

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

DRIT LP, )  
)  
Plaintiff, )  
)  
v. ) C.A. No. N16C-07-218 WCC CCLD  
)  
GLAXO GROUP LIMITED and )  
HUMAN GENOME SCIENCES, )  
INC., )  
)  
Defendants. )

Submitted: June 14, 2019  
Decided: October 17, 2019

**Defendants' Renewed Motion for Judgment as a Matter of Law or, in the  
Alternative, for a New Trial – DENIED**

**Plaintiff's Motion for Determination of Damages and Entry of Partial  
Judgment – GRANTED**

**MEMORANDUM OPINION**

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**CARPENTER, J.**

Before the Court are Defendants Glaxo Group Limited (“GGL”) and Human Genome Sciences, Inc.’s (“HGS”) (collectively, “Defendants” or “GSK”) Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial, and Plaintiff DRIT LP’s (“Plaintiff” or “DRIT”) Motion for Determination of Damages and Entry of Judgment. For the reasons set forth below, Defendants’ Motion is DENIED and Plaintiff’s Motion is GRANTED.

## **I. FACTUAL & PROCEDURAL BACKGROUND**

The Court has rehashed the factual background of this case several times in prior Opinions, and it will only provide a brief recitation of the facts most relevant to the pending post-trial Motions.

This litigation stems from a Patent License and Settlement Agreement entered into on October 28, 2008, and subsequently amended on August 24, 2012 (the “Settlement Agreement”).<sup>1</sup> The Settlement Agreement was originally between Defendants GGL, HGS, and non-party Biogen to resolve a patent ownership dispute over inventions relating to the use of antibodies for the treatment of lupus.<sup>2</sup> This Settlement Agreement, among other things, gave Defendants ownership of such inventions and obligated Defendants to pay royalties to Biogen for United States

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<sup>1</sup> Am. Compl. ¶ 1.

<sup>2</sup> *Id.* ¶ 3.

sales of the lupus drug Benlysta, including U.S. Patent No. 8,071,092 (the “‘092 Patent”).<sup>3</sup>

On August 24, 2012, Plaintiff DRIT purchased Biogen’s royalty rights under the Settlement Agreement. Defendants consented to this purchase and paid royalties to Plaintiff, as Biogen’s assignee, for nearly three years. However, in April 2015, Defendants filed a request for a statutory disclaimer of the ‘092 Patent with the United States Patent and Trademark Office (“USPTO”). Defendants informed Plaintiff that the statutory disclaimer had the effect of eliminating any claim for royalties, and stopped making royalty payments to DRIT on United States sales of Benlysta from that point forward.

Plaintiff filed this litigation on July 28, 2016, alleging breach of contract (Count I) and breach of the implied duty of good faith and fair dealing (Count II). This Court ultimately dismissed Count I for breach of contract prior to trial. On April 25, 2018, DRIT amended its Complaint to add a new claim for breach of contract (Count III), which the Court severed for later resolution.

In September 2018, the parties went to trial solely with respect to liability on Count II for breach of the duty of good faith and fair dealing. On September 18, 2018, a jury found that Defendants breached the implied duty of good faith and fair dealing by statutorily disclaiming the ‘092 Patent. Defendants subsequently filed a

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<sup>3</sup> *Id.* See also Defs.’ Ex. 2 [hereinafter Term Sheet].

Motion for Renewed Judgment as a Matter of Law or, in the Alternative, for a New Trial. Plaintiff filed a Motion for Determination of Damages and Entry of Partial Judgment on Counts I and II. This is the Court's decision on the post-trial Motions.

## II. DISCUSSION

### A. Defendants' Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial

Pursuant to Superior Court Civil Rule 50(b):

Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion... If a verdict was returned, the Court may ... allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law.<sup>4</sup>

Under Rule 50, this Court is required to view the evidence in a light most favorable to the nonmoving party.<sup>5</sup> In order to grant Defendants' Motion, this Court must find that "there is no legally sufficient evidentiary basis for a reasonable jury to find for" Plaintiff.<sup>6</sup> Thus, "the factual findings of a jury will not be disturbed if there is *any* competent evidence upon which the verdict could reasonably be based."<sup>7</sup>

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<sup>4</sup> Del. Super. Ct. Civ. R. 50(b).

<sup>5</sup> *Mumford v. Paris*, 2003 WL 231611, at \*2 (Del. Super. Ct. Jan. 31, 2003).

<sup>6</sup> Del. Super. Ct. Civ. R. 50(a).

<sup>7</sup> *Mumford v. Paris*, 2003 WL 231611, at \*2 (Del. Super. Ct. Jan. 31, 2003) (citing *Delaware Elec. Coop. Inc. v. Pitts*, 1993 WL 445474, at \*1 (Del. 1993) (quoting *Mercedes-Benz v. Norman Gershman's*, 596 A.2d 1358 (Del. 1991)) (emphasis added).

“A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative.”<sup>8</sup> In considering a motion for a new trial, the Court should give the jury’s verdict “enormous deference,”<sup>9</sup> and “should not set aside a verdict ... unless, on review of all the evidence, [it] preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result.”<sup>10</sup> “A new trial should be granted only when the great weight of the evidence is against the jury verdict.”<sup>11</sup>

Defendants first argue they are entitled to judgment as a matter of law because the “evidence at trial showed that GSK and Biogen expressly agreed that GSK’s royalty obligation under the 2008 Agreement would cease if a royalty-bearing patent was disclaimed.”<sup>12</sup> According to Defendants, there was also no evidence that GSK would have agreed to limit its “pre-existing right as a patent owner to disclaim its own patents.”<sup>13</sup> Furthermore, GSK contends that “DRIT’s evidence relating to industry norms failed to provide a legally sufficient evidentiary basis for a verdict that GSK breached the implied covenant by disclaiming the ‘092 Patent, and thereby terminating royalty obligations under the 2008 Agreement.”<sup>14</sup>

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<sup>8</sup> Del. Super. Ct. Civ. R. 50(b).

<sup>9</sup> *Cuonzo v. Shore*, 958 A.2d 840, 844 (Del. 2008).

<sup>10</sup> *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979); *see also Town of Cheswold v. Vann*, 9 A.3d 467, 472 (Del. 2010).

<sup>11</sup> *Patterson v. Coffin*, 2004 WL 1656514, at \*2 (Del. 2004).

<sup>12</sup> Defs.’ Opening Br. at 1.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.* at 14.

In response, Plaintiff contends that it presented ample evidence to support the jury's verdict.<sup>15</sup> DRIT also argues that testimony from its experts supported the conclusion that GSK's disclaimer was unreasonable.<sup>16</sup> Furthermore, Plaintiff claims that Defendants are not entitled to a new trial because they have failed to identify any legal error that unfairly prejudiced the trial.<sup>17</sup>

Viewing the evidence in a light most favorable to Plaintiff, the Court finds that DRIT met its burden for showing a breach of the implied duty of good faith and fair dealing. The Court believes there was sufficient evidence for the jury to conclude that GSK acted in bad faith by statutorily disclaiming the '092 Patent. The testimony offered by Defendants' witnesses demonstrated that GSK, at best, made the decision to disclaim the '092 Patent under suspicious circumstances, doing everything they could to prepare themselves for the legal battle that inevitably ensued.<sup>18</sup> After hearing all of the evidence during the week-long trial, the Court believes the jury found GSK's purported business motivations for the disclaimer to be less than credible, and it reached an appropriate verdict. The evidence supports the conclusion that the statutory disclaimer was such an unusual event that it would not have been reasonably anticipated by the parties. It is also clear that if such an event had been

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<sup>15</sup> Pl.'s Opp'n Br. at 9.

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *Id.* at 23.

<sup>18</sup> *See id.* at 18 (noting that "[t]he patent lawyers immediately engaged GSK's dispute-resolution group to assist in carrying out the disclaimer, because they anticipated that the disclaimer would lead to litigation").

anticipated, it certainly would have been addressed in the contract as it went to the fundamental underpinning of the Agreement, the continued payment of royalties for which Biogen bargained. The good faith and fair dealing claim was then appropriate to address the issue. Defendants' counsel presented their case in a highly competent and skilled manner, but unfortunately could not change the factual backdrop they were given.

Additionally, many of the arguments made by Defendants in this Motion simply rehash ones that were previously made, and denied, throughout the course of this litigation. The Court always finds it amazing that after a lengthy jury trial the unsuccessful party often believes that there was no evidence to support the verdict and the jury simply got it wrong. It is as if only the evidence they presented was credible and their version of the facts should have been adopted by the jury. Of course, litigation is an adversarial process where there are two sides that generally advocate different positions. Counsel then compounds this view by creating legal arguments that have already been ruled on by the Court and repackaging them in a Rule 50 format hoping the Court will reconsider its ruling and overturn the jury's decision, something a trial judge is very hesitant to do and seldom does.

The Defendants' Motion, to a significant degree, centers on the testimony of the Plaintiff's expert, Mr. Philip Johnson. In order for Plaintiff to establish its good faith and fair dealing claim, it had to establish that the conduct of Defendants'

disclaiming the patent was not a normal rational action for a company to take and thus would support Plaintiff's theory that the only purpose for the disclaimer was to discharge their royalty obligations. Mr. Johnson's 45 years of practice in the intellectual property area certainly provided him a basis to opine whether such conduct by Defendants would be consistent with norms in the handling of patents and in particular, in the pharmaceutical area with which he was familiar.

The Court has again read Mr. Johnson's trial testimony, as well as the arguments made at the pretrial conference regarding Mr. Johnson. The basis or lack thereof for Mr. Johnson's opinions were thoroughly reviewed during cross-examination and his opinions were significantly challenged by that examination. The Court continues to find his credentials as an expert were sufficient, he stayed within the limitations placed by the Court on his testimony, and that the Court appropriately exercised its gatekeeping function regarding this expert's testimony. No doubt the testimony was not to Defendants' liking, but it clearly was not unfairly prejudicial or misleading and was appropriately allowed to be given to the jury.

Here, the answer is quite simple. The Court gave Defendants every opportunity to present evidence to convince the jury that they acted appropriately and in good faith, and they failed to persuade the jury. The Court's responsibility is to provide a fair playing field for the parties to present their case. In doing so, the Court must make difficult rulings, with which one side will naturally disagree. But



in this case, the Court is confident that a fair trial occurred and sees no reason to disturb and reverse the jury's decision or to grant a new trial.

### **B. Plaintiff's Motion for Determination of Damages and Entry of Partial Judgment**

Pursuant to Superior Court Civil Rule 58, the Court may, at its discretion, enter final judgment where it determines that final judgment is in accordance with the provisions of Rule 54(b) and "there is no just reason for delay."<sup>19</sup> Rule 54(b) requires "(1) the action involves multiple claims or parties; (2) at least one claim or the rights and liabilities of at least one party has been finally decided; and (3) that there is no just reason for delaying an appeal."<sup>20</sup>

In reviewing motions for entry of final judgment, the Court must also weigh the "judicial administrative interests" against the possibility of "some danger of hardship or injustice which would be alleviated by immediate appeal."<sup>21</sup> Importantly, the Court must keep in mind that "excessive resort to [Rule 54(b)] will increase the already sizeable burden of appellate dockets . . . ." <sup>22</sup> Therefore, the discretionary entry of final judgment is to be done "sparingly."<sup>23</sup>

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<sup>19</sup> Del. Super. Ct. Civ. R. 58 (3).

<sup>20</sup> Del. Super. Ct. Civ. R. 54(b).

<sup>21</sup> *Lima Delta Co. v. Global Aerospace, Inc.*, 2016 WL 1169125, at \*2 (Del. Super. Ct. Mar. 17, 2016).

<sup>22</sup> *World Energy Ventures, LLC v. Northwind Gulf Coast LLC*, 2015 WL 6772638, at \*4 (Del. Super. Ct. Nov. 2, 2015).

<sup>23</sup> See *In re Tri-Star Pictures, Inc., Litig.*, 1989 WL 112740, at \*1 (Del. Ch. Sept. 26, 1989).

Plaintiff first argues it is entitled to a damages award that puts it in the position it would have been absent GSK's breach.<sup>24</sup> According to DRIT, "GSK owes royalties to Plaintiff from April 28, 2015 (the date GSK ceased paying royalties) until August 4, 2022 (the date the '092 Patent would have expired had GSK not statutorily disclaimed the patent), plus interest, compounded monthly, for amounts overdue."<sup>25</sup>

Furthermore, Plaintiff contends that the Court should enter final judgment on Counts I and II because all the requirements of Delaware Superior Court Rules 54(b) and 58 have been satisfied.<sup>26</sup> DRIT argues that the claim in Count II was decided by the jury and that "Count I has been finally decided as a result of the Court's opinion dismissing it on April 6, 2017 . . . ."<sup>27</sup> Finally, DRIT claims "there is no just reason for delaying an appeal, given the hardship that DRIT and its investors have already suffered and would continue to suffer if the payment of royalties is further delayed."<sup>28</sup>

In response, Defendants first argue that Plaintiff should receive no damages because DRIT failed to show they would have been reasonably foreseeable at the time of the Agreement's execution.<sup>29</sup> Defendants next contend that, even if the Court

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<sup>24</sup> Pl.'s Mot. for Determination of Damages and Entry of Partial J. at 3.

<sup>25</sup> *Id.* at 3-4.

<sup>26</sup> *Id.* at 7-8.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Defs.' Opp'n to Pl.'s Mot. for Determination of Damages and Entry of Partial J. at 9.

does award damages, it “should be limited to the period between GSK’s last payment and October 25, 2016 because: (a) this was the date that the parties expected the patent to expire at the time they were negotiating the 2008 Agreement, and (b) had GSK not statutorily disclaimed the ‘092 Patent, GSK would have terminally disclaimed the ‘092 Patent and such a terminal disclaimer would have ended GSK’s royalty obligations to DRIT on October 25, 2016.”<sup>30</sup>

Finally, Defendants argue that Plaintiff’s Motion for Entry of Partial Judgment should be denied because it has not shown a compelling need for the Court to declare a partial final judgment.<sup>31</sup> According to GSK, “[d]elay in the entry of final judgment will not jeopardize DRIT’s ability to survive, and there is no risk GSK will not be able to satisfy a future judgment.”<sup>32</sup>

The Court believes damages and appropriate interest should be awarded through the date of the jury’s verdict in favor of Plaintiff on September 18, 2018. Defendants’ claim that GSK’s royalty obligations would have ended in October 2016, even without the statutory disclaimer, was less than convincing, as evidenced by the jury’s verdict, and the Court is not willing to base DRIT’s damages award on that date. The expectation of the parties to the initial contract was that, in the absence of certain identified events, Plaintiff would continue to receive royalties until the

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<sup>30</sup> *Id.* at 10.

<sup>31</sup> *Id.* at 18.

<sup>32</sup> *Id.* at 20.

patent expired, which would normally have been twenty years after the date it took effect. The fact that there was a delay in the issuance of the patent by the patent office simply delayed when the royalties would begin. If Defendants believed that royalty rights began upon application, they would have also paid royalties between when the application was filed and the date of approval. The Court does not recall any evidence that this occurred.

The parties are to confer in an attempt to come to an agreement as to the amount covered by this timeframe (from the date the royalties ceased to the date of the jury's verdict). If they are unable to agree, each side will submit their calculations of royalties and interest and the Court will decide whether additional testimony is needed.

As of September 18, 2018, Defendants are obligated to pay royalties on a quarterly basis to Plaintiff based upon United States sales of Benlysta. Since this obligation now continues into the future and circumstances change, this requirement will continue unless a Court decision is rendered that finds that future royalty payment obligations have ended or the parties agree there is a good faith basis to terminate the obligation.

The Court also finds that final judgment should be entered on Counts I and II, as all three prongs of Rule 54(b) have been met. This action involves multiple claims, and now two of the three claims have been finally decided as a result of the Court's

dismissal of Count I in April 2017 and the jury's verdict on September 18, 2018. Furthermore, because it is denying Defendants' Renewed Motion for Judgment or a New Trial, the Court believes entering final judgment on these Counts promotes judicial efficiency, as the appellate process will ultimately determine the outcome of Plaintiff's now-severed Count III for breach of contract.<sup>33</sup> Although the Court is not convinced that failing to enter final judgment would result in any serious hardship to DRIT, it sees no reason to delay, and believes the parties should be able to move forward with an appeal. Therefore, Plaintiff's Motion for Determination of Damages and Entry of Partial Judgment is granted.

### III. CONCLUSION

For the foregoing reasons, Defendants' Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial is DENIED. Plaintiff's Motion for Determination of Damages and Entry of Partial Judgment is GRANTED.

**IT IS SO ORDERED.**

  
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Judge William C. Carpenter, Jr.

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<sup>33</sup> Count III simply covered the time period between when the disclaimer was filed (April 27, 2015) and when payment was received by the patent office (July 16, 2015). The Defendants believed payment was made when the disclaimer was filed or that payment would be taken by the patent office from an account that was maintained with them. This did not occur. So that action, even under the Defendants' theory of the case, extended the patent for an additional 80 days.