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7 **UNITED STATES DISTRICT COURT**
 8 **NORTHERN DISTRICT OF CALIFORNIA**

9 DEBORAH JANE JARRETT, NANCY)
 ISENHOWER, AND JEFFREY H.)
 10 FRANKEL,)

11 Plaintiffs,)

12 v.)

13 INTERMUNE INC., W. SCOTT)
 14 HARKONEN AND GENENTECH, INC.,)

15 Defendants.)

16 LINDA K. RYBKOSKI, on behalf of herself)
 and others similarly situated,)

17 Plaintiff,)

18 v.)

19 INTERMUNE, INC., W. SCOTT)
 20 HARKONEN, AND GENENTECH, INC.,)

21 Defendants.)

22 ZURICH AMERICAN INSURANCE)
 23 COMPANY,)

24 Plaintiff,)

25 v.)

26 GENENTECH, INC., INTERMUNE, INC.,)
 27 and W. SCOTT HARKONEN,)

28 Defendants.)

STIPULATION AND [PROPOSED]
ORDER FOR THE INTERIM
PRESERVATION OF
POTENTIALLY DISCOVERABLE
INFORMATION

THIS DOCUMENT RELATES TO:

Case No. 3:08-cv-02376-MHP

Judge Marilyn H. Patel

Case No. 3:08-cv-02916-MHP

Judge Marilyn H. Patel

Case No. 3:08-cv-3797-MHP

Judge Marilyn H. Patel

1 Plaintiffs Deborah Jane Jarrett, Nancy Isenhower, Jeffrey H. Frankel, Linda K. Rybkoski,
2 and Zurich American Insurance Company (collectively, “Plaintiffs”), and Defendants Genentech,
3 Inc., InterMune, Inc. and W. Scott Harkonen (collectively, “Defendants”), by their undersigned
4 counsel (collectively “the Parties”), hereby stipulate to the interim preservation of Potentially
5 Discoverable Information as follows:

6 WHEREAS the Parties participated in a Case Management Conference on September 15,
7 2008, during which the Court instructed the Parties, within fourteen days of the Conference, or
8 by September 29, 2008, to submit a stipulation for preservation of documents until at least the
9 December 8, 2008 hearing on the motions to dismiss or a date subsequently established by the
10 Court or the Parties;

11 It is hereby ORDERED and AGREED that:

12 **A. Definitions**

- 13 1. “Party” or “Parties” means individually or collectively (depending on
14 usage of term): Genentech, Inc., InterMune, Inc., W. Scott Harkonen, and
15 Plaintiffs Deborah Jane Jarrett, Nancy Isenhower, Jeffrey H. Frankel,
16 Linda K. Rybkoski, and Zurich American Insurance Company.
- 17 2. “Corporate Parties” means all Parties that are not individuals.
- 18 3. “This Litigation” means the above-captioned civil actions, previously
19 deemed by the Court to be related. When and if any other actions
20 subsequently filed are determined by the Court *sua sponte* or on motion by
21 any existing or newly added Party to be related to the above-captioned
22 actions, Plaintiffs agree to notify those new plaintiff(s) of the existence of
23 this Order and seek their agreement to its terms.
- 24 4. “Potentially Discoverable Information” means documents and/or means
25 electronically stored information (“ESI”), as those terms are used in Fed.
26 R. Civ. P. 34(a), and Meta-Data to the extent it exists, that the Parties have
27 a duty to preserve and/or know or reasonably should know are relevant to
28 the claims and defenses of the Litigation. “Potentially Discoverable

1 Information” includes all documents and/or ESI that are in existence at the
2 time this Order is entered, as well as those documents or ESI which are
3 created after the date of this Order.

4 5. “Native File(s)” means ESI in the electronic format of the application in
5 which such ESI is normally created, viewed and/or modified. Native Files
6 are a subset of ESI.

7 6. “Meta-Data” means: (i) information embedded in a Native File that is not
8 ordinarily viewable or printable from the application that generated,
9 edited, or modified such Native File; and (ii) information generated
10 automatically by the operation of a computer or other information
11 technology system when a Native File is created, modified, transmitted,
12 deleted or otherwise manipulated by a user of such system. Meta-Data is a
13 subset of ESI.

14 7. “Backup Systems” means computer systems that periodically store
15 electronic information on tapes or comparable media.

16 8. “Backup Tapes” means magnetic tapes or other electronic media used to
17 store copies of electronic data, for use when restoration or recovery of data
18 is required.

19 9. “Preservation” and “Preserve” each mean taking all reasonable steps to
20 prevent the partial or full destruction, deletion, or alteration of Potentially
21 Discoverable Information and assure its availability for use in the
22 Litigation.

23 10. “Relevant Time Period” means from January 1, 1998 until a date in the
24 future that will be fixed by the parties or the Court.

25 **B. Instructions and Guidelines for Preservation:**

26 Each Party shall comply with the following instructions and guidelines with respect to the
27 implementation of the preservation procedures and protocols set forth herein:
28

- 1 1. This Order pertains to all Potentially Discoverable Information created
- 2 during the Relevant Time Period.
- 3 2. The Parties shall Preserve Potentially Discoverable Information.
- 4 3. Each Party must ensure reasonable safeguarding and preservation of all
- 5 portable or removable electronic storage media containing potentially
- 6 relevant Potentially Discoverable Information.
- 7 4. Each Party shall maintain all current or legacy software and hardware
- 8 necessary to access, manipulate, and print Potentially Discoverable
- 9 Information.
- 10 5. Each Party shall notify relevant persons of this Preservation Order,
- 11 including but not limited those listed below:
- 12 a. Each individual named as a Plaintiff or Defendant;
- 13 b. Persons employed by a Party or agents of that Party which that
- 14 Party knows or reasonably should know have Potentially
- 15 Discoverable Information;
- 16 c. Each Corporate Party's IT personnel/director of network services;
- 17 d. Each Corporate Party's custodian of records.
- 18 6. In addition to the obligations contained in Paragraph B.5 above, each
- 19 Party shall notify any person or entity over whom that Party has control
- 20 and can reasonably identify, and whom that Party knows or reasonably
- 21 should know has Potentially Discoverable Information, of the existence of
- 22 this Litigation.
- 23 7. The Corporate Parties are obligated to ensure and monitor compliance
- 24 with this Order, by:
- 25 a. internally identifying a contact person who will address questions
- 26 regarding preservation duties;
- 27 b. determining whether data of "key persons" requires special
- 28 handling (e.g., imaging/cloning hard drives); and

1 c. issuing reminders with a frequency that each Corporate Party
2 believes in good faith to be appropriate, that the litigation hold is
3 still in effect.

4 8. This Order does not obligate the Parties to segregate such Potentially
5 Discoverable Information from other records on the computer backup
6 medium where they reside.

7 9. Each Party shall bear its own costs for complying with this Order. This is
8 without prejudice to any Party taking a different position on cost-shifting
9 once discovery commences.

10 **C. Manner of Preserving Different Types of Documents**

11 The Parties shall take reasonable steps to Preserve, in accordance with the following
12 specifications, the following types of Potentially Discoverable Information in the manner(s)
13 specified below:

14 1. **Paper Records**: For Potentially Discoverable Information maintained in
15 the normal course of business in paper form, the Parties may retain paper
16 Potentially Discoverable Information in either their original form or in a
17 single-page TIFF or PDF format.

18 2. **Electronic Mail**: For electronic mail, at least one copy of all Potentially
19 Discoverable Information in their native format, including any
20 attachments, located in the e-mail server(s) and on personal computers. If
21 this is not reasonably possible, upon notification to all Parties, a Party may
22 retain electronic mail in single page TIFF or PDF format with all file data
23 and Meta-Data that exists.

24 3. **Electronic Data and Files on Computer Systems Saved to Networks**:
25 For all ESI maintained on a network in the custody and control of the
26 Party, at least one copy of all such Potentially Discoverable Information in
27 their native format. If this is not reasonably possible, upon notification to
28 all parties, a Party may retain electronic Potentially Discoverable

1 Information in single page TIFF or PDF format with all file data and
2 Meta-Data that exists.

- 3 4. **Electronic Data on Computers Not Saved to Networks:** For all
4 electronic Potentially Discoverable Information (other than electronic mail
5 Potentially Discoverable Information) maintained on a non-networked
6 computer system where such Potentially Discoverable Information are not
7 saved to a network, at least one copy of all final versions of all such
8 Potentially Discoverable Information in their native format. If this is not
9 reasonably possible, upon notification to all Parties, a Party may retain
10 such electronic Potentially Discoverable Information in single page TIFF
11 or PDF format with all file data and Meta-Data that exists.

12 **D. Identified Documents to be Preserved**

13 In addition to the obligation set forth in Section B(2) of this Order, Defendants shall
14 preserve all documents produced or provided to any party in *United States v. InterMune, Inc.*,
15 Case No. 06-CR-0707 (N.D. Cal.) and *United States v. Harkonen*, Case No. 08-CR-0164 (N.D.
16 Cal.) (“the Government Production”), along with all subpoenas, correspondence, and indices
17 concerning those documents. The Government Production shall be preserved in the same manner
18 and format as it was produced to the Government, except that InterMune may, pursuant to this
19 Court’s order at the September 15, 2008 Case Management Conference, index those documents.

20 **E. Records Not Required to be Preserved**

21 Any records not specified above as Potentially Discoverable Information are not required
22 to be preserved under this Order. By a way of example, and without limiting the preceding
23 sentence, the Parties have no obligation to preserve the following:

- 24 1. Disaster recovery files or tapes, unless the disaster recovery files and tapes
25 are known to be the only source of the Potentially Discoverable
26 Information;
- 27 2. Duplicative data records, including replicant data, embedded data, cache
28 files, cookie files, and temporary files;

1 3. Backup Tapes or other information stored in its Backup System as long as
2 a Party has employed one of the means of preserving electronic Potentially
3 Discoverable Information as discussed above. The Parties may recycle,
4 erase, reuse, delete, purge or otherwise destroy these Backup Tapes and
5 other information stored in their Backup Systems, as long as a Party has
6 employed one of the means of preserving electronic Potentially
7 Discoverable Information as discussed above.

8 4. A Party may continue to comply with any current corporate or internal
9 preservation and retention policies which have been enacted prior to the
10 date this Order is entered as long as those actions do not contradict or
11 inhibit the items provided herein. In any situation where the actions
12 outlined in a pre-existing corporate or internal preservation and retention
13 policy conflict with the items described within this Stipulation, this
14 Stipulation shall control.

15 5. The Parties collectively may, without leave of Court, agree in writing that
16 certain documents or categories of documents or evidence need not be
17 preserved in accordance with this Stipulation. If such an agreement is
18 reached, it is effective upon signing by counsel for Plaintiffs and counsel
19 for Defendants without further order of Court.

20 **F. No Waiver**

21 By agreeing to Preserve all Potentially Discoverable Information in accordance with the
22 terms of this Stipulation, the Parties are not waiving any objection to the ultimate discoverability
23 or admissibility of such information at such point when discovery is ultimately authorized in this
24 Litigation. Further, nothing in this stipulation should be construed to override the terms of
25 Federal Rule of Civil Procedure 37(e).

1 Dated: September 29, 2008

Respectfully submitted,

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*Attorneys for Plaintiff Zurich American
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DATED this 30th day of September, 2008.



CERTIFICATE OF SERVICE

I, Kristen Johnson Parker, hereby certify that I caused a copy of the foregoing *Stipulation and Order for the Interim Preservation of Potentially Discoverable Information* to be filed electronically via the Court's electronic filing system. Those attorneys who are registered with the Court's electronic filing system may access these filings through the Court's system, and notice of these filings will be sent to these parties by operation of the Court's electronic filing system. Those attorneys not registered with the Court's electronic filing system will be served via electronic mail this 29th day of September, 2008.

Dated: September 29, 2008

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