In the United States Court of Federal Claims

No. 26-12
(Filed: June 12, 2026)

* *

MNG BIO, LLC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* *

ORDER

Pending in this patent infringement claim brought under 28 U.S.C. § 1498(a) is defendant's motion to dismiss. Plaintiff, mNG Bio, LLC ("mNG") alleges infringement of United States Patent No. 10,221,221 ("the '221 Patent") by defendant, acting in and through private party ModernaTX, Inc. ("Moderna"), which held a contract with the government to develop a COVID-19 vaccine. Defendant invokes Rule 12 (b)(1) of the Rules of the Court of Federal Claims ("RCFC") to contend that this court lacks jurisdiction due to the operation of 28 U.S.C. §1500. In addition, it raises another issue under RCFC 12(b)(1) and argues, pursuant to RCFC 12(b)(6), that the complaint fails to state a claim. The matter is fully briefed, and oral argument was held on June 10, 2026. For the reasons outlined below we deny defendant's motion.

BACKGROUND[1]

mNG developed and patented mNeonGreen, a fluorescent protein to aid researchers in creating vaccines. mNeonGreen allows scientists to "determine receptor expression and dynamics with therapeutic outcome [sic] for high-throughput systems." Complaint ("Compl.") ¶ 32, Dkt. No. 1. The protein's fluorescence lets observers "see" microscopic objects better. *Id.* at

[1] Unless otherwise noted, these facts are drawn from the complaint.

¶ 30. Instead of using the time-intensive "immunostaining" technique to identify important molecules, mNeonGreen allows researchers to omit steps. *Id.* at ¶ 67. This is especially useful when developing vaccines where long delays are typically incurred as researchers winnow a field of thousands of candidate vaccines to find a handful that are functional.

In 2020, the Trump administration launched Operation Warp Speed to expedite the production of a COVID-19 vaccine. On April 16, 2020, the Department of Health and Human Services funded Moderna's vaccine development through contract number 75A501-20-C-00034 ("the C-034 contract"). *Id.* at ¶ 35. The government reserved to itself "ownership and applicable usage rights of all materials/product (e.g., vaccines, validated lots) manufactured and/or acquired with Government funds, throughout the Contract's entire period of performance." *Id.* at ¶ 44. The contract expressly incorporated Federal Acquisition Regulation ("FAR") 52.227-1, which states that, "[t]he Government authorizes and consents to all use and manufacture, in performing this contract or any subcontract at any tier, of any invention described in and covered by a United States patent." 48 C.F.R. §52.227-1 ("Authorization and Consent"). Under this contract, Moderna successfully developed SARS-CoV-2 vaccines using messenger ribonucleic acids. Moderna named its primary vaccine product Spikevax.

In developing Spikevax, Moderna used and still uses a fluorescent assay named "FRNTmNG." Compl. ¶ 53, Dkt No. 1. An assay is a test for antibodies to determine how well they perform against a given virus. *Id.* According to plaintiff, in Moderna's trial number NCT04283461 and other studies, the company used an assay to narrow and evaluate vaccine candidates. *Id.* at ¶ 60. Plaintiff alleges that this assay was based on mNeonGreen and used without permission. Moderna used three different methods including, "the focus reduction neutralization test mNeonGreen (FRNTmNG), which uses recombinant SARS-CoV-2 expressing the fluorescent reporter gene mNeon-Green." *Id.* Ex. G, 2429. Moderna ultimately produced Spikevax from this process and generated approximately $47 billion from its sales. Compl. ¶ 75, Dkt. No. 1.

On January 7, 2026, mNG filed suit here seeking "reasonable and entire compensation for the unauthorized and unlicensed use" of the mNeonGreen product disclosed in the '221 patent. *Id.* at 1. Plaintiff alleges,

based on the government's statement of interest in another case,[2] that defendant granted its express "authorization and consent" for Moderna's use of patented inventions in the C-034 contract. mNG argues that defendant, through Moderna, infringed the '221 patent entitling plaintiff to a reasonable royalty or other appropriate measure of compensation. Plaintiff filed the complaint "in the alternative to liability directly against Moderna." Compl. ⁋ 11, Dkt. No. 1. The complaint "expressly reserv[ed] mNG Bio's primary contention that Moderna is liable for the acts of infringement concerning or relating to Spikevax or any Moderna-related COVID vaccine." *Id.* Plaintiff also "expressly reserve[d] its position on which of Moderna and/or the United States are ultimately to be liable for each of the infringing acts." *Id.* at ⁋ 13.

On the next day, January 8, 2026, plaintiff filed a different complaint, naming as defendant only Moderna and its affiliates, in the United States District Court for the District of Massachusetts. *See* Def. Mot. to Dismiss, Ex. 1, ("D. Mass. Complaint") Dkt. No. 8.[3] In it, plaintiff alleged that Moderna began using mNeonGreen before the C-034 contract. *Id.* at ¶ 9. In some respects, the two complaints were similar. *Compare* Compl. ¶¶ 53–58; 60–65; 67–76, *with* D. Mass. Compl. ¶¶ 5–8; 36–46; 52–55; 57 (outlining "accused products" in near verbatim language). *Compare also* Compl. ¶¶ 78–86 (entitled "Unlicensed Use of the '221 Patent by or for the Government"), *with* D. Mass. Compl. ¶¶ 58–66 (labeled as "Defendant's Use of the mNeonGreen Neutralization Assay at all times"). While the complaint here speaks in terms of "Defendant and/or Moderna," the District Court Complaint refers only to Moderna. *Compare, e.g.,* Compl. ¶ 54, *with* D. Mass. Compl. ¶ 35. The District Court complaint also states that "Moderna is legally responsible for" the alleged infringement. D. Mass. Compl. ¶ 35.

On April 23, 2026, defendant moved to dismiss mNG's complaint for three reasons. First, it argued that 28 U.S.C. § 1500 mandates dismissal. Second, the defendant contends we lack jurisdiction because plaintiff cannot bring suit here under 28 U.S.C. § 1498(a) and in another court if the underlying infringing acts are similar. Lastly, defendant argues that mNG fails to state a claim because it reserved the right to argue that Moderna was the relevant infringing party.

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[2] Statement of Interest at 1, *Arbutus Biopharma Corp. v. Moderna, Inc.*, No. 22-cv-00252 (D. Del.) Dkt. No. 49.

[3] Defendant's Exhibit 1 is plaintiff's Complaint, *mNG Bio, LLC v. Moderna, Inc. et al*, No. 26-cv-1074 (D. Mass. Jan. 8, 2026).

DISCUSSION

I. Does this Court have Jurisdiction under Section 1500?

Section 1500 divests this court of jurisdiction when there is (1) "an earlier-filed suit" that is (2) "'based on substantially the same operative facts' as the Claims Court suit." *Acetris Health, LLC v. United States*, 949 F.3d 719, 728 (Fed. Cir. 2020) (quoting *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 317 (2011)). Defendant concedes that the current state of the law is that section 1500 only ousts jurisdiction in this court if the non-Court of Federal Claims proceeding was filed prior to the proceeding here. Criticism of the prior-filing rule notwithstanding,[4] the Federal Circuit has held that section 1500 requires "an earlier-filed suit." *Acetris*, 949 F.3d at 728. Thus, we may not entertain invitations to hold to the contrary: section 1500 does not bar our jurisdiction here.

II. Is the Complaint Inconsistent with the Exclusivity of Section 1498(a)?

Next, defendant challenges jurisdiction here because mNG cannot maintain a claim here under section 1498(a) while simultaneously suing Moderna in a federal district court for the same infringement. Under the statute, plaintiff may seek "the recovery of [its] reasonable and entire compensation for . . . use and manufacture" of a patented invention by the United States without a license. 28 U.S.C § 1498(a). Defendant contends this statute is the *only* method by which mNG can obtain recovery against Moderna. Def. Reply 3, Dkt. No. 11 (citing *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 343 (1928) (explaining that "[t]he word 'entire' emphasizes the exclusive and comprehensive character of the remedy provided")). The ironic consequence of the exclusivity of section 1498, according to the government, is that this proceeding should be dismissed. We disagree.

Section 1498(a) is the exclusive remedy for a plaintiff "where the United States had used the invention without his license or lawful right to

[4] The Federal Circuit at one point rejected the prior-filing rule en banc. *UNR Indus., Inc. v. United States*, 962 F.2d 1013, 1023 (Fed. Cir. 1992), *aff'd sub nom, Keene Corp. v. United States*, 508 U.S. 200 (1993). Defendant acknowledges that the Supreme Court vacated *UNR* in affirming on other grounds.

use it." *Richmond Screw Anchor Co.*, 275 U.S. at 344. The government is correct that it is also the exclusive remedy against a private company *if* the allegedly infringing acts were done on behalf of the United States and "for [its] benefit." *IRIS Corp. v. Japan Airlines Corp.*, 769 F.3d 1359, 1362 (Fed. Cir. 2014); *see also Advanced Software Design Co. v. Fed. Reserve Bank of St. Louis*, 583 F.3d 1371, 1378 (Fed. Cir. 2009) (holding that when those two "requirements of § 1498(a) are met, it functions . . . as consent to liability"). mNG has alleged as much by highlighting the contractual provisions authorizing Moderna's conduct and giving the government usage rights to Spikevax. This gives *us* jurisdiction. The fact that there is pending in district court a proceeding based on similar facts does not preclude the suit here (absent the application of section 1500). *See Peck v. Jenness*, 48 U.S. 612, 625 (1849) (stating "where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court").

III. Does the Complaint Allege Sufficient Facts to State a Claim Under Section 1498(a)?

Finally, defendant argues under RCFC 12(b)(6) that plaintiff failed to state a claim upon which relief can be granted because it does not assert that only the government is liable for infringement. In fact, plaintiff expressly reserves its position "on which of Moderna and/or the United States are ultimately to be liable for each of the infringing acts, and each allegation [is] . . . made in the alternative . . . ." Compl. ¶ 13; *see also id.* at ¶ 11. Defendant contends that this express reservation of liability bars jurisdiction because plaintiff only equivocally alleged that the infringement was under section 1498(a). Def. Mot. Dismiss 12, Dkt. No. 8. Because the plaintiff explicitly conceded that Moderna might ultimately be liable for each of the infringing acts, defendant argues mNG's allegations are conclusory and do not unequivocally allege that Moderna's conduct was "for the United States" and performed with its authorization or consent, pursuant to 28 U.S.C. § 1498(a). Both statements cannot be true, defendant argues, so mNG has not provided a "plain statement of the grounds for the court's jurisdiction." RCFC 8(a)(1).[5]

That is incorrect. Here, plaintiff is required to plead that the accused activity was "for the United States" and that the accused activity was performed "with the authorization or consent of the Government." 28 U.S.C.

[5] This appears to be a novel argument as defendant cites no authority for this position.

§ 1498(a). Plaintiff has provided an appropriate statement plausibly alleging sufficient facts under section 1498(a) to state a claim. It alleges in some detail a contractual relationship between Moderna and HHS, Compl. ¶¶ 2–3, 34–43, and links the C-034 contract to FAR 52.227-1 which ostensibly authorizes Moderna's acts, *id.* at ¶ 47. These allegations are not inherently contradicted by the plaintiff's express reservation that Moderna may be liable for the acts of infringement. Thus, we deny defendant's motion as to RCFC 12(b)(6) as well.

CONCLUSION

Plaintiff has stated a facially plausible claim in alleging that Moderna's use of the mNeonGreen was done on behalf of and either authorized or consented to by the government via the C-034 contract. Our exclusive jurisdiction under section 1498(a) is not jeopardized by the pendency of the district court proceeding. Nor does that other proceeding prompt dismissal under section 1500. Accordingly, the following is ordered:

1. Defendant's motion to dismiss (ECF No. 8) is denied.

2. The parties shall submit a joint status report on or before June 26, 2026, proposing further pre-trial activities.

s/Eric G. Bruggink
ERIC G. BRUGGINK
Senior Judge