

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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|---------------------|---|---------------|
| AMGEN INC., et al., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | 2:17-cv-01235 |
| v. |) | |
| |) | |
| MYLAN INC., et al., |) | |
| |) | |
| Defendants. |) | |

ORDER

Pending before the Court is Defendant’s Motion for Judgment on the Pleadings Pursuant to Rule 12(c) (the “Motion”). (ECF No. 79). For the reasons that follow, it is hereby ORDERED that the Motion is DENIED WITHOUT PREJUDICE.

The Parties have fully briefed the pending Motion. (ECF Nos. 80, 81, 86, 87, 95, 97). Shortly after the Motion was filed, the parties identified multiple claim terms in dispute in the asserted patents: U.S. Patent No. 9,643,997 and U.S. Patent No. 8,273,707 (the “’707 Patent”). (ECF No. 100). In the Court’s estimation, the Defendant advances several arguments in support of its Motion that depend on the Court’s construction of at least two of these terms in dispute in the ’707 Patent: “mixing a preparation containing the protein with a combination of a first salt and a second salt” and “between about 0.1 M and 1.0.” The Court agrees with Plaintiff insofar as that the Defendant’s Motion cannot be resolved so long as the scope and construction of at least these terms remains in dispute. (Amgen Resp. Br. at 3, ECF No. 86).

The Court recognizes that the Court may engage in claim construction at the pleading stage. *See Scripps Res. Inst. v. Illumina, Inc.*, No, 2017 WL 1361623 (N.D. Cal. Apr. 14, 2017); *see generally Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996) (holding that

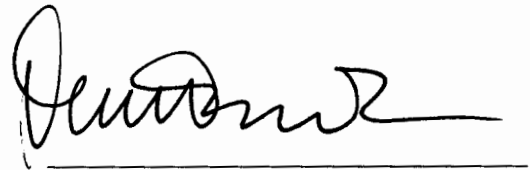
claim construction is a matter of law to be determined exclusively by the Court). But it is not always appropriate to do so, especially “where the Court finds that it would benefit from additional briefing and evidence presented at the claim construction phase.” *Scripps*, 2017 WL 1361623 at *4. Such additional evidence is already before the Court. It would thus make little sense for the Court to rule on Defendant’s Motion prior to issuing its Opinion and Order construing the claim terms in dispute between the Parties.

The Parties have fully briefed their arguments regarding their proposed constructions of the claim terms in dispute, (ECF Nos. 106, 109, 110, 114, 130, 132), and the Court heard Oral Argument on these positions on September 21, 2018. The claim construction matter is fully ripe for disposition. Several dispositive considerations in the Defendant’s pending Motion are intertwined with the Court’s construction of the Parties’ disputed claim terms. For example, Mylan argues that the ’707 Patent claims require that the salts and protein must be mixed prior to loading the protein/salt mixture onto the column, and thus their process does not infringe. (Mylan Br. at 20, ECF No. 80). Mylan also argues that their process does not infringe the ’707 Patent because the claimed salt concentration of “about 0.1 M to about 1.0” cannot include concentrations as low as 0.04 M. (*Id.* at 22–24). In the Court’s estimation, Amgen’s arguments in opposition to the Motion are premised on the Court adopting contrary constructions than the ones that Mylan proposes. (Amgen Br. at 9–10, 20–24, ECF No. 86).

The arguments asserted by the respective Parties could materially change depending on the Court’s construction of at least these terms. For these reasons, the Motion at ECF No. 79 is hereby DENIED WITHOUT PREJUDICE subject to its reassertion (in whole or in part) following the issuance of the Court’s Claim Construction Opinion and Order. If Defendants

reassert their Motion, the Parties will be granted leave to file new briefs in support of, and in opposition to, the Motion, or to rely on those previously filed.

It is further ORDERED that all discovery-related deadlines and the obligations to engage in discovery are hereby STAYED and held in abeyance pending further Order. New deadlines will be set by further Order of the Court following the issuance of the Court's Claim Construction Opinion and Order.

A handwritten signature in black ink, appearing to read 'Mark R. Hornak', written over a horizontal line.

Mark R. Hornak
United States District Judge

Dated: November 15, 2018
cc: All counsel of record