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 18 ONYX PHARMACEUTICALS, INC.

19 UNITED STATES DISTRICT COURT
 20 NORTHERN DISTRICT OF CALIFORNIA
 21 SAN FRANCISCO DIVISION

22 ONYX PHARMACEUTICALS, INC.,

Case No. C 09-2145 (MHP)

23 Plaintiff,

24 v.

**STIPULATION AND ~~PROPOSED~~
 ORDER REGARDING
 PROTOCOL FOR PRODUCTION OF
 DOCUMENTS AND
 INFORMATION**

25 BAYER CORPORATION, BAYER AG,
 26 BAYER HEALTHCARE LLC, AND
 27 BAYER SCHERING PHARMA AG,

28 Defendants.

1 This Stipulation and Proposed Order sets forth the general protocol and agreement of the
2 parties to this litigation regarding the procedure for production of documents and information
3 (collectively “document(s)”). The parties shall take reasonable steps to comply with this agreed-
4 upon protocol. This protocol is adopted in concert with the Stipulated Protective Order, and
5 nothing in this protocol is intended to contradict the obligations set forth in the Protective Order.

6 This Stipulation and Proposed Order shall not enlarge or affect the proper scope of
7 discovery in this Action, nor shall this Stipulation and Proposed Order imply that Discovery
8 Material produced under the terms of this Stipulation and Proposed Order is properly discoverable,
9 relevant or admissible in this Action or in any other litigation. Nor does this Stipulation and
10 Proposed Order alter or expand the preservation obligations of any party; such obligations are set
11 forth in a separate order. Discovery Material produced in this Action can only be used in
12 conjunction with this Action. Nothing in this Stipulation and Proposed Order shall be interpreted
13 to require disclosure of materials that a party contends are protected from disclosure by the
14 attorney-client privilege or the attorney work-product doctrine.

15 **A. Scope**

- 16 1. To the extent reasonably possible, the Litigation and discovery shall be conducted so as to
17 maximize efficient and quick access to document discovery and minimize paper document
18 production and distribution costs. All documents that originally existed in either hard-
19 copy or native electronic form that are not privileged or otherwise protected from
20 production and are responsive to discovery requests or a Court Order – or are otherwise
21 produced in these proceedings – shall be produced, subject to objections and responses, in
22 electronic image form in the manner provided herein.
- 23 2. Except as specifically limited herein, the procedures and protocols set forth below govern
24 the production of discoverable documents and electronically stored information by the
25 parties during the pendency of the Litigation.
- 26 3. Reasonable efforts will be made to ensure that all natively-produced documents shall be
27 decrypted, but the parties have no affirmative duty to identify encrypted documents prior
28 to production.

1 4. Reasonable efforts will be made to ensure that all documents are legible. If a copy is not
2 legible, upon reasonable request, the original shall be made available for inspection and
3 copying within thirty (30) days of a request from the Receiving Party, or as mutually
4 agreed upon by the parties.

5 **B. Definitions**

6 The following definitions further clarify the scope of this protocol:

- 7 1. The term “Bates Number” means a unique number permanently affixed to a document
8 produced in litigation.
- 9 2. The term “Custodian” means a person who had custody of information or a document
10 prior to collection for production.
- 11 3. The term “Database” means an electronic collection of structured data (often maintained
12 in a non-custodial manner), such as data created and maintained in Oracle, SAP, SQL,
13 Microsoft Access, or FileMaker Pro.
- 14 4. The term “Electronic Document” means any document existing in electronic form
15 including word processing files (e.g. Microsoft Word), computer presentations (e.g.,
16 PowerPoint slides), Databases or spreadsheets (e.g., Excel), together with the Metadata
17 associated with each such document.
- 18 5. The term “Load File,” as used herein, refers to a file or files issued with each production
19 providing a map to the images and meta-data or objective coding contained within the
20 production.
- 21 6. The term “Optical Character Recognition” or “OCR” refers to the result of the process by
22 which a hard copy document is analyzed by a computer for the purposes of creating a
23 plain-text Electronic Document that contains the textual content gleaned and recognized
24 from the original hard copy document. The term “Extracted Text” shall refer to the result
25 of the process by which textual content of an Electronic Document is gleaned and
26 extracted from an original Electronic Document for the purpose of creating a plain-text
27 Electronic Document containing the textual content from that Electronic Document.
- 28

- 1 7. The term “Metadata,” as used herein, includes, but is not limited to, structured fields or
2 information stored with or associated with a given file. Non-limiting examples of specific
3 fields of Metadata are set forth in Section D(5), *infra*.
- 4 8. The term “Native Format,” as used herein, means the default format of a data file created
5 by its associated software program. For example, Microsoft Excel® produces its output
6 as ‘.xls’ files by default, which is the native format of Excel. Microsoft Word® produces
7 native files with a ‘.doc’ extension, which is the native format of Word.
- 8 9. The term “Producing Party” means any party to the Action who produces documents or
9 information under this Order.
- 10 10. The term “Receiving Party” means any party to the Action who receives documents or
11 information under this Order.

12 **C. Search Protocol for Electronic Information**

- 13 1. Either side may use term-searching as the primary means of identifying electronic
14 information responsive, subject to objections, to the other side’s requests for production.
15 Each side shall be responsible for generating search terms or expressions that it believes,
16 in good faith, will return a reasonably high proportion of responsive documents. Each
17 party’s counsel may select its search terms or expressions without resort to expert
18 assistance or quality-assurance methods beyond those discussed below. The following
19 provisions are intended to provide quality assurance.
- 20 2. Each side shall disclose a list of the search terms or expressions it used. Each side is
21 encouraged to suggest any revision or addition to the terms. The parties will endeavor to
22 confer cooperatively to obtain terms agreeable to all parties.
- 23 3. Before bringing a motion or otherwise arguing to the Court or jury that a Producing
24 Party’s search methodology was inadequate, a Receiving Party must identify the proposed
25 inadequacy and meet and confer in order to allow the Producing Party a reasonable
26 amount of time to cure the proposed inadequacy.

27 **D. Format Protocol for Specific Types of Discoverable Electronic Information**

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- 1 1. **Documents in Hard Copy:** All documents that exist in hard copy shall be produced as
2 black and white images at not less than 300 dpi resolution and shall be saved and
3 produced in a Group IV compression single-page TIFF format file, with OCR text, when
4 technologically feasible (i.e., certain categories of documents may not be suitable for
5 OCR, such as handwritten notes or graphic representations). The document’s electronic
6 image must convey the same information as if the subject document was produced in a
7 hard copy form. Documents shall be generally produced as they are maintained in the
8 ordinary course of business, including maintaining, to the extent possible with reasonable
9 production steps, the documents and attachments or affixed notes as they existed in the
10 original when creating the image file. Reasonable efforts shall be used to scan the pages
11 or images at or near their original size and so that the print or image appears straight, and
12 not skewed. Physically oversized originals, however, may appear reduced. The Parties
13 agree that slight reduction of image size may be necessary in order to display Bates
14 Numbers without obscuring text. OCR shall be produced as multi-page text files whose
15 file name is identical to the name of the first TIFF file of the corresponding document and
16 contain the file extension “.TXT”.
- 17 2. **Electronic Documents:** All documents existing in electronic format shall be produced in
18 a Group IV TIFF compression, single-page, black and white format file with Metadata.
19 The Metadata associated with each produced document will be contained in a separate
20 load file or files (*see* Section D(5), *infra*). The parties shall only remove any
21 information from the Metadata fields described below in Section D(5) on the grounds of
22 privilege or attorney work product. The parties will take reasonable steps to produce any
23 documents attached to an email contemporaneously and sequentially immediately
24 following the parent email. Extracted Text shall be produced as multi-page text files
25 whose file name is identical to the name of the first TIFF file of the corresponding
26 document and contain the file extension “.TXT”.
- 27 3. **Databases:** The parties shall identify and describe databases that contain material
28 responsive to document requests when responding to document requests. The description

1 shall include a summary of the type of information available from the database and a
2 description of the work necessary to provide responsive information from the database.
3 The parties shall cooperate to produce responsive information from the database to the
4 extent reasonably accessible, considering undue burden and cost. The parties shall meet
5 and confer in order to ensure that the information from the Database is produced in a
6 reasonably usable form.

7 4. **Production of Native Files or Hard Copies:** After reviewing any document produced in
8 TIFF format, a Receiving Party may request a color hard copy or native-format copy of that
9 document by identifying its Bates Number range. Upon reasonable request, the Producing
10 Party shall generally produce the document in the format requested or otherwise respond
11 within ten (10) days of receipt of the request, but in no instance shall fail to produce the
12 document or otherwise respond within thirty (30) days of receipt of the request. Parties
13 shall cooperate with each other to facilitate the acquisition of appropriate licenses and
14 technical information to review files produced in native format.

15 5. **Metadata and load files:** The parties shall identify and produce Metadata, as set forth
16 below.

17 a. For each Electronic Document produced, a load file or files shall be produced
18 identifying the following pieces of information, to the extent they exist and apply to the
19 original Electronic Document:

- 20 (i) Title or Subject;
- 21 (ii) To;
- 22 (iii) CC;
- 23 (iv) BCC;
- 24 (v) All Recipient(s)
- 25 (vi) Author or Sender;
- 26 (vii) Date Modified;
- 27 (viii) Date Created;
- 28 (ix) Date Sent
- (x) Starting Bates number;

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- (xi) Ending Bates number;
- (xii) Starting Attachment Bates number;
- (xiii) Ending Attachment Bates number;
- (xiv) Custodian or non-custodial repository name;
- (xv) Date produced for discovery;
- (xvi) Document application;
- (xvii) Original file path
- (xviii) File extension.

b. For any other document produced in TIFF format, a load file or files shall be produced identifying the following pieces of information:

- (i) Starting Bates number;
- (ii) Ending Bates number;
- (iii) Starting Attachment Bates number;
- (iv) Ending Attachment Bates number;
- (v) Custodian or non-custodial repository name;
- (vi) Date produced for discovery.

c. **Load Files.** Load files shall be produced for all images and metadata produced. TIFF images shall be produced with an Opticon load file. Metadata shall be produced in a .dat file with standard Concordance delimiters. The .dat file containing metadata will contain a “text_link” fields containing the physical paths to the produced OCR or Extracted Text files.

E. Document/Data Identification Conventions for All Types of Discoverable Electronic Information

1. **Production Media:** All discoverable electronic information that is produced in this proceeding by any party shall initially be produced in electronic image format in the manner provided herein, on a hard drive, CD, DVD, or other mutually agreeable format. Producing Parties are encouraged to use hard drives for productions greater than 10 gigabytes.

1 2. **Bates Numbering:** Each individual piece of computer media produced must be clearly
2 labeled with a Volume ID number and a Bates range that is indelibly written on, or affixed
3 to the media.

4 a. Every page of each document produced in TIFF format shall have a legible, unique
5 Bates Number electronically “burned” onto the image. The Bates Number shall be placed
6 at the lower right corner of the page. Slight reduction of image size may be necessary in
7 order to display Bates Numbers without obscuring information from the original
8 document otherwise reasonable steps shall be taken to place the Bates Number at a
9 location that does not obscure any information from the source document.

10 b. In the event a document is reproduced in a modified form (e.g., portions of the
11 document are unredacted as a result of a privilege challenge), the document shall bear the
12 same Bates Number as the originally produced version along with an alphabetical suffix
13 (e.g., 00001234-A)

14 c. Except for redactions, there shall be no other legend or stamp placed on the
15 document image unless a document qualifies for confidentiality designations per the
16 Stipulated Protective Order. In such case, the document image may also have burned in an
17 appropriate legend regarding confidentiality. Slight reduction of image size may be
18 necessary in order to display the legend without obscuring information from the original
19 document otherwise steps shall be taken to place the legend at a location that does not
20 obscure any information from the source document. If the confidentiality designation of a
21 document is later changed, the Producing Party shall produce a new version of the
22 document with the appropriate confidentiality legend.

23 d. Produced document file names shall correspond with the Bates number imprinted
24 on the document. For example, if the Bates number “BL0000001 was imprinted, the
25 document would bear the name “BL0000001.tif.”

26 e. The file name of any document produced in native format shall be renamed with a
27 new Bates number or a Bates Number corresponding to the first page of the originally
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1 produced TIFF image document before production. The original file name shall be
2 produced as a Metadata field as described *supra*.

3 f. Bates numbers should contain at least eight (8) numeric digits.

4 3. **File Naming Conventions:** Unless not practicable or otherwise agreed upon, each
5 TIFF image file shall be named with the unique Bates Number of the corresponding TIFF
6 image, followed by the extension “.TIF.” Each piece of production media shall be
7 uniquely named with a sequential number that includes the Producing Party’s unique alpha
8 identifier (e.g., “BAYER1,” “BAYER2,” *etc.*). The parties will cooperate to ensure that
9 the logistics of production are efficient and economical, including production media, and
10 naming conventions and procedures for directories and subdirectories.

11 4. **Privilege and Attorney Work Product:** Producing Parties shall only withhold
12 discoverable information on the basis of privilege or attorney work-product within the
13 bounds of applicable law or the Orders of this Court. All documents withheld or redacted
14 on the grounds of privilege or attorney work product shall be described on a privilege log,
15 except as otherwise agreed in writing by the parties. Any privilege logs shall be produced
16 on a rolling basis and shall not delay the production of nonprivileged documents because
17 of the preparation of a privilege log. A privilege log for documents redacted on privilege
18 or attorney work product grounds shall generally be produced within sixty (60) days of
19 production of the redacted document. Privilege Logs shall be produced in an Excel
20 Spreadsheet format, and shall contain, at least, the following information for each
21 document withheld or redacted on the grounds of privilege or attorney client work
22 product: Bates Range, Date, Applicable Privilege, Subject, and Names associated with the
23 document (with Author, Recipient(s), Carbon Copy Recipient(s), and Blind Carbon Copy
24 Recipient(s) if apparent from the document).

25 5. **Expert Work Product:** The parties propose the following limitation on discovery from
26 experts, other than experts (i) who are employees or former employees of a party; and (ii)
27 who have, in connection with their employment by a party (and independent of their
28 service as an expert), performed any work relating to sorafenib or regorafenib: Written

1 communications between counsel and experts, drafts of expert reports and experts' notes
2 shall be non-discoverable in this action, except to the extent that the expert relies upon
3 such communications or notes as the basis for his or her opinion(s) and are not otherwise
4 disclosed in the expert report, its attachments and/or exhibits. The parties and experts
5 (except as noted above) need not produce drafts of the expert reports (or related
6 demonstratives or exhibits), other work product prepared by the experts or their staffs, or
7 notes, emails, or other communications made in connection with the drafting of the
8 reports. Oral or written communications, and notes concerning such communications,
9 between experts (except as noted above) and counsel for the party expecting to call the
10 expert as a witness shall not be discoverable unless the expert is relying on the
11 communication as part of the basis for his or her expert testimony. This stipulation does
12 not apply to underlying materials and documents received by an expert from counsel. Nor
13 does this prevent a party from asking the expert questions in a deposition about the
14 manner in which the expert report was prepared. Notwithstanding the foregoing, drafts of
15 expert reports shall be non-discoverable for any experts (i) who are employees or former
16 employees of a party; and (ii) who have, in connection with their employment by a party
17 (and independent of their service as an expert), performed any work relating to sorafenib
18 or regorafenib.

19 **6. Delivery:**

- 20 a. All computer media must be properly packaged to ensure safe shipping and
21 handling.
22 b. All computer media that is reasonably capable of being write-protected should be
23 write-protected before production.

24 **F. Resolution of Disputes Concerning Electronic Discovery**

- 25 1. Notwithstanding any provision set forth above, any party may apply to the Court for
26 relief, but only after first meeting and conferring in good faith with the other party to
27 attempt to resolve or otherwise narrow any dispute, and after giving sufficient notice to be
28 heard.

1 2. Because of the potential for a large number of documents to be produced, it may not be
2 possible to review the images immediately upon production. The parties will identify any
3 problems they encounter with imaged document(s) promptly after discovery of the
4 problem, and thereafter the parties will cooperate in good faith to resolve the problem.

5 **G. Inadvertent Production of Documents Subject to Privilege or Attorney Work**
6 **Product Protections.**

7 In the event that one of the law firms that is counsel of record in this action learns or
8 discovers that a document subject to immunity from discovery on the basis of attorney-client
9 privilege, work product, or other valid basis has been produced inadvertently, counsel shall
10 notify the Receiving Party or parties in writing within thirty (30) days after so learning or
11 discovering that such inadvertent production has been made. The inadvertently disclosed
12 documents and all copies thereof shall be returned to the Producing Party and the Receiving
13 Party shall not, without good cause shown, seek an order compelling production of the
14 inadvertently-disclosed documents on the ground that the Producing Party has waived or is
15 otherwise estopped from asserting the applicable privilege or immunity on the basis that the
16 document has been voluntarily produced. Such inadvertent disclosure shall not result in the
17 waiver of any associated privilege, provided that the Producing Party has given timely notice
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1 as provided in this paragraph. Counsel shall cooperate to restore the confidentiality of any
2 such inadvertently produced information.

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4 Dated: September 25, 2009 COOLEY GODWARD KRONISH LLP

5
6 /s/
7 _____
8 Michelle S. Rhyu
9 Attorneys for Plaintiff
10 ONYX PHARMACEUTICALS, INC.

11 Dated: September 25, 2009 BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP

12 /s/
13 _____
14 Mark Levine
15 Attorneys for Defendants
16 BAYER CORPORATION, BAYER AG,
17 BAYER HEALTHCARE LLC, AND BAYER SCHERING
18 PHARMA AG

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IT IS SO ORDERED this 28th day of September 2009.



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GENERAL ORDER 45 ATTESTATION

In accordance with General Order 45, concurrence in the filing of this document has been obtained from each of the signatories and I shall maintain records to support this concurrence for subsequent production for the Court if so ordered or for inspection upon request by a party.

Dated: September 25, 2009 COOLEY GODWARD KRONISH LLP

/s/
Michelle S. Rhyu

Attorneys for Plaintiff
ONYX PHARMACEUTICALS, INC.