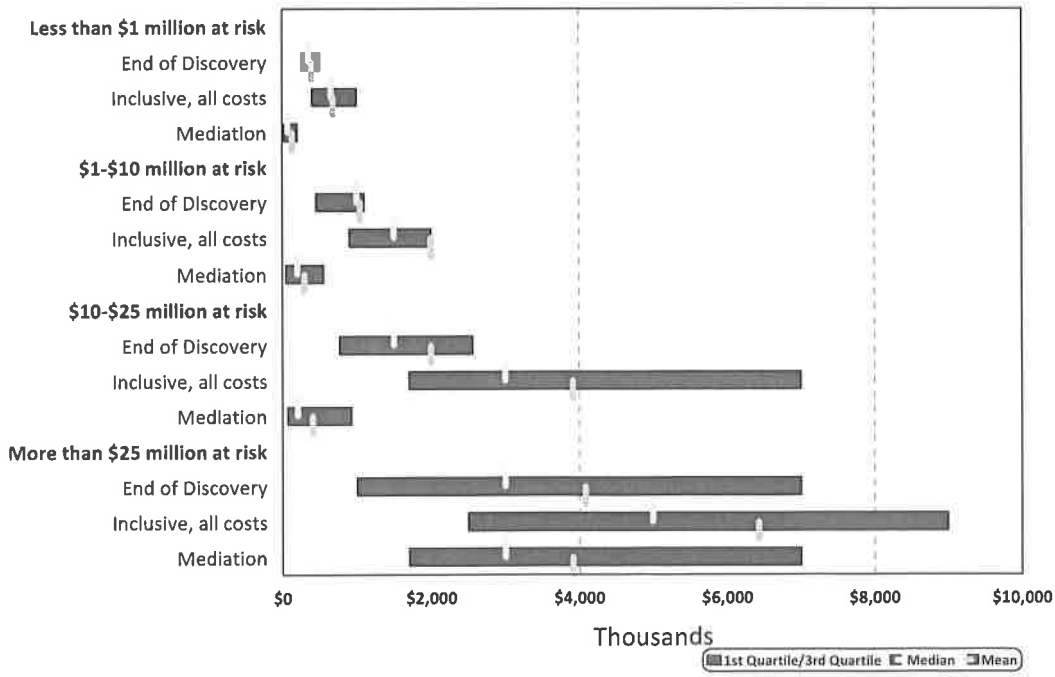
MEDIAN LITIGATION COSTS (CONTINUED)	$000s					
	2005	2007	2009	2011	2013	2015
$10-$25 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$2,500	$1,500
Inclusive, all costs	N/A	N/A	N/A	N/A	4,000	3,000
Mediation	N/A	N/A	N/A	N/A	N/A	200
MORE THAN $25 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$3,250	$3,000
Inclusive, all costs	N/A	N/A	N/A	N/A	6,000	5,000
Mediation	N/A	N/A	N/A	N/A	N/A	3,000
PATENT INFRINGEMENT SUIT, DEFENDING CLAIMS OF PATENT INFRINGEMENT BY NON-PRACTICING ENTITY						
LESS THAN $1 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$300	$300
Inclusive, all costs	N/A	N/A	N/A	N/A	600	500
Mediation	N/A	N/A	N/A	N/A	N/A	100
$1-$10 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$750	$570
Inclusive, all costs	N/A	N/A	N/A	N/A	1,250	1,000
Mediation	N/A	N/A	N/A	N/A	N/A	113
$10-$25 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$1,500	$1,200
Inclusive, all costs	N/A	N/A	N/A	N/A	2,400	2,000
Mediation	N/A	N/A	N/A	N/A	N/A	200
MORE THAN $25 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$2,500	$2,000
Inclusive, all costs	N/A	N/A	N/A	N/A	4,000	3,750
Mediation	N/A	N/A	N/A	N/A	N/A	213
PATENT INFRINGEMENT SUIT, SECTION 337						
LESS THAN $1 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$375	$500
Inclusive, all costs	N/A	N/A	N/A	N/A	550	750
Mediation	N/A	N/A	N/A	N/A	N/A	100
$1-$10 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$750	$1,000
Inclusive, all costs	N/A	N/A	N/A	N/A	1,800	1,600
Mediation	N/A	N/A	N/A	N/A	N/A	113
$10-$25 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$1,500	$2,000
Inclusive, all costs	N/A	N/A	N/A	N/A	3,000	4,000
Mediation	N/A	N/A	N/A	N/A	N/A	150
MORE THAN $25 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$3,000	$3,250
Inclusive, all costs	N/A	N/A	N/A	N/A	5,000	5,000
Mediation	N/A	N/A	N/A	N/A	N/A	250
INTER PARTES PROCEEDINGS						
Through filing petition	N/A	N/A	N/A	N/A	N/A	$80
Through end of motion practice	N/A	N/A	N/A	N/A	N/A	200
Through PTAB hearing	N/A	N/A	N/A	N/A	N/A	275
Through appeal	N/A	N/A	N/A	N/A	N/A	350
TRADEMARK INFRINGEMENT SUIT						
LESS THAN $1 MILLION AT RISK						
End of discovery	$200	$150	$175	$200	$150	$150
Inclusive, all costs	300	255	300	350	300	325
Mediation	N/A	N/A	N/A	N/A	N/A	50
$1-$10 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$350	$263
Inclusive, all costs	N/A	N/A	N/A	N/A	550	500
Mediation	N/A	N/A	N/A	N/A	N/A	75
$10-$25 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$500	$400
Inclusive, all costs	N/A	N/A	N/A	N/A	1,000	720
Mediation	N/A	N/A	N/A	N/A	N/A	100

MEDIAN LITIGATION COSTS (CONTINUED)	$000s					
	2005	2007	2009	2011	2013	2015
MORE THAN $25 MILLION AT RISK						
End of discovery	$750	$600	$750	$1,000	$750	$900
Inclusive, all costs	1,250	1,250	1,400	1,500	1,500	1,600
Mediation	N/A	N/A	N/A	N/A	N/A	100
TRADEMARK OPPOSITION/CANCELLATION						
End of discovery	$50	$50	$50	$50	$50	$50
Inclusive, all costs	80	75	80	90	80	95
COPYRIGHT INFRINGEMENT SUIT						
LESS THAN $1 MILLION AT RISK						
End of discovery	$138	$150	$150	$200	$150	$150
Inclusive, all costs	250	290	300	350	300	250
Mediation	N/A	N/A	N/A	N/A	N/A	40
$1-$10 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$350	$250
Inclusive, all costs	N/A	N/A	N/A	N/A	563	500
Mediation	N/A	N/A	N/A	N/A	N/A	63
$10-$25 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$600	$500
Inclusive, all costs	N/A	N/A	N/A	N/A	1,000	750
Mediation	N/A	N/A	N/A	N/A	N/A	100
MORE THAN $25 MILLION AT RISK						
End of discovery	$550	$550	$750	$ 750	$775	$750
Inclusive, all costs	975	1,000	1,100	1,375	1,625	1,200
Mediation	N/A	N/A	N/A	N/A	N/A	100
TRADE SECRET MISAPPROPRIATION SUIT						
LESS THAN $1 MILLION AT RISK						
End of discovery	$200	$200	$250	$250	$250	$250
Inclusive, all costs	300	350	400	425	425	500
Mediation	N/A	N/A	N/A	N/A	N/A	50
$1-$10 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$500	$500
Inclusive, all costs	N/A	N/A	N/A	N/A	800	925
Mediation	N/A	N/A	N/A	N/A	N/A	50
$10-$25 MILLION AT RISK						
End of discovery	N/A	N/A	N/A	N/A	$850	$800
Inclusive, all costs	N/A	N/A	N/A	N/A	1,400	1,500
Mediation	N/A	N/A	N/A	N/A	N/A	100
MORE THAN $25 MILLION AT RISK						
End of discovery	$1,000	$1,000	$1,225	$1,360	$1,900	$1,625
Inclusive, all costs	2,000	1,750	2,250	2,500	2,950	2,650
Mediation	N/A	N/A	N/A	N/A	N/A	113

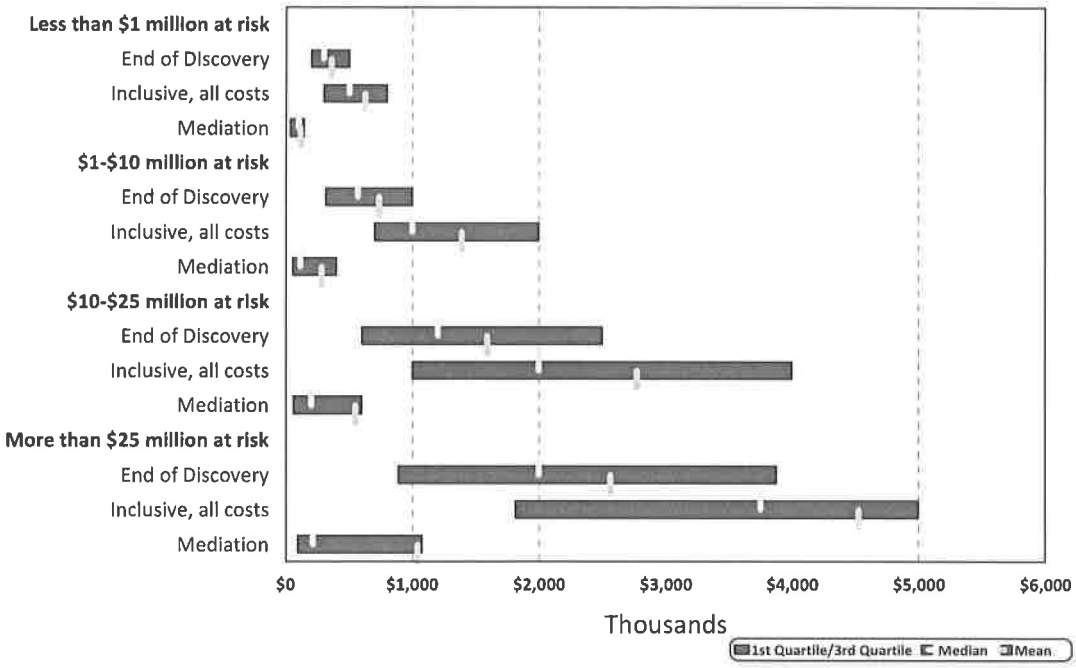
ESTIMATED TOTAL COST OF A PATENT INFRINGEMENT SUIT - ALL VARIETIES (P. I-105 to I-112, Q35Aa-Q35Al)



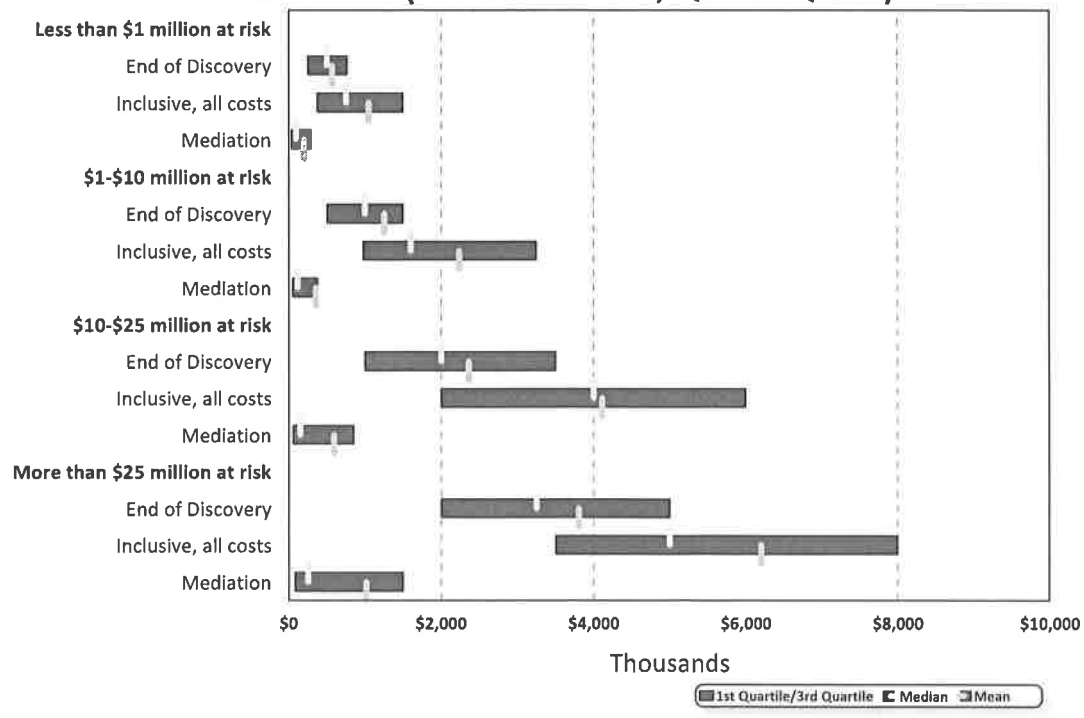
ESTIMATED TOTAL COST OF A PATENT INFRINGEMENT SUIT - HATCH WAXMAN ACT (P. I-113 to I-120, Q35Ba-Q35Bl)



ESTIMATED TOTAL COST OF PATENT INFRINGEMENT-DEFENDING CLAIMS BY NON-PRACTICING ENTITY (P. I-121 to I-128, Q35Ca-Q35Cl)

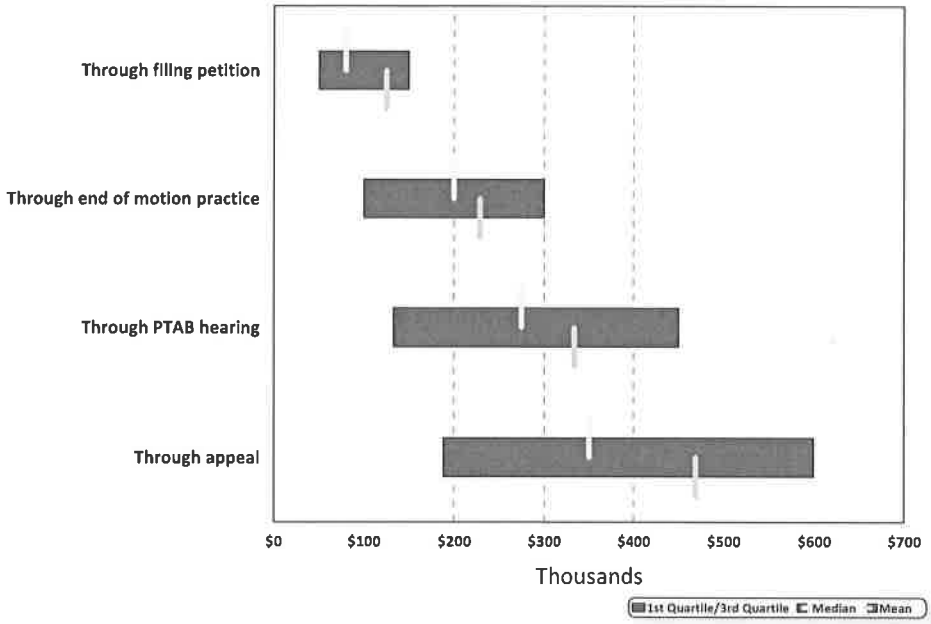


ESTIMATED TOTAL COST OF A PATENT INFRINGEMENT SUIT-SECTION 337 (P. I-129 to I-136, Q35Da-Q35Dl)



Six in 10 respondents say the total cost of filing a petition for inter partes proceedings (IPR, CMB or PGR) is about the same as the total cost of defending such an action. Of those that indicate it is not the same, on average the cost of filing is 83.4% the cost of defending.

ESTIMATED TOTAL COST OF INTER PARTES PROCEEDINGS (P. I-139 to I-142, Q36i-Q36iv)



TOTAL COST COMPARISON OF FILING A PETITION FOR INTER PARTES PROCEEDINGS (IPR, CBM or PGR) TO TOTAL COST OF DEFENDING (P. I-143, Q36B)

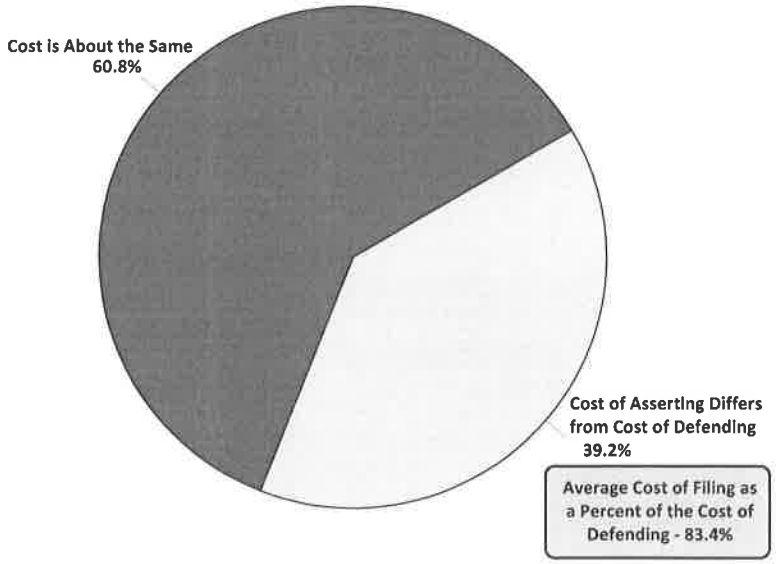


EXHIBIT 6

This product is part of the RAND Corporation monograph series. RAND monographs present major research findings that address the challenges facing the public and private sectors. All RAND monographs undergo rigorous peer review to ensure high standards for research quality and objectivity.

Where the Money Goes

Understanding Litigant Expenditures for Producing Electronic Discovery

Nicholas M. Pace, Laura Zakaras

Institute for Civil Justice

A RAND LAW, BUSINESS, AND REGULATION INSTITUTE

This research was conducted by the RAND Institute for Civil Justice, a research institute within RAND Law, Business, and Regulation, a division of the RAND Corporation.

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Preface

This monograph addresses one of the most persistent challenges of conducting litigation in the era of digital information: the costs of complying with discovery requests, particularly the costs of review. Using case studies of eight large corporations and a review of the literature on electronic discovery (e-discovery), we estimate the dimensions of those costs and identify effective ways to reduce them. We also examine the challenges of preserving electronic information and recommend steps that can be taken to address them.

This research was conducted by the RAND Institute for Civil Justice (ICJ), a research institute within RAND Law, Business, and Regulation (LBR). The ICJ is dedicated to improving the civil justice system by supplying policymakers and the public with rigorous and independent research. Its studies analyze litigation trends and outcomes, evaluate policy options, and bring together representatives of different interests to debate alternative solutions to policy problems. The ICJ builds on a long tradition of RAND research characterized by an interdisciplinary, empirical approach to public policy issues and rigorous standards of quality, objectivity, and independence.

LBR, a research division of the RAND Corporation, is dedicated to improving policy and decisionmaking in civil justice, corporate ethics and governance, and business regulation. It serves policymakers and executives in both government and the private sector through research and analysis on controversial and challenging issues in these areas.

Research is supported by pooled grants from a range of sources, including corporations, trade and professional associations, individuals, government agencies, and private foundations. It disseminates its work widely to policymakers, practitioners in law and business, other researchers, and the public. In accordance with RAND policy, all its reports are subject to peer review. Its publications do not necessarily reflect the opinions or policies of its research sponsors.

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Abbreviations

ABA	American Bar Association
BLS	Bureau of Labor Statistics
DESI	Discovery of Electronically Stored Information
EDRM	Electronic Discovery Reference Model
ESI	electronically stored information
FJC	Federal Judicial Center
FRCP	Federal Rules of Civil Procedure
FRE	Federal Rules of Evidence
GB	gigabyte
ICAIL	International Conference on Artificial Intelligence and Law
ICJ	RAND Institute for Civil Justice
IT	information technology
LBR	RAND Law, Business, and Regulation
LPO	legal process outsourcing
NAICS	North American Industry Classification System
NIST	National Institute of Standards and Technology
NPV	negative predictive value
OCR	optical character recognition
PPV	positive predictive value
ROC	receiver operating characteristic
TREC	Text REtrieval Conference

CHAPTER TWO

Production Expenditures, by Task

In this chapter, we examine how production costs in our sample cases break out by collection, processing, and review.

Total Costs of Production

Though it is not possible to assess the extent to which the cases included in our data collection actually reflect typical e-discovery production in the participating companies as we had requested, total expenditures do range from a seemingly modest $17,000 (in an intellectual property matter) to $27 million (in a product-liability case), with a median value of $1.8 million (see Table 2.1). Note that we were able to calculate total spend for ESI production in only 45 of the 57 cases for which we sought cost data. As is apparent in the tables and figures in this chapter, there were gaps in the information available to us that prevented applying the same set of metrics to all 57 cases. Some of the 12 cases missing from Table 2.1 might not, for example,

Table 2.1
Production Costs for 45 Cases

Subject Matter	Total Cost ($)
Intellectual property	17,183
Government subpoena	22,810
Product liability	38,743
Intellectual property	76,950
Intellectual property	82,478
Insurance	147,004
Government subpoena	186,692
Government subpoena	187,979
Fraud or false claims	252,473
Intellectual property	275,394
Contract	307,587
Intellectual property	328,405
Contract	334,372

Table 2.1—Continued

Subject Matter	Total Cost ($)
Intellectual property	432,588
Intellectual property	573,365
Intellectual property	708,016
Intellectual property	718,083
Government subpoena	788,928
Government subpoena	1,173,685
Contract	1,266,457
Intellectual property	1,324,597
Fraud or false claims	1,329,891
Government subpoena	1,770,715
Intellectual property	1,969,971
Product liability	2,031,138
Intellectual property	2,076,257
Intellectual property	2,150,000
Antitrust	2,169,189
Product liability	2,198,006
Product liability	2,210,724
Government subpoena	2,489,165
Intellectual property	2,541,383
Fraud or false claims	2,623,693
Government subpoena	3,007,116
Intellectual property	3,186,587
Fraud or false claims	3,208,863
Government subpoena	3,426,014
Contract	4,042,606
Product liability	4,418,022
Government subpoena	5,133,422
Employment	6,974,027
Intellectual property	7,803,064
Antitrust	8,367,649
Product liability	21,007,504
Product liability	27,118,520

have complete information about the costs of review or for all expenses associated with vendors, so we could not calculate the total spend for responding to requests for production.

Most of the cases included in our data collection involved discovery expenditures that were much larger than what a recent Federal Judicial Center (FJC) survey reported as the median total litigation expenditures of producing parties in a sample of federal cases.[1] The cost data presented in this monograph should be considered in light of the fact that the scope of production was atypical compared with that of the "average" case described in the FJC study. But total expenditures in and of themselves mean little in interpreting whether the costs of production were justified by the unique circumstances of the case, such as monetary claims made by the plaintiffs, the probative value of the information produced, or particular challenges faced during collection, processing, or review. We did attempt to collect information about stakes, but the results were judged to be unacceptable due to difficulties in applying a uniform definition for litigation value. For example, the stakes in one case were estimated by our organizational contact to be worth tens of millions of dollars if only the instant litigation were considered, but many hundreds of millions more based on that litigation's potential to disrupt the company's other lines of business if resulting media coverage was unfavorable or if a successful outcome for the opposing party spawned a rash of similar claims. The stakes associated with regulatory investigations were particularly difficult to determine. Some of the participating companies' representatives were quite frank in describing how they approached the problem of balancing e-discovery expenditures against the apparent stakes in a case, reporting that they would not shy away from committing what might seem to be a disproportional amount of resources to comply with an electronic-document demand if they believed that the claims against them were of questionable merit or the damages sought were grossly exaggerated.[2]

Perhaps a more useful way to view these cases is by the costs incurred for each gigabyte (GB) of what was actually turned over to the other side after collection, processing, and review were completed, as shown in Figure 2.1 (for a detailed list of cases presented in that figure, along with their primary subject matters, see Table A.1 in Appendix A). For most cases in our study group, those costs were less than $40,000 per gigabyte, and, for about one-third of the cases, less than $20,000. However, in one instance, the company spent $900,000 to produce an amount of data that would consume less than one-quarter of the available capacity of an ordinary DVD.[3] Arguably, it is not the volume of the production that matters but what it contained in terms of the data's intrinsic value (for example, the degree to which the data help provide all litigants with mutual knowledge of relevant facts). Such an analysis was beyond the scope of this monograph. Some cases in our collection did reach the trial stage, though the extent to which any e-discovery was transformed into admitted evidence and presented to the trier of fact is unknown.

The numbers are somewhat more consistent across cases when the focus is on the total costs per gigabyte reviewed. Arguably, gigabytes reviewed provides a more useful way of com-

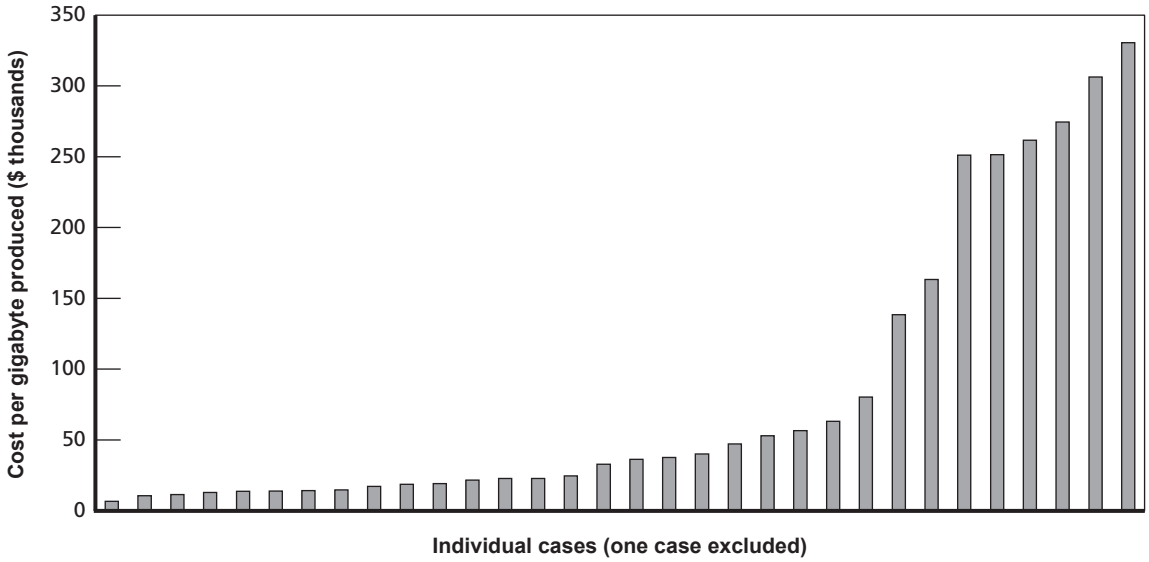
---

[1] Lee and Willging, 2009, Tables 4 and 5.

[2] We were confident of both the estimated stakes and total spend in just six instances. In four of those six cases, final production expenditures were 3 percent or less of case value; in a fifth, it was about 16 percent. In the remaining case, e-discovery expenditures were roughly about the same as the apparent monetary stakes in the case, but an adverse outcome in that particular litigation was said to have important implications for other actions in which the company was involved.

[3] The discussion concerns costs per gigabyte of data. In actuality, the case discussed involved a production of about 3.5 gigabytes of data in total, with total e-discovery–related expenditures of about $3.2 million.

Figure 2.1
Total Costs per Gigabyte Produced, 32 Cases



NOTE: The figure excludes one case in which costs per gigabyte produced were greater than $350,000.
RAND *MG1208-2.1*

paring the e-discovery process across cases because, at least in theory, the review stage is not primarily intended as a tool to reduce volume. Documents may be excluded from production because of concerns about privilege or a determination that they are not relevant and responsive. However, it is arguable that the "success" of a review is not measured by how many documents or gigabytes of data were ultimately withheld. As can be seen in Figure 2.2, the total costs per gigabyte reviewed were generally around $18,000, with the first and third quartiles in the 35 cases with complete information at $12,000 and $30,000, respectively.[4] There was one instance in which total costs for each gigabyte of data reviewed was $358,000; it appears that this case was subjected to an especially vigorous review effort using both outside counsel and offshore vendors, resulting in a final production that was just 40 percent of the volume of the reviewed data.

Costs of Collection

As the e-discovery world began to mature in the 1990s and early 2000s, many of the leading opinions and rule-making efforts during that period focused on issues of collection. Locating specific emails on disaster-recovery backup tapes that may not be in reasonably accessible formats, pulling files off inactive servers, accessing legacy computer systems, and sifting through metadata dominated the fact patterns of important court rulings and stakeholder complaints. But, in more-recent times, as represented by Figure 2.3, collection generally consumes less than 10 percent of total e-discovery expenditures.[5] There are exceptions, as can be seen in the right

[4] See also Table A.2 in Appendix A.

[5] See also Table A.3 in Appendix A.

EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JANSSEN BIOTECH, INC., Plaintiff, v. CELLTRION HEALTHCARE CO., LTD., CELLTRION, INC., and HOSPIRA, INC., Defendants.	)	Civil Action No. l:17-cv-11008-MLW

DEFENDANTS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS (NOS. 1–75)

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, the Local Rules of this Court, and this Court's June 21, 2017 Order (No. 15-10698 Dkt. 574), Defendants Celltrion Healthcare Co., Ltd., Celltrion, Inc. (together "Celltrion"), and Hospira, Inc. ("Hospira") (collectively "Defendants") hereby request that Plaintiff Janssen Biotech, Inc. ("Janssen") respond to the following requests by August 14, 2017. Documents and things should be produced at the offices of Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, or at such other place or in such other manner as may be mutually agreed upon by the parties.

Janssen lacks standing for its May 31, 2017 complaint, and the complaint should be dismissed for at least the reasons set forth in Defendants' motion to dismiss filed July 11, 2017. Further, Defendants contend that the parties and the Court should not devote resources to conducting discovery while Defendants' motion to dismiss is pending. These requests are propounded without waiver of any position of Defendants' with respect to standing, their motion to dismiss, or the question of whether further discovery on damages should be stayed until the Defendants' motion to dismiss the 2017 action is decided.

The ’083 patent is not infringed and is invalid, and Janssen is not entitled to any form of relief, monetary or otherwise. The below requests are made without any admission or waiver of rights or arguments regarding noninfringement, invalidity, or any of Janssen’s theories or claims regarding damages or other relief.

Defendants reserve all rights to serve additional discovery requests, including interrogatories, requests for production, requests for admission, and requests for discovery from third parties.

DEFINITIONS AND INSTRUCTIONS

1. These definitions and instruction incorporate by reference the Federal Rules of Civil Procedure and Local Rules of this Court.

2. "Biosimilar" means a biological product as defined under 42 U.S.C. § 262.

3. "BLA" means a Biologic License Application submitted to FDA, as authorized by 42 U.S.C. § 262 and as regulated by 21 C.F.R. §§ 600 et seq.

4. "Celltrion" means Defendant Celltrion, Inc. and/or Defendant Celltrion Healthcare Co., Ltd., and, where applicable, their officers, directors, employees, partners, corporate parents, subsidiaries, affiliates, successors, predecessors, and any Person or organization under their control.

5. "Celltrion's Biosimilar Infliximab" means the biologic product that is the subject of Celltrion's BLA (BLA 125544) for which Janssen's Remicade® (infliximab) products is the claimed reference product under 42 U.S.C. § 262(k).

6. "Communication(s)" means any transmission of information from one Person or entity to another or between or among two or more Persons or entities, including but not limited to conveyances of information by e-mail, text message, memorandum, letter, note, Document, telegram, fax, telephone, voicemail, recording, in-person communication, post, instant messaging, tweet, or other media, and also includes the circumstances by which You came into possession of the Document evidencing the communication.

7. "Defendants" means, individually and collectively, Celltrion and Hospira.

8. "Document(s)" is to be given its customary and broad sense and means originals and all other copies (whether in printed, optical, or electronic form) of all written or graphic materials however produced or reproduced, of every kind and description, in Your possession, custody, or control, including, without limitation, all content storage media and items, whether

handwritten, printed, recorded, filmed, typewritten, or produced by any other mechanical, optical, or electronic process, whether on disk, diskette, tape, card, hard drive, or otherwise stored in a memory either electronically, optically, digitally, graphically, or mechanically, whether or not asserted to be privileged or immune from discovery, and whether the item is a master or original or copy, including drafts of, or original, preliminary notes or marginal notations appearing on any Document, including self-stick removable notes, and any other information-containing paper or other medium, including but not limited to any such medium that in any way records or Documents a Communication.

9. "FDA" means the United States Food and Drug Administration.

10. "Hospira" means Defendant Hospira, Inc. and, where applicable, its officers, directors, employees, partners, corporate parents, subsidiaries, affiliates, successors, predecessors, and any Person or organization under their control.

11. "Infliximab" means chimeric monoclonal antibody that is the active ingredient in Remicade®.

12. "Infliximab Product(s)" means any and all products, compositions, formulations, or dosage forms containing Infliximab or Biosimilar Infliximab as the active ingredient, including but not limited to proposed, experimental, and commercial embodiments.

13. "Information" means information in any form, including but not limited to Documentary, electronic, graphical, or tabular, and communicated by any means, including but not limited to orally, in writing, in a Document, or via electronic communication.

14. "Janssen," "You," and "Your" mean Janssen Biotech, Inc., its predecessors (including Centocor, Inc. and Centocor Ortho Biotech, Inc.) and successors, its past and present parents, subsidiaries, and divisions, any entities in which they have or had an interest, its past and

present directors, officers, employees, and agents, and past and present representatives (including consultants and attorneys) of any of the foregoing, including any and all Persons acting or purporting to act, or who have acted or purported to act, on behalf of Janssen Biotech, Inc., its past and present parents, subsidiaries, and divisions, any entities in which they have or had an interest, its past and present directors, officers, employees, and agents, and past and present representatives (including consultants and attorneys) of any of the foregoing.

15. "Johnson & Johnson" and "J&J" mean Johnson & Johnson, its predecessors and successors, its past and present parents, subsidiaries, and divisions, any entities in which they have or had an interest (*e.g.*, the Johnson & Johnson family of companies), its past and present directors, officers, employees, and agents, and past and present representatives (including consultants and attorneys) of any of the foregoing, including any and all Persons acting or purporting to act, or who have acted or purported to act, on behalf of Johnson & Johnson, its past and present parents, subsidiaries, and divisions, any entities in which they have or had an interest, its past and present directors, officers, employees, and agents, and past and present representatives (including consultants and attorneys) of any of the foregoing.

16. "Janssen's BLA" means Janssen's Biologics License Application No. 103772, including any amendments, supplemental filings, or additions, filed with the FDA for approval to commercially market Remicade®.

17. "Person(s)" means any natural person, firm, association, partnership, government agency, or other entity and its officers, directors, partners, employees, former employees, representatives and agents.

18. "Remicade®" means any drug product or pharmaceutical formulation marketed or sold under the name Remicade®, any other drug product or pharmaceutical formulation

marketed further to the FDA's approval of Janssen's BLA, as amended and/or supplemented, and any Infliximab Product for which Janssen seeks damages.

19. "Remicade® Media" means any cell medium used to manufacture or produce Remicade®.

20. "'083 Patent" and "Asserted Patent" mean U.S. Patent No. 7,589,083.

21. "'083 Patent Inventors" means those individuals, individually and collectively, who contributed in any way to the conception of the subject matter claimed in U.S. Patent No. 7,589,083, including but not limited to the individuals listed on the face of the '083 Patent: David Epstein, Roger Monsell, Joseph Horwitz, Susan Lenk, Sadettin Ozturk, and Christopher Marsh.

22. "'083 Patent Media Product(s)" means any cell medium composition embodying the composition claimed in the '083 Patent.

23. "Reflecting," "referring," "relating to," "regarding," "concerning" or any derivation thereof shall mean, without limitation, being in any way legally, logically, or factually connected with the matter discussed.

24. As used in these Requests for Production ("Request"), the singular shall include the plural, the past tense shall include the present tense, and vice versa, the words "and" and "or" shall be both conjunctive and disjunctive, the word "all" shall mean "any and all," and the word "including" shall mean "including without limitation," whichever makes the Request more inclusive.

25. If You claim that a Request is in any way objectionable, respond to the portion of the Request believed to be unobjectionable and specifically identify that aspect of the Request that You claim to be objectionable and why.

26. If You claim that Information requested or required in response to a given Request is also responsive to another Request, You may not answer the Request by referring to the answer to another Request unless the answer to the Request being referred to supplies a complete and accurate response to the Request being answered.

27. If You object to any Request on the ground that it is vague and/or ambiguous, identify the particular words, terms, or phrases that You assert make such Request vague and/or ambiguous and specify the meaning You actually attribute to such words, terms, or phrases for purposes of Your response.

28. If any requested Document is known, thought, or believed to have once existed and cannot now be located, or has been destroyed or discarded, identify the Document by stating the last known custodian of the Document, the date the Document was discarded or destroyed, the manner and means by which the Document was destroyed or discarded, the reason or reasons the Document was discarded or destroyed, the efforts made to locate such Document or a duplicate of it, and a statement describing the contents of the Document and all authors, addressees and recipients of the Document.

29. Each Document responsive to any Request shall be produced in its entirety, including all attachments and enclosures. If a portion of a Document is responsive to a Request, produce the entire Document, including all attachments, enclosures, "post-it"-type notes, and any other part physically attached to the Document. If a Document responsive to any Request cannot be produced in full, it shall be produced to the extent possible with an explanation stating why.

30. Separately with respect to each piece of Information called for by these Requests that You withhold under a claim of privilege or otherwise, state that You are withholding it and

explain why, including a description of the Information withheld in accordance with Fed. R. Civ. P. 26(b)(5).

31. No Request shall be read as limiting any other Request.

32. Unless otherwise stated, all electronically stored information ("ESI") shall be produced in the form in which it is ordinarily maintained, or as text searchable single page TIFF images with associated multi-page text files containing extracted text or OCR with Concordance and Opticon load files containing all requisite Information including relevant metadata. The integrity of the underlying ESI including formatting, metadata, and revision history shall be preserved.

33. The Requests are continuing and require, to the extent authorized by Fed. R. Civ. P. 26(e), production of any additional responsive Documents that may be located or acquired by You or those in privity with You after the date of Your original production.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

All Documents relating to development, testing, and evaluation of cell culture media for commercial production of Remicade® and Infliximab Products, including but not limited to '083 Patent Media Products and/or Remicade® Media.

REQUEST FOR PRODUCTION NO. 2:

All Documents relating to Janssen's consideration of or decision not to use any '083 Patent Media Product to commercially produce Remicade® and any other Infliximab Products.

REQUEST FOR PRODUCTION NO. 3:

All Documents, created by You or on Your behalf, that constitute, refer to, or reflect analysis of or Information about the United States market and all other markets in which Infliximab Products are sold for (a) Remicade®, (b) Infliximab Products generally, or (c) Celltrion's Biosimilar Infliximab.

REQUEST FOR PRODUCTION NO. 4:

All Documents relating to business plans, commercial strategic plans, or marketing plans relating to Remicade® for sale in the United States and in all other markets in which Infliximab Products are sold.

REQUEST FOR PRODUCTION NO. 5:

All Documents concerning Communications with FDA regarding sales or marketing of Remicade®, including any comparison to other biologic or pharmaceutical drugs.

REQUEST FOR PRODUCTION NO. 6:

All Documents concerning physician demand, medical provider demand, insurer demand, or consumer demand for Remicade® in the United States and in all other markets in which Infliximab Products are sold, including all articles, press releases, consultant reports, trade press, surveys concerning demand or consumer preferences, and demand analyses.

REQUEST FOR PRODUCTION NO. 7:

Documents sufficient to identify all competitive products to Remicade® (*e.g.*, products used to treat one or more conditions treated by Remicade®) in the United States and in all other markets in which Infliximab Products are sold, as between or among Infliximab Products, other Biosimilars, other pharmaceuticals, or other products or treatment used to treat one or more conditions treated by Remicade®.

REQUEST FOR PRODUCTION NO. 8:

All Documents concerning competition between Remicade® and any other product or treatment used to treat one or more conditions treated by Remicade®, including, without limitation, assessments of projected market share and/or revenue analyses, consumer surveys, consultant surveys, economic studies, promotional materials, sales materials, training materials, or any other Documents concerning the (dis)advantages, benefits, weaknesses, or limitations of, Remicade® in relation to any other product or treatment. This Request applies to competition in the United States and in all other markets in which Infliximab Products are sold.

REQUEST FOR PRODUCTION NO. 9:

All Documents concerning the business plans, commercial strategic plans, and marketing plans of all '083 Patent Media Products for sale in the United States and in all other markets in which '083 Patent Media Products are sold, including any plans, research, projections, reports, and budgets for the sale of such media or soluble composition.

REQUEST FOR PRODUCTION NO. 10:

All Documents regarding any financial valuations of the '083 Patent or '083 Patent Media Products, including for licensing, transfer pricing, inter-company transfer, transaction purposes, or any other reason.

REQUEST FOR PRODUCTION NO. 11:

All Documents concerning consumer demand for '083 Patent Media Products in the United States and worldwide, including all articles, press releases, consultant reports, trade press, surveys concerning Consumer demand or consumer preferences, and consumer demand analyses.

REQUEST FOR PRODUCTION NO. 12:

Documents sufficient to identify all competitive products to '083 Patent Media Products (*e.g.*, Remicade® Media, and products used to or capable of producing Remicade® or any other Infliximab Product).

REQUEST FOR PRODUCTION NO. 13:

All Documents concerning competition between '083 Patent Media Products and any other product that is or may be used for the same purpose(s) as the '083 Patent Media Products, including, without limitation, assessments of projected market share and/or revenue analyses, consumer surveys, consultant surveys, economic studies, promotional materials, sales materials, training materials, or any other Documents concerning the (dis)advantages, benefits, weaknesses, or limitations of, the '083 Patent Media Products in relation to any other product. This Request applies to competition in the United States and in all other markets in which '083 Patent Media Products are sold.

REQUEST FOR PRODUCTION NO. 14:

Documents sufficient to identify possible or anticipated use(s) of '083 Patent Media Products.

REQUEST FOR PRODUCTION NO. 15:

All Documents relating to projected or estimated sales (in units and dollars), costs, profits, pricing, market share, sales volume, market projections or analysis, or consumer profiles concerning Remicade® for sale in the United States and in all other markets in which Infliximab Products are sold.

REQUEST FOR PRODUCTION NO. 16:

All Documents concerning the potential effect of selling Remicade® on promoting sales of other products, including, but not limited to, derivative or convoyed sales.

REQUEST FOR PRODUCTION NO. 17:

Documents sufficient to identify the total number of units of Remicade® sold, in the United States and in all other markets in which Infliximab Products are sold, to end-payers, on a monthly, quarterly, annual and/or other period basis, together with Documents or data sufficient to show: (a) the location of sales (country, city, and state); (b) product description; (c) product strength; (d) product form; (e) package size in terms of units per package; and (f) NDC, UPC, or SKU.

REQUEST FOR PRODUCTION NO. 18:

All Documents reflecting the sales and/or prescriptions for Remicade® by quarter and by year, as reported in dollars and number of units of Remicade® sold, including (a) National Drug and Therapeutic Index (NDTI) data, (b) Xponent data and/or Xponent PlanTrak data, (c) Formulary Focus data, (d) IMS data, (e) Scott-Levin data, (f) Calls, Samples, and Details data, (g) Integrated Promotional Services (IPS) data, and (h) Early View data.

REQUEST FOR PRODUCTION NO. 19:

All Documents concerning the costs, actual revenues, royalties, expenses, returns, profits, or profit margins relating to the sale of Remicade® sold in the United States and in all other markets in which Infliximab Products are sold on a monthly and annual basis, including Documents reflecting: (a) gross revenues; (b) net revenues; (c) fixed and variable costs of goods sold; (d) fixed and variable costs of manufacturing; (e) sales and distribution costs; (f) marketing, advertising, promotional, and sales expenses; (g) fixed and variable operating expenses; (h) research and development expenditures (including costs related to Remicade® Media and costs for testing cell media not ultimately used to produce Remicade®); (i) licensing fees and royalties paid and/or received; (j) depreciable and capital improvements; (k) materials cost; (l) labor cost; (m) marginal cost; (n) rebates and discounts; (o) unit volume of sold net of returns; (p) gross profits; (q) operating profits; (r) net profits; and (s) allocation of overhead costs not booked separately.

REQUEST FOR PRODUCTION NO. 20:

Documents sufficient to show how any revenues, royalties, returns, and profits relating to the sale of Remicade®, sold in the United States and in all other markets in which Infliximab Products are sold, are distributed between Janssen and other Johnson & Johnson entities.

REQUEST FOR PRODUCTION NO. 21:

All Documents relating to projected or estimated sales (in units and dollars), costs, profits, pricing, market share, sales volume, market projections or analysis, or consumer profiles concerning '083 Patent Media Products for sale in the United States and in all other markets in which '083 Patent Media Products are sold.

REQUEST FOR PRODUCTION NO. 22:

All Documents, created by You or on Your behalf, that constitute, refer to, or reflect analysis of, or Information about, pricing of (a) Remicade®, (b) Infliximab Products, or (c) Celltrion's Biosimilar Infliximab in the United States and in all other markets in which Infliximab Products are sold, including, but not limited to, the effect of price on demand or sales of Infliximab Products, price elasticity, and the effect of Infliximab Product pricing on demand or sales of products used to treat one or more conditions treated by Remicade®.

REQUEST FOR PRODUCTION NO. 23:

All Documents that constitute, refer to, or reflect Your pricing strategy for Remicade® that is made, sold, offered for sale, used, or imported into the United States, including but not limited to any price lists, pricing manuals, pricing histories, pricing plans, pricing policies, pricing forecasts, pricing strategies, pricing analyses, pricing projections, or pricing decisions, and Documents showing rebate calculations.

REQUEST FOR PRODUCTION NO. 24:

All product-specific profit and loss statements, including but not limited to Documents or data concerning any of the following financial characteristics of Remicade®, broken down by indicated treatment if available: (a) the total amount of revenue from sales; (b) the total gross profit from sales; (c) the total net profit from sales, together with all expenses, deductions, allowances or other adjustments used to calculate net profits; and (d) the total amount spent on marketing, advertising, promotions and sales both in the aggregate and based on the particular type of expense.

REQUEST FOR PRODUCTION NO. 25:

Janssen's financial reports and statements from the year(s) of the initial research and development that led to the subject matter of the '083 Patent to the present including annual reports, monthly reports, balance sheets and statements of income, gross revenue, gross profit, net profit, and costs.

REQUEST FOR PRODUCTION NO. 26:

Documents sufficient to identify what You contend the measure of lost profits would be in this case, or which would otherwise establish what You contend is the value of the '083 Patent.

REQUEST FOR PRODUCTION NO. 27:

All Documents that support, refute, or concern Your assertion that Janssen has lost or will lose "market share for and profits from Remicade® in the markets in which Defendants' Biosimilar [infliximab] product is marketed," as asserted in the Complaint.

REQUEST FOR PRODUCTION NO. 28:

All Documents that support, refute, or concern Your assertion that Janssen's licensee for distribution of Remicade® has lost or will lose "market share for and profits from Remicade® in markets in which Defendants' Biosimilar [infliximab] product is marketed," as asserted in the Complaint.

REQUEST FOR PRODUCTION NO. 29:

Documents sufficient to show Your strategy or planning (or both) with respect to reimbursements to be received by any Person or entity for purchase of Remicade® in the United States and in all other markets in which Infliximab Products are sold.

REQUEST FOR PRODUCTION NO. 30:

All Documents that constitute, refer to, or reflect Your strategy or analysis (or both) for discounts or rebates (or both) of Remicade® on sale in the United States and in all other markets in which Infliximab Products are sold.

REQUEST FOR PRODUCTION NO. 31:

Documents sufficient to show Remicade®'s (i) wholesale acquisition cost, (ii) retail or usual and customary price, (iii) net sales, (iv) total prescription market share and volume, (v) new prescription market share and volume, and (vi) marketing budget for each month since its introduction in the U.S.

REQUEST FOR PRODUCTION NO. 32:

All Documents concerning the costs, expenses, or profitability of making, using, offering for sale, research and development, commercialization, design, testing, characterization, evaluation, regulatory approval, formulating, manufacturing, packaging, labeling, supplying, importation, export, distribution, promotion, marketing, or pursuit of regulatory approval for any '083 Patent Media Products.

REQUEST FOR PRODUCTION NO. 33:

All Documents concerning the costs, expenses, or profitability of making, using, offering for sale, research and development, commercialization, design, testing, characterization, evaluation, regulatory approval, formulating, manufacturing, packaging, labeling, supplying, importation, export, distribution, promotion, marketing, and pursuit of regulatory approval for Remicade® Media.

REQUEST FOR PRODUCTION NO. 34:

All Documents concerning the costs, expenses, or profitability of making, using, offering for sale, research and development, commercialization, design, testing, characterization, evaluation, regulatory approval, formulating, manufacturing, packaging, labeling, supplying, importation, export, distribution, promotion, marketing, and pursuit of regulatory approval for any cell medium or cell medium composition evaluated, tested, contemplated, or proposed for use to commercially produce Remicade®.

REQUEST FOR PRODUCTION NO. 35:

All Documents concerning the costs, expenses, or profitability of making, using, offering for sale, research and development, commercialization, design, testing, characterization, evaluation, regulatory approval, formulating, manufacturing, packaging, labeling, supplying, importation, export, distribution, promotion, marketing, and pursuit of regulatory approval for Remicade®.

REQUEST FOR PRODUCTION NO. 36:

All Documents regarding any monetary or non-monetary compensation, benefits, bonuses, or inducements that Janssen or any other Johnson & Johnson family company offered, provided, or proposed to any of the ’083 Patent Inventors related to the ’083 Patent Media Products and/or the ’083 Patent, including Communications concerning profit sharing, salary, commissions, bonuses, fringe benefits, insurance, stock options, health and medical benefits, vacation benefits, retirement benefits, deferred compensation benefits and annuity benefits.

REQUEST FOR PRODUCTION NO. 37:

All Documents regarding any monetary or non-monetary compensation, benefits, bonuses, or inducements that Janssen or any other Johnson & Johnson family company offered, provided, or proposed to any of the ’083 Patent Inventors after the ’083 Patent Inventors left the employment of Janssen, including Communications concerning profit sharing, salary, commissions, bonuses, fringe benefits, insurance, stock options, health and medical benefits, vacation benefits, retirement benefits, deferred compensation benefits and annuity benefits.

REQUEST FOR PRODUCTION NO. 38:

Documents sufficient to identify each Janssen and/or Johnson & Johnson entity that has employed or currently employees each of the ’083 Patent Inventors.

REQUEST FOR PRODUCTION NO. 39:

All agreements or licenses, and Documents regarding agreements or licenses, between or among Janssen and New York University that refer to or relate to Remicade®.

REQUEST FOR PRODUCTION NO. 40:

All agreements or licenses, and Documents regarding current, former, future, proposed, contemplated, or rejected agreements or licenses, between You and any third party that refer to or relate to the making, use, offering for sale, sale, research, development, commercialization, design, testing, characterization, evaluation, regulatory approval, formulating, manufacturing, packaging, labeling, supplying, importation, export, distribution, promotion, marketing, pursuit of regulatory approval in the United States, profit sharing, or royalty distribution of Remicade®.

REQUEST FOR PRODUCTION NO. 41:

All agreements or licenses, and Documents regarding current, former, future, proposed, contemplated, or rejected agreements or licenses, between You and any third party that refer to or relate to the making, use, offering for sale, sale, research, development, commercialization, design, testing, characterization, evaluation, regulatory approval, formulating, manufacturing, packaging, labeling, supplying, importation, export, distribution, promotion, marketing, pursuit of regulatory approval in the United States, profit sharing, or royalty distribution of '083 Patent Media Products.

REQUEST FOR PRODUCTION NO. 42:

All agreements or licenses, and Documents regarding current, former, future, proposed, contemplated, or rejected agreements or licenses, between You and any third party that refer to or relate to the making, use, offering for sale, sale, research, development, commercialization, design, testing, characterization, evaluation, regulatory approval, formulating, manufacturing, packaging, labeling, supplying, importation, export, distribution, promotion, marketing, pursuit of regulatory approval in the United States, profit sharing, or royalty distribution of Remicade® Media.

REQUEST FOR PRODUCTION NO. 43:

All agreements or licenses, and Documents regarding current, former, future, proposed, contemplated, or rejected agreements or licenses, between You and any third party that refer to or relate to the making, use, offering for sale, sale, research, development, commercialization, design, testing, characterization, evaluation, regulatory approval, formulating, manufacturing, packaging, labeling, supplying, importation, export, distribution, promotion, marketing, pursuit of regulatory approval in the United States, profit sharing, or royalty distribution of cell culture media.

REQUEST FOR PRODUCTION NO. 44:

All agreements or licenses, and Documents regarding current, former, future, proposed, contemplated, or rejected agreements or licenses, between You and any third party that refer to

or relate to the making, use, offering for sale, sale, research, development, commercialization, design, testing, characterization, evaluation, regulatory approval, formulating, manufacturing, packaging, labeling, supplying, importation, export, distribution, promotion, marketing, pursuit of regulatory approval in the United States, profit sharing, or royalty distribution of any biologic drug.

REQUEST FOR PRODUCTION NO. 45:

All Documents related to each instance of licensing of related applications, related patents, or foreign counterparts of the '083 Patent, including a copy of each such license and any appendices, attachments, or amendments thereto.

REQUEST FOR PRODUCTION NO. 46:

All Documents relating to the royalty rate or rates that You contend would constitute a reasonable royalty under 35 U.S.C. § 284, assuming infringement of the '083 Patent, including, for example, Documents regarding any facts, circumstances, legal contentions, and other factors upon which Janssen bases its contention, including any or all of the factors to be considered under a Georgia-Pacific analysis; the relevant time period(s) during which the rate or rates should be applied; and any assumptions, estimates, circumstances, and calculations upon which Janssen bases such contention(s).

REQUEST FOR PRODUCTION NO. 47:

All Documents relating to Janssen's assertion that it is entitled to damages for lost profits, assuming infringement of the '083 Patent, including, for example, Documents regarding any facts, circumstances, legal contentions, and other factors upon which Janssen bases its contention; the relevant time period(s) for which lost profits are sought; and any assumptions, estimates, circumstances, and calculations upon which Janssen bases such contention(s).

REQUEST FOR PRODUCTION NO. 48:

All Documents relating to Janssen's assertion that it is entitled to damages for price erosion, assuming infringement of the '083 Patent, including, for example, Documents regarding any facts, circumstances, legal contentions, and other factors upon which Janssen bases its contention; the relevant time period(s) for which recovery for price erosion is sought; and any assumptions, estimates, circumstances, and calculations upon which Janssen bases such contention(s).

REQUEST FOR PRODUCTION NO. 49:

Documents sufficient to show the complete composition of and manufacturing process for '083 Patent Media Products that have ever been made, used, offer for sale, sold, or commercialized by Janssen or any licensee of the '083 Patent.

REQUEST FOR PRODUCTION NO. 50:

Documents sufficient to show the complete composition and formula of, and manufacturing process for, Remicade® Media.

REQUEST FOR PRODUCTION NO. 51:

Documents sufficient to show the sources of or vendors for Remicade® Media or all components or ingredients of Remicade® Media.

REQUEST FOR PRODUCTION NO. 52:

All Documents that refer to or mention Infliximab, any Infliximab Product, or the Sp2/0 cell line and also Iscove's medium, Iscove's powder, Iscove's modified Dulbecco's medium or IMDM.

REQUEST FOR PRODUCTION NO. 53:

All Documents that refer to or mention Infliximab, any Infliximab Product or the Sp2/0 cell line and also CD Hybridoma Medium or any version or modification of CD Hybridoma Medium.

REQUEST FOR PRODUCTION NO. 54:

All publicly available Documents that disclose a cell culture medium or cell culture medium composition that has been or may be used for producing Infliximab or any Infliximab Product.

REQUEST FOR PRODUCTION NO. 55:

Documents sufficient to identify all cell culture media or media compositions of which Janssen is aware that can be used to produce infliximab and which Janssen contends are not '083 Patent Media Products, including Documents sufficient to show that any such media or media composition is not an '083 Patent Media Product.

REQUEST FOR PRODUCTION NO. 56:

Documents sufficient to show all Janssen and Johnson & Johnson entities and third parties involved in the development, manufacture, testing, sale, offer for sale, importation, and exportation of '083 Patent Media Products.

REQUEST FOR PRODUCTION NO. 57:

Documents sufficient to show all Janssen and Johnson & Johnson entities and third parties involved in the development, manufacture, testing, sale, offer for sale, importation, and exportation of Remicade® Media.

REQUEST FOR PRODUCTION NO. 58:

Documents sufficient to show all Janssen and Johnson & Johnson entities and third parties involved in the development, manufacture, testing, sale, offer for sale, importation, and exportation of Remicade®.

REQUEST FOR PRODUCTION NO. 59:

Documents relating to the capacity of all Janssen and Johnson & Johnson entities to develop, manufacture, sell, import, and export Remicade® and any other Infliximab Products.

REQUEST FOR PRODUCTION NO. 60:

All Documents concerning any agreement between a third party and Janssen or any other J&J entity regarding any partnership, collaboration, or any other joint venture for the sale, marketing, promotion, or manufacture of Remicade®.

REQUEST FOR PRODUCTION NO. 61:

All Documents which form the basis for, or which contradict, Your contention that this case is "exceptional," as asserted in the Complaint.

REQUEST FOR PRODUCTION NO. 62:

All Documents that support, refute, or concern Your contention that the alleged infringement of the '083 Patent was willful, as asserted in the Complaint.

REQUEST FOR PRODUCTION NO. 63:

All confidential, non-public, and/or sealed filings and discovery responses in the action entitled *Janssen Biotech, Inc. v. Samsung Bioepis Co., Ltd.*, Case No. 17-cv-03524-MCA-SCM (D.N.J.).

REQUEST FOR PRODUCTION NO. 64:

All Documents relating to, and Documents sufficient to identify the bases for, Janssen's contention that Samsung Bioepis Co., Ltd. infringes one or more claims of the '083 Patent as asserted in *Janssen Biotech, Inc. v. Samsung Bioepis Co., Ltd.*, Case No. 17-cv-03524-MCA-SCM (D.N.J.), including the protocol for and results of any testing of Samsung Bioepis Co., Ltd.'s products conducted by, for, or on behalf of Janssen.

REQUEST FOR PRODUCTION NO. 65:

All transcripts of court hearings in the action entitled *Janssen Biotech, Inc. v. Samsung Bioepis Co., Ltd.*, Case No. 17-cv-03524-MCA-SCM (D.N.J.).

REQUEST FOR PRODUCTION NO. 66:

Documents sufficient to identify all accused products and the compositions of all accused products in the action entitled *Janssen Biotech, Inc. v. Samsung Bioepis Co., Ltd.*, Case No. 17-cv-03524-MCA-SCM (D.N.J.).

REQUEST FOR PRODUCTION NO. 67:

All confidential, non-public, and/or sealed filings in the action entitled *Janssen Biotech, Inc. v. HyClone Labs. Inc.*, Case No. 16-cv-00071-JNP-EJF (D. Utah).

REQUEST FOR PRODUCTION NO. 68:

All Documents relating to, and Documents sufficient to identify the bases for, Janssen's contention that HyClone Laboratories, Inc. infringes one or more claims of the '083 Patent as asserted in *Janssen Biotech, Inc. v. HyClone Labs. Inc.*, Case No. 16-cv-00071-JNP-EJF (D. Utah), including the protocol for and results of any testing of GE's or HyClone Laboratories, Inc.'s products conducted by, for, or on behalf of Janssen.

REQUEST FOR PRODUCTION NO. 69:

All transcripts of court hearings in the action entitled *Janssen Biotech, Inc. v. HyClone Labs. Inc.*, Case No. 16-cv-00071-JNP-EJF (D. Utah).

REQUEST FOR PRODUCTION NO. 70:

Documents sufficient to identify all accused products in the action entitled *Janssen Biotech, Inc. v. HyClone Labs. Inc.*, Case No. 16-cv-00071-JNP-EJF (D. Utah).

REQUEST FOR PRODUCTION NO. 71:

Documents sufficient to identify all Persons or entities aside from Defendants whom You contend infringe or practice, or have infringed or practiced, the '083 Patent, including identification of all products You contend infringe or practice the '083 Patent.

REQUEST FOR PRODUCTION NO. 72:

Documents sufficient to show how any monetary damages recovered in this case will be distributed among Janssen, Johnson & Johnson entities, or any other third party, including identification of which entities will recover any portion of damages.

REQUEST FOR PRODUCTION NO. 73:

All Documents that support, refute, or concern whether You or any licensee of the '083 Patent marked any products and/or packaging with the '083 Patent.

REQUEST FOR PRODUCTION NO. 74:

All Documents that were considered by, or form the basis of, Your experts' opinion on or determination of the amount and type of damages to be awarded in this case.

REQUEST FOR PRODUCTION NO. 75:

All Documents and things referred to, relied upon, cited, identified, or otherwise used to prepare any answer to any Interrogatory propounded by Defendants in the present action.

Dated: July 11, 2017

Respectfully submitted,

Celltrion Healthcare Co., Ltd., Celltrion, Inc., and Hospira, Inc.

By their attorneys,

/s/Andrea L. Martin, Esq.

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CERTIFICATE OF SERVICE

I, Andrea L. Martin, hereby certify that this Document was served on counsel of record by electronic mail on July 11, 2017.

/s/Andrea L. Martin, Esq.
Andrea L. Martin, Esq.