

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

GENENTECH, INC. and CITY OF
HOPE,

Plaintiffs,

V.

AMGEN INC.,

Defendant.

Civ. No. 17-1407- CFC, Consol.

GENENTECH, INC. and CITY OF
HOPE,

Plaintiffs,

V.

AMGEN INC.,

Defendant.

Civ. No. 18-924-CFC

MEMORANDUM ORDER

Recent sealed and redacted filings in these related cases make clear that the parties are not giving due regard to the public’s right of access to judicial records or the “good cause” standard that governs protective orders under Federal Rule of Civil Procedure 26(c).

In the 18-924 action, for example, Defendant Amgen Inc. filed on March 3, 2020 a sealed stipulated proposed order allowing it to delay the filing of its trial

exhibit list, which had been due that day. Amgen had good reason to request a delay. Its electronic discovery platform for these cases was hosted by Epiq Systems, Inc.; and, as Epiq had publicly announced on March 2nd, Epiq's systems were compromised by a ransomware attack on February 29th, causing Epiq to take its systems offline.¹ Without access to the discovery housed on Epiq's systems, Amgen understandably could not meet the March 3rd deadline. Because of the urgency of the matter, I signed the stipulated order that day without giving thought to its sealed status.

On March 10th, Amgen filed a redacted public version of the stipulated order. That redacted version reads in relevant part:

WHEREAS, [REDACTED];

WHEREAS, Epiq experienced a complete and total system-wide interruption of all services (the "Epiq outage") beginning the morning of Saturday, February 29, 2020 (see attached Declaration of [REDACTED]);

WHEREAS, as a result of the Epiq outage, [REDACTED];

WHEREAS Amgen's Initial Exhibit List (L.R. 16 (3)(6)) is currently due Tuesday, March 3, 3030;

¹ <https://www.globenewswire.com/news-release/2020/03/02/1993837/0/en/Epiq-Issues-Statement-on-Unauthorized-System-Activity.htm>.

WHEREAS [REDACTED]
[REDACTED];

WHEREAS [REDACTED]
[REDACTED];

NOW THEREFORE, it is hereby stipulated and agreed by the Parties subject to the approval of the Court, that:

Genentech, Inc. and Amgen Inc. hereby stipulate and agree, subject to the approval of the Court, to extend Amgen's deadline for service of its Initial Exhibit List for four full days, measured from the time that [REDACTED]
[REDACTED].

* * * *

Genentech, Inc. and Amgen Inc. hereby further stipulate and agree, subject to the approval of the Court, to meet and confer and seek approval from the Court for further modifications to the Schedule for Pretrial Exchange as needed to address any impact to the other deadlines caused by the Epiq outage.

D.I. 532 at 1–2.² Three days later, Amgen filed under seal a stipulated order to delay the trial that had been scheduled for April in the 18-924 case. D.I. 537. That order largely mirrors the first stipulated order. I signed and docketed the second stipulated order but did not seal it. D.I. 539.

It doesn't take a genius to figure out what Amgen redacted in its public version of the first stipulated order—i.e., that Amgen housed its discovery on

² All citations are to the docket in C.A. No. 18-924 unless otherwise noted.

Epiq's systems, that it no longer had access to the discovery, and that it did not know when its access to the discovery would be restored. But the fact that it is obvious to a reader of a redacted filing what has been redacted, does not justify the redactions. And in this case, I am unable to discern a legitimate basis for hiding from the public the fact that Amgen was a victim of the Epiq ransomware attack, especially when that fact is the reason behind a court order to move a trial date. Amgen offered no explanation for sealing the stipulated orders or for the redactions in the public version of the first order it filed. But in any event, Amgen could not reasonably assert that its use of the Epiq system or its inability to access that system as a result of the publicly announced ransomware attack somehow constitutes a trade secret or other proprietary information. Nor could it reasonably argue that public disclosure of the fact that it was a victim of the ransomware attack would cause "a clearly defined and serious injury" that would trump the public's presumptive right of access to this Court's filings. *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019).

The stipulated orders were not the first filings Amgen has made in these cases that shielded from the public eye information that cannot fairly be characterized as proprietary or a trade secret. Plaintiffs Genentech, Inc. and City of Hope (collectively, Genentech) have also made unjustified sealed and redacted filings.

In another March 3rd filing, for example, Genentech redacted dozens of pages of expert testimony from the transcript of a hearing held in open court last October. D.I. 524. The testimony concerned the meaning of certain terms used in the patents asserted in these cases. Typical of the testimony Genentech redacted is the following:

Q. Now, are you familiar with use of the term fermentation in your field of cell culture technology?

A. I am familiar.

Q. And what does it mean in your field?

A. It has a plain and ordinary meaning, and mainly, if you apply it today, it's mainly the use of cells to produce a product.

* * * *

Q. In the context of this portion of the Kao patent, the person of ordinary skill in the art would know that the fermentation process referred to there is referring to a mammalian cell culture process; correct?

A. Yes. As I stated, the term fermentation is very context dependent, so the context here would be, would be cell culture, that's correct.

Q. In the context of the Kao patent, the word fermentation is used to refer to a mammalian cell culture process for making antibodies; correct?

A. With the -- if you are speaking to the whole patent and all of the claims, there's also some mention to procaryotic systems as well, but claims we're talking about today would be procaryotic systems, so would be mammalian cell.

Q. So, correct. Within the context of the Kao patent, the person of ordinary skill would understand the term fermentation to refer to cell culture processes for making antibodies; correct?

A. Yes. Cell culture process, including for procaryotic, yes.

* * * *

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