EFiled: Sep 22 2020 03:56PM EDT
Filing ID 65954484
Case Number 25,2020

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| GLAXO GROUP LIMITED and HUMAN GENOME SCIENCES, INC., | ) | |
| Defendants Below, Appellants/Cross-Appellees, | ) | No. 25, 2020 |
| v. | ) | |
| DRIT LP, | ) | Case Below: Superior Court of the State of Delaware C.A. No. N16C-07-218 WCC CCLD |
| Plaintiff Below, Appellee/Cross-Appellant. | ) | |

# CROSS-APPELLANT'S CORRECTED REPLY BRIEF ON CROSS-APPEAL

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## INTRODUCTION

As DRIT demonstrated in its answering brief, this Court should uphold the jury's verdict that GSK breached the implied covenant of good faith and fair dealing by statutorily disclaiming U.S. Patent No. 8,071,092 (the "'092 Patent") to avoid paying royalties to DRIT under the Patent License and Settlement Agreement (the "Agreement").

Alternatively, the Court may uphold the judgment below on the basis that GSK breached the Agreement by ceasing to make royalty payments accruing after it disclaimed the '092 Patent. The unambiguous language of the Agreement does not permit GSK to stop paying royalties after a *voluntary* disclaimer of a royalty-bearing patent. GSK's interpretation of the Agreement—which gives GSK unilateral power to disclaim and cease royalty payments at any time—is contrary to the purpose, structure and language of the Agreement, which carefully delineates the limited circumstances under which GSK's royalty payments could end. GSK's interpretation is also contrary to the expectations of the contracting parties; reads into the Agreement benefits to GSK that it did not bargain for or obtain; and deprives DRIT of the benefit of the bargain Biogen struck with GSK and that DRIT assumed. GSK should be held to the bargain it struck, not its *post hoc* reinterpretation of the Agreement and its unilateral rewriting of the bargain.

## ARGUMENT

### I. The Agreement Does Not "Expressly" Grant GSK the Power To Terminate Royalties Following a Voluntary Disclaimer.

GSK contends 14 times in its briefs that the Agreement "expressly provide[s]", "expressly allow[s]", "expressly acknowledges", "expressly recognizes", "expressly and unambiguously recognizes", "express[ly] contemplat[es]", "expressly mentions", "expressly authorize[s]", "expressly permit[s]" or "expressly specif[ies]" the right for it to cease royalty payments upon a statutory disclaimer of a royalty-bearing patent. (GSK Opening Br. 5, 16, 18-19; GSK Answering Br. 4, 8-11, 20.) Tellingly, it points to no contractual provision that actually says this, and with good reason—the Agreement does not contain any such "express" provision.

Instead, GSK tries to manufacture an "express" provision from the definition of Valid Claim in Section 1.49 of the Agreement. As demonstrated below, the definition of Valid Claim does not mean what GSK thinks. But the debate over what Section 1.49 means is beside the point in any event because the Valid Claim definition does *not* confer any affirmative rights. That is clear from its face—the provision says nothing about GSK's ability to cease paying royalties. And, although GSK often improperly resorts to citing supposed extrinsic evidence about the parties' intent (for which it never provides any record support), it ignores the testimony of its corporate representative, Lucy Hitchcock, who conceded that

the Valid Claim definition did *not* give GSK any affirmative rights to disclaim. (B1785-86.) Ms. Hitchcock went further, admitting that the Agreement contains no "provision that explicitly allows GSK [] to disclaim" the '092 Patent. (B1786.)

The absence of any language "expressly" permitting GSK to terminate its royalty payments upon a disclaimer stands in stark contrast to the provisions of the Agreement where the parties *did* "expressly" give GSK limited rights to terminate royalties. In Section 7 of the Agreement, the parties exhaustively documented the ways in which they could terminate the contract or specific aspects of it, in particular how and under what circumstances GSK could take action to cease paying its contractual royalties. Notably, Section 7 does *not* contain any provision allowing GSK to cease paying royalties on the '092 Patent, and does not permit GSK to cease royalty payments after a voluntary statutory disclaimer of a royalty-bearing patent. The absence of such language is telling.

GSK's argument that Sections 7.3 and 7.4 "say nothing about GSK's right to disclaim and terminate royalties" on the '092 Patent (GSK Answering Br. 8) misses the point. Under Sections 7.3 and 7.4, GSK can terminate its licenses and royalty payments on the "Biogen Idec Prosecution Patents" for "*any reason or for no reason at all*". (A093 (emphasis added).) These provisions show that where the parties agreed to give GSK the unilateral power to terminate royalties, they included those rights in carefully crafted, express provisions. No similar right

to terminate royalty payments on the HGS Patents, such as the ’092 Patent, exists.

To the contrary, Section 7.5 requires GSK to *continue paying royalties* on the HGS Patents even if GSK terminates the contract due to material breach by Biogen. (A094.) This provision makes clear that the royalty stream on the ’092 Patent was important enough to Biogen that it specifically sought—and GSK agreed to provide—protection of that royalty stream even if GSK terminated the Agreement *for cause*. GSK’s reinterpretation of the Agreement would render this provision toothless because GSK could terminate the ’092 royalty stream by simply disclaiming the patent *at any time*. (*See* GSK Answering Br. 8-9.)

Recognizing the significance of the Section 7 provisions, GSK makes a number of failing arguments to discount them. *First*, GSK argues that Section 7.5 cannot mean what it says because it is limited by the definition of “Valid Claim”. (*Id.* at 8.) But the language GSK cites identifies only the specific obligations and their sources (in the Agreement) that will continue, as the text makes clear: “Notwithstanding anything else, upon termination of this Agreement by Licensees pursuant to Section 7.2, *Licensees’ obligation to make milestone payments under Section 3.2 and royalty payments under Section 3.3 for any Product covered by a Valid Claim of the HGS Patents* shall survive.” (A094 (emphasis added).) No affirmative termination right is conferred by this provision.

*Second*, GSK asserts that the termination provision of Sections 7.3

and 7.4 are irrelevant "because under the Patent Act GSK could not disclaim Biogen-owned patents—so GSK needed the Agreement to bestow the right to terminate royalties on those patents." (GSK Answering Br. 8.) GSK provides no record support for this assertion about its motivation. Even if GSK could point to evidence of that intent, such extrinsic evidence is irrelevant to the inquiry at the motion to dismiss stage. *See Nicholas v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 83 A.3d 731, 732 (Del. 2013) (analysis of "extrinsic evidence of the parties' intent" is a question that is inappropriate for resolution on a Rule 12(b)(6) motion to dismiss); *see also Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991) ("[I]f the instrument is clear and unambiguous on its face, neither this Court nor the trial court may consider parol evidence 'to interpret it or search for the parties' intent[ions] . . . .'" (citation omitted)).

In any event, the text of the Agreement itself reveals the actual reason the parties included these provisions. Sections 7.3 and 7.4 impose a cost to GSK if it wants to stop paying royalties on Biogen's patents: GSK can no longer sell products covered by the royalty-bearing patents. (*See* A093 (requiring GSK to give up its license to Biogen-owned patents upon termination).) Under GSK's interpretation of the Agreement, by contrast, GSK would be entitled to stop paying royalties on the '092 Patent while still selling products covered by its then-disclaimed patents. That interpretation makes no economic sense. *See Chi. Bridge*

*& Iron Co. v. Westinghouse Elec. Co.*, 166 A.3d 912, 930 (Del. 2017) (favoring the interpretation that "maintains the underlying economics of the parties' bargain").

*Third*, GSK argues, again without support from the Agreement, that it is counterintuitive that GSK "would ever agree to pay royalties on a product that the patent could no longer protect".[1] (GSK Answering Br. 8.) But the reason GSK would agree to do so is evident from the bargain struck by the parties: Biogen gave up all rights to the invention in dispute, including its pre-existing patent, and settled the PTO interference—giving GSK assurance that Biogen could not attempt to block sales of Benlysta—in exchange for royalty payments on the HGS Patent that ultimately issued (the '092 Patent). (*See* B007, A076, A084-85.) Biogen sought—and obtained—the protection, under Section 7.5, of its right to receive those royalty payments even in the event of its own breach of the Agreement. An interpretation of the Agreement that allows GSK to terminate those royalty payments simply by filing a disclaimer with the PTO is inconsistent with the

[1] GSK cites to *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 462-63 (2015) and *Brulotte v. Thys Co.*, 379 U.S. 29 (1964) (GSK Answering Br. 8), but those cases are inapposite. *Kimble* and *Brulotte* hold that a patentholder cannot charge royalties after *the expiration* of a patent term, based on the principle "that all patents, and all benefits from them, must end when their terms expire". *Kimble*, 576 U.S. at 463 (citing *Brulotte*, 379 U.S. at 30-32). Those cases do not speak to the payment of royalties under the circumstances here, where GSK voluntarily disclaimed the '092 Patent more than five years before the patent term was set to expire (B1035; A452-53, A480, A489-90). Nor was GSK *charging* royalties on its '092 Patent; rather, by agreement, it was *paying* royalties on sales of a product covered by the patent.

carefully negotiated provisions of Section 7.

At bottom, GSK's reading of the Agreement defies common sense. GSK posits that the parties carefully considered the ways in which GSK could stop paying royalties, but then only partially reduced that understanding to writing by including Sections 7.2, 7.4 and 7.5 while failing to include an express provision allowing GSK to cease paying royalties after a statutory disclaimer. This reinterpretation—which would mean that Biogen gave up its blocking patent in return for a royalty stream cancelable at GSK's whim—is flatly inconsistent with the overall scheme of the Agreement and the bargain that the parties struck.

## II. The Definition of "Valid Claim" Does Not "Expressly Allow" GSK To Terminate Royalty Payments After a Voluntary Disclaimer.

GSK's sole support for its purported right to terminate royalties based on its voluntary disclaimer of the '092 Patent is the definition of "Valid Claim" in Section 1.49. But nothing in the language of that definitional provision permits GSK to terminate royalties based on a voluntary statutory disclaimer.

GSK argues that a Valid Claim is one "that has not been [1] dedicated to the public, [2] disclaimed, *or* [3] held unenforceable, invalid or cancelled by a court or administrative agency" (GSK Answering Br. 5), but this diagram of the provision is materially incomplete. In addition to omitting the first of the two "that has not" clauses, GSK omits all of the language following "administrative agency", including a second instance of the word disclaim, in the form of "disclaimer". The full sentence, with the words omitted by GSK in bold, is set forth below:

> "Valid Claim" means a claim of an issued, unexpired patent within the Patent Rights **that has not expired, lapsed, or been cancelled or abandoned**, and that has not been dedicated to the public, disclaimed, or held unenforceable, invalid, or cancelled by a court or administrative agency **of competent jurisdiction in an order or decision from which no appeal can be taken or was timely taken, including through opposition, reexamination, reissue or disclaimer**.

(A083 (emphases added).)

By cherry-picking the contractual language, GSK obfuscates the actual structure of the Valid Claim definition, which makes clear that the second

"that has not" clause covers items that are ordered by courts or administrative agencies, in contrast to the actions that can be undertaken by GSK in the first "that has not" clause. GSK also ignores the final clause of the Valid Claim provision—"including through opposition, reexamination, reissue or *disclaimer*"—thereby violating the foundational tenet that all the words of a contractual clause must be given meaning. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will not read a contract to render a provision or term 'meaningless or illusory.'" (quoting *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992)).

The final clause of the Valid Claim definition logically modifies "by a court or administrative agency of competent jurisdiction in an order or decision from which no appeal can be taken or was timely taken", and would definitively apply in that way under GSK's view of the last antecedent rule. (*See* GSK Answering Br. 5-6; *see also RAG Am. Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at *4 (Del. Ch. Dec. 7, 1999) ("[Q]ualifying words or phrases, where no contrary intention appears, usually relate to the last antecedent.").) Thus, this final clause—which GSK's construction simply ignores—confirms that the parties contemplated a disclaimer ordered by a court or administrative agency. *See Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739-40 (Del. 2006) ("[a] court must accept and apply the plain meaning of an unambiguous term *in the*

*context of the contract language* and circumstances" (emphasis added)).

GSK's only answer to this flaw in their interpretation is to ask this Court to ignore the Agreement's plain language because "*only patentees*" can make a disclaimer under the Patent Act. (GSK Answering Br. 6.) But this myopic focus on the U.S. patent system fails to recognize that the Agreement covers patents in jurisdictions globally, not limited to the United States. (*See, e.g.*, A082 ("'Territory' means [under the Agreement] all countries of the world."); A085 (providing, in Section 3.4, for the payment of royalties on a "country-by-country basis").) That the parties included language that calls for a court or administrative agency to take various actions that might not apply in the U.S., like "opposition" (a proceeding available in the European Union but not in the U.S.) or "disclaimer", is, therefore, hardly surprising. In any event, as DRIT demonstrated in its opening brief, U.S. courts do in fact have the power to order a patentee to disclaim a patent. (DRIT Opening Br. 57-58.) While GSK focuses on the clerical manner in which that disclaimer would be filed in the PTO (by the patentee), it cannot dispute that a court has the power to require that filing.

While GSK ignores the last antecedent rule with regard to the last clause of the Valid Claim definition, it insists that the rule must apply to "by a court or administrative agency of competent jurisdiction", limiting that clause's application to "held unenforceable, invalid or canceled". (GSK Answering Br. 5.)

But, as DRIT noted in its opening brief, the last antecedent rule "is but one of numerous rules" of contract interpretation that "is not to be inflexibly or uniformly applied", *NBC Universal, Inc. v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *6 (Del. Ch. Apr. 29, 2005), and it does not control where a "contrary intention appears", *RAG Am. Coal*, 1999 WL 1261376, at *4. (DRIT Opening Br. 58-59.) Here, a contrary intention is clearly present in the parties' use of two "that has not" clauses: the first identifies events that can take place without judicial or agency action, and the second identifies events, including disclaimer, that require an "order or decision" by "a court or administrative agency". (A083.) If the parties had not intended the two "that has not" clauses to have different meanings, they could have dispensed with the second "that has not" and made a far less complex provision. But they did not.

GSK simply ignores the case law on the discretionary nature of the last antecedent rule, asserting that the rule cannot be "ignore[d]" because "the contractual language could have been more efficient." (GSK Answering Br. 6.) This misconstrues DRIT's argument regarding the two "that has not" clauses. It is not simply that, under GSK's interpretation, the language could be "more efficient" (*id.*). GSK's interpretation violates the basic principles of contract law because it inappropriately renders the second "that has not" superfluous. *See Osborn*, 991

A.2d at 1159 ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.").

If GSK's interpretation were correct, the Valid Claim definition would have instead been written as a single sequence, which would require the deletion and addition of several words. DRIT's interpretation, on the other hand, requires no modifications to the definition. This can be seen through simple diagrams of the trial court's and DRIT's interpretations:

| **DRIT's Interpretation:** | **GSK's Interpretation:** |
|---|---|
| a claim of an issued, unexpired patent within the Patent Rights | a claim of an issued, unexpired patent within the Patent Rights that has not |
| that has not expired, lapsed, or been cancelled or abandoned, and | expired,<br>lapsed, ~~**or**~~<br>been cancelled<br>~~**or**~~ **[been]** abandoned, |
| that has not been dedicated to the public, disclaimed, or held unenforceable, invalid, or cancelled by a court or administrative agency of competent jurisdiction in an order or decision from which no appeal can be taken or was timely taken, including through opposition, reexamination, reissue or disclaimer. | ~~**and that has not**~~ been dedicated to the public,<br>**[been]** disclaimed, or<br>**[been]** held unenforceable, invalid, or canceled by a court or administrative agency of competent jurisdiction in an order or decision from which no appeal can be taken or was timely taken, including through opposition, reexamination, reissue or disclaimer. |

DRIT's interpretation gives meaning to the natural separations in the Valid Claim provision, which should be read as providing two discrete groups of events—each introduced by "that has not"—that can cause a royalty-bearing patent to be removed from the definition of Valid Claim. The unambiguous language of the Valid Claim provision provides that GSK's royalty obligations were not terminated by its unilateral disclaimer of the '092 Patent.

## CONCLUSION

For the foregoing reasons, the Superior Court's judgment in favor of DRIT should be affirmed on the alternative ground that the contract did not permit GSK to cease paying royalties after its voluntary disclaimer of the '092 Patent.

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Dated: September 22, 2020