

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

GENENTECH, INC. and CITY OF HOPE,)
)

Plaintiffs,)

v.)

AMGEN, INC.)
)

Defendant.)
_____)

C.A. No. 17-1407- CFC-SRF
(Consolidated)

GENENTECH, INC. and CITY OF HOPE,)
)

Plaintiffs,)

v.)

AMGEN, INC.)
)

Defendant.)
_____)

C.A. No. 18-924-CFC-SRF

INTERIM ORDER OF SPECIAL MASTER

Rodney A. Smolla, Special Master

District Court Judge Colm Connolly assigned these consolidated matters to the Special Master in a Memorandum Order entered on March 30, 2020. The District Court's order broadly instructed the Special Master to determine whether the sealed

and redacted filings of the parties comply with the legal principles that govern the sealing of documents filed in federal judicial proceedings as established by the Supreme Court of the United States, the United States Court of Appeals for the Third Circuit, and the Federal Rules of Civil Procedure.

A preliminary hearing on the duties assigned to the Special Master was conducted on the record on April 16, 2020. This Interim Order reflects the agreement of the parties and the Special Master as to how to proceed going forward.

I. Briefing and Hearing Schedule

A. The Parties Will Initially Self-Review

The parties reached agreement with the Special Master on a process through which the parties themselves would engage in a self-review of the material previously submitted under seal. That review would provide the parties with the opportunity to voluntarily unseal, opening to public view on the docket of the Court, some of the materials previously filed under seal, thereby reducing the volume of remaining sealed material requiring document-by-document review by the Special Master.

B. Written Submission Deadlines and Guidelines

1. June 11 Deadline

By June 11, 2020, the parties shall each submit to the Special Master:

- Index of Sealed Materials. For each case, an index reflecting the docket number and title of the pleadings (including exhibits) that the party requests continue to be sealed in whole or in part.
- Appendix of Sealed Materials (Highlighted). An appendix corresponding to the index for each case attaching a copy of the pleadings and materials that the party wishes to be sealed, highlighted in blue¹ to show the party's requested redactions (such copies to be OCR'd if possible so that the Special Master can copy and paste the language in the redactions proposed by the party). The Index and Appendix should encompass all materials filed under seal up to and including date the materials are submitted to the Special Master, on or before June 11, 2020.
- Legal Brief. A legal brief (not to exceed 15 pages) providing the legal basis for the sealing request by the party, and any response to this Interim Order.
- Factual Support. For each item on the index, a party shall provide its basis for the sealing request. The basis for sealing may be indicated categorically in connection with the index and/or supported by a written discussion of the applicable law to the facts. Declarations, affidavits, or other factual support

¹ The parties have alerted the Special Master that the materials filed with the Court occasionally include yellow or orange highlighting to direct the Court's attention to particular cited information. The parties will thus use blue highlighting for this redaction review process.

for the sealing requests may be included. There is no page limit for this portion of the submissions.

- **Proposed Procedure for Future Filings.** The parties should submit, either separately, or after meeting and conferring, jointly, a proposed procedure for expeditious and efficient review by the Special Master of future filings submitted under seal. (The parties should meet and confer to determine if there is a process jointly agreed to that will facilitate such expeditious review.)

2. June 26 Deadline

Each party may submit (but is not required to) a paper (not to exceed 10 pages for each case) indicating disagreement or comment upon any sealing requests of the counterparty.

3. Hearing Date

A hearing on the matters pending before the Special Master is shall be held on Monday, June 29, at 1:00 p.m., unless otherwise ordered.

II. Applicable Legal Principles

The parties have additionally requested guidance from the Special Master as to the substantive legal principles to be applied in conducting their own “self-review.” This Interim Order sets forth the legal standards to be applied. In submitting their written submissions and in oral argument the parties remain free to contest these legal principles, in whole or in part, and to present such legal and

evidentiary argumentation regarding their application as the parties deem appropriate.

A. The Three Tiers of Review

Three discrete bodies of law govern the principles pertaining to confidentiality, sealing, and redactions of documents in federal court litigation. They apply in ascending orders of scrutiny.

First, there are principles governing the issuance of protective orders in federal litigation. These principles emanate from Rule 26(c) of the Federal Rules of Civil Procedure, and the attendant gloss courts have applied to the application of Rule 26(c). *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 783-92 (3d Cir. 1994).

Second, federal courts recognize a common law right of access to judicial records. “The existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute.” *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1066 (3d Cir. 1984). There is a “presumption in favor of access to ‘public records and documents, including judicial records and documents.’” *Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates*, 800 F.2d at 343, *quoting Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

Third, “the public and the press have a First Amendment right of access to civil trials.” *In re Avandia Marketing Sales Practices & Product Liability Litigation*,

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