

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

GENENTECH, INC.,

Plaintiff,

v.

AMGEN INC.,

Defendant.

Case No. 1:18-cv-00924-CFC



**GENENTECH, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 37(B)**

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I. INTRODUCTION

Amgen's third try to exempt its in-house lawyers from the scope of Amgen's privilege waiver should fare no better than its first two efforts. The Court's order still extends the scope of the privilege waiver "to Amgen's in-house counsel," Lois Kwasigroch still qualifies as such, and Amgen produced her for a deposition pursuant to the Court's order. Amgen has *no answer* for why it instructed Ms. Kwasigroch to refuse to answer questions unless she had communicated the information at issue to Amgen's "business leaders." The parties litigated that precise question and Amgen lost. This Court drew a line as to the scope of the waiver in June, and Ms. Kwasigroch falls inside it.

Amgen does not try to defend those instructions *per se*. Instead, Amgen contends that Ms. Kwasigroch was unable to answer any questions about her own state of mind because her brain had melded with Amgen's outside trial counsel, rendering her an empty vessel save for what Cooley told her. That claim is not plausible on its face, but even if it were, the instructions were improper. This Court has ruled that Amgen put at issue *Amgen's* state of mind, that Ms. Kwasigroch *is Amgen*, and that Amgen has therefore waived the privilege as to her state of mind. The court's order specifically exempted *communications* with trial counsel from the scope of the waiver and Genentech did not inquire into them. But to allow Amgen's in-house counsel to refuse to answer questions about her state of mind because her state of mind might have been *informed* by communications with trial counsel, without disclosing the communications themselves, would effectively gut the Court's order, as the instructions to Ms. Kwasigroch made clear.

In view of Amgen's violation of this Court's order, already confirmed by this Court's denial of Amgen's request for reargument, the Court should order the requested sanctions.

II. ARGUMENT

A. Amgen In-House Counsel Lois Kwasigroch Is Subject To The Waiver Order.

Amgen contends that Lois Kwasigroch is not “subject to discovery under the Order[.]” Opp’n at 5. But the Court’s June 20, 2019 order granting Genentech’s motion to compel held that Amgen’s production of the opinion letters had “effected a subject matter waiver of Amgen’s attorney-client privilege” and that the waiver “extends to Amgen’s in-house counsel.” Order at 1, D.I. 259. No one disputes that “Amgen’s in-house counsel” includes Ms. Kwasigroch.

The Court correctly extended Amgen’s waiver to Ms. Kwasigroch because she *is Amgen* for purposes of assessing willfulness. The parties briefed this issue exhaustively over the summer: Genentech explained that *EchoStar* forbids Amgen from releasing only those communications that went to “Amgen decision-makers who relied upon the opinions[.]” Letter Br. at 1, D.I. 254. Amgen pushed for a narrower scope of waiver, arguing that Amgen’s in-house counsel should be treated as outside lawyers, not as the client, and that [REDACTED]

[REDACTED] Amgen Letter Br. at 2, D.I. 255. The Court rejected that position, noting that “*Amgen is the decision-maker* and Amgen’s ultimate decisions are informed by the knowledge of [] a number of people within its organization. *That includes in-house counsel.*” See Reply Declaration of Daralyn J. Durie (“Durie Reply Decl.”) Ex. 1, Hr’g Tr. at 41:21–42:3, June 18, 2019 (emphasis added); see also *id.* at 43:20–23. Any doubt vanished when Amgen sought reargument, asking the Court to reconsider whether “*EchoStar* and subsequent cases establish that in-house counsel’s work product not communicated to decision makers is not subject to waiver.” See Amgen Mot. for Reargument at 3, D.I. 266. This Court affirmed its prior conclusion, noting that it “*already fully considered and addressed these arguments[.]*” Order Denying Mot. for Reargument ¶ 5, D.I. 345 (emphasis added).

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