

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

INCYTE CORPORATION, ) C.A. No. N15C-09-055 MMJ CCLD  
)  
Plaintiff, )  
)  
v. )  
)  
FLEXUS BIOSCIENCES, INC., )  
TERRY ROSEN, and JUAN JAEN, ) **FILED UNDER SEAL**  
)  
Defendants. )

Submitted: September 24, 2018

Decided: September 28, 2018

**On the Issue of Whether Plaintiff May Present  
Investigator’s Brochure and CP Excerpt  
as Compilation Trade Secrets  
DENIED.**

**MEMORANDUM OPINION**

Michael P. Kelly, Esq. (Argued), Andrew S. Dupre, Esq., J. Wylie Donald, Esq., David A. Schlier, Esq., McCarter & English, LLP, Attorneys for Plaintiff Incyte Corporation

Jonathan A. Patchen, Esq., Max B. Twine, Esq., Taylor & Patchen, LLP, Attorneys for Defendants Terry Rosen and Juan Jaen

James F. Hurst, Esq. (Argued), Patricia A. Carson, Esq., Daniel Forchheimer, Esq., Ashley Borom, Esq., Kirkland & Ellis LLP, Attorneys for Defendant Flexus Biosciences, Inc.

Gregory V. Varallo, Esq., C. Malcolm Cochran, IV, Esq., Katharine Lester Mowery, Esq., Richards, Layton & Finger, P.A., Attorneys for All Defendants

**JOHNSTON, J.**

By Opinion dated August 23, 2018, the Court considered five motions, including cross motions for summary judgment. The Court did not address the issue of whether Plaintiff may present evidence that the Investigator's Brochure or the CP Excerpt are compilation trade secrets.

After the Opinion was issued, the parties requested a teleconference with the Court. The parties agreed that the compilation trade secret issue had been briefed, and requested that the Court decide the matter in advance of trial. Trial is scheduled to begin October 22, 2018.

Because counsel stated that the Court had received written submissions and heard argument on this issue, the Court found that additional briefing and argument were not necessary. Thus, the parties were directed to file letters specifically identifying relevant portions of the record presented in conjunction with the briefing on the five motions. At this stage of the proceedings, no new arguments or factual information will be considered.

### ***Incyte's Contentions***

Incyte has identified the argument entitled "The IB Is a Trade Secret." Incyte cites expert testimony describing the Investigator's Brochure as "so full of information that could have been useful to Flexus that I will not attempt to elucidate every morsel [and] the IB is a treasure trove of information for a competitor because it must necessarily present a complete summary of all available nonclinical and

clinical data on a compound in clinical development.” The expert offered “detailed discussion of some selected elements.” Incyte argued that all of the elements were confidential and valuable to Flexus.

Incyte asserted that the clinical protocol “describes how the [clinical] trial will be conducted, including what patients should be included or excluded, and detailed background information on the compound at issue, including its previous preclinical and clinical test results.” In contrast, the Investigator’s Brochure “relates more generally to the drug candidate itself and is updated during the trial to include ongoing data and information, as necessary.”

Incyte contends that the CP Excerpt “contained Incyte trade secrets [and] contained indisputably confidential information concerning human half-life.” Incyte concludes that the “CP Excerpt is also protectable as compilation information.” Incyte’s expert and fact witnesses purportedly “have explained at length the extent to which the selection and sequencing of information in that document would have been valuable to a competitor, and is thus entitled to trade secret protection.” The expert witness testified that the “logic behind a protocol...is considered to be confidential.” Further, the CP Excerpt “provides a uniquely comprehensive guide to [Incyte’s drug] and its pre-clinical and clinical test data and properties.”

### *Flexus Defendants' Contentions*

Flexus argued that “the evidence shows that Defendants never had the Investigator’s Brochure, and Incyte cannot prove the existence of any ‘trade secret’.” Flexus asserts that Incyte provided “no specificity whatsoever as to what Incyte regards as trade secret from the various versions of its IB.” Additionally, “[n]either Incyte nor its experts have ever identified *what* Defendants misappropriated, *how* they misappropriated the information, or *how they* used the information.” Flexus states that Incyte failed to demonstrate the “way in which [the] various components fit together as building blocks in order to form the unique whole.”<sup>1</sup>

With regard to the CP Excerpt, Flexus contends: “This is not a case about a novel assembly of known components that creates a uniquely valuable combination—such as using a new and unique combination of known ingredients to make an improved drug formulation that doubles its shelf-life. The CP Excerpt is simply a short summary of the scientific background of IDO inhibitors generally, with some information about Incyte’s drug, complete with citations to **23 published articles** from 1991 to 2012.” Flexus argues that Incyte has failed to make a specific showing that the CP Excerpt joins together information in a “unified process, design and

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<sup>1</sup>Quoting *Sit-Up Ltd. v. IAC/InterActiveCorp.*, 2008 WL 463884, at \*9 (S.D.N.Y.).

operation of which, in unique combination, affords a competitive advantage and is a protectable secret.”<sup>2</sup>

Flexus concedes that Incyte has identified the human half-life of its drug as a trade secret. The half-life information is contained in the CP Excerpt. However, Flexus disputes that the half-life information is a trade secret.

Flexus also argues that Incyte has waived any compilation trade secret claim by failing to identify the CP Excerpt as a “compilation” in response to a request by the Special Master to specify all trade secrets.

### **ANALYSIS**

A compilation trade secret is “a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.”<sup>3</sup> A compilation trade secret must be identified with a reasonable degree of precision and great specificity.<sup>4</sup>

In the August 23, 2018 Opinion, the Court found that the half-life data alleged trade secret had two possible sources - the Investigator’s Brochure and the CP Excerpt. Further, the CP Excerpt “*contained* confidential information.” The Court ruled: “The jury must resolve the genuine issue of material fact of whether Jaen knew

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<sup>2</sup>Quoting *Merck & Co. v. SmithKline Beecham Pharm. Co.*, 1999 WL 669354, at \* 15 (Del. Ch.).

<sup>3</sup>*Sit-Up*, 2008 WL 463884, at \*9.

<sup>4</sup>*Savor, Inc. v. FMR Corp.*, 2004 WL 1965869, at \*6 (Del. Super.).

or should have known that Kohrt had sent him confidential information from a clinical trial in the email at issue.” The Court concluded: “Genuine issues of material fact exist concerning the [Defendants’] knowledge of the Kohrt email and whether the alleged trade secret contained in it—the half-life data—had any independent economic value.”

The Court has considered the parties’ submissions on the narrow issue of compilation trade secrets.

### ***Investigator’s Brochure***

The Court finds that Incyte has not demonstrated evidence sufficient to present to the jury the Investigator’s Brochure as a compilation trade secret. Incyte’s allegations with regard to the Investigator’s Brochure are conclusory and lack sufficient specificity as to how “a complete summary of all available nonclinical and clinical data on a compound in clinical development” could amount to a process, protocol or design presented in unique combination, that could afford a competitive advantage necessitating protection as a compilation trade secret.

### ***CP Excerpt***

In addition to arguments in previously-filed briefs, Incyte relies on the Bley Expert Report in support of its claim that the CP Excerpt as a whole is a compilation trade secret. The cited portions of the Bley Report set forth the expert’s opinions that: the information is proprietary and confidential; Flexus improperly obtained the

half-life data; and that Flexus could not have calculated half-life based upon publically-available information. Bley states: “Ultimately, predicted plasma half-life values drove Flexus’s selection of its clinical candidate....Flexus only knew the [half-life data] because they read it in the [CP Excerpt].”

Bley also identified elevation of liver enzymes as a separate trade secret. Bley concludes that the information “provided readers with optimism regarding the IDO1 inhibitor class, and would further guide Flexus to prioritize this immuneoncology approach over others with potentially worse safety profiles that were competing for resources.”

Bley further states that by reading the CP Excerpt, “Flexus would have benefited from the articulation of Incyte’s strategy and tactics for developing an IDO1 inhibitor....Such information would have been quite helpful for a new and direct competitor. Such information would guide competitors such as Flexus to exclude from consideration several potential sources of adverse effects....” Although Incyte presented testimony that, as a general matter, the sequencing of background information may be confidential, Bley did not specifically opine as to how the sequencing of the CP Excerpt background information amounted to a compilation trade secret.

The Court finds that Bley’s conclusions simply are not sufficient, as a matter of law, to establish genuine issues of material fact for the jury. Conclusory

allegations may be enough to state a claim for a compilation trade secret in initial pleadings. However, after discovery has been closed, greater specificity and precision are necessary. “Helpful” information that “would guide” a competitor is not a “unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.”<sup>5</sup> Incyte has not proffered specific evidence as to how much time and resources would be saved by using the “helpful guidance” in the CP Excerpt as a compilation.

This finding, however, neither diminishes nor negates the Court’s prior holding that the half-life data *contained* in the CP Excerpt and Investigator’s Brochure may be presented to the jury as an alleged trade secret with independent economic value.

### **CONCLUSION**

The Court finds that Incyte shall not be permitted to present either the Investigator’s Brochure or the CP Excerpt as compilation trade secrets to the jury.

**IT IS SO ORDERED.**

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/s/  
The Honorable Mary M. Johnston

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<sup>5</sup>*Sit-Up*, 2008 WL 463884, at \*9.