

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE GENETICS, INC.

Plaintiff,

vs.

ARIZONA TECHNOLOGY ENTERPRISES,

Defendant.

No. 2:12-cv-01734-RAJ

**SECOND AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT**

JURY TRIAL DEMAND

Plaintiff Seattle Genetics, Inc. ("Plaintiff" or "Seattle Genetics"), by and through its counsel, respectfully submits this Second Amended Complaint for Declaratory Judgment against Defendant Arizona Technology Enterprises ("AzTE"). In support thereof, Plaintiff alleges as follows:

THE PARTIES

1. Plaintiff Seattle Genetics is a publicly traded biotechnology company (SGEN) focused on developing antibody-based therapeutics for the treatment of cancer. Seattle Genetics is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 21823 - 30th Drive S.E., Bothell, WA 98021.

2. Upon information and belief, Defendant AzTE is a corporation organized and existing under the laws of the State of Arizona, having its principal place of business

1 at 1475 N. Scottsdale Road, Scottsdale, AZ 85257. AzTE is the exclusive intellectual
2 property management company for Arizona State University (“ASU”), a public institution
3 organized and existing under the laws of the State of Arizona and controlled by a separate
4 entity, the Arizona Board of Regents (“ABOR”). Collectively, Plaintiff refers to AzTE,
5 ASU and ABOR as “the Arizona Institutions”.

6 3. AzTE was formed expressly to provide technology transfer and intellectual
7 property management services to ASU. AzTE performs all the management functions
8 related to all of ASU’s intellectual property, including identifying and patenting
9 inventions, negotiating licenses and enforcing patents.

10 **JURISDICTION AND VENUE**

11 4. This is an action seeking a declaration regarding the parties’ rights and
12 obligations under the patent laws of the United States, 35 U.S.C. §§ 1 *et seq.* More
13 particularly, Plaintiff Seattle Genetics seeks a declaration that: 1) United States Patent
14 No. 5,635,483 (“the ‘483 patent”) is not infringed by Plaintiff; 2) Plaintiff is not in breach of a
15 2003 Materials Transfer Agreement entered into by the parties (the “2003 MTA”); and 3)
16 Plaintiff has not been unjustly enriched through the use of materials, information or know-how
17 that has been provided by the Arizona Institutions to Plaintiff under the ‘483 Patent License, the
18 2003 MTA or any other agreements that may exist between the parties.

19 5. This Court has original jurisdiction over the subject matter of this action
20 pursuant to 28 U.S.C. §§ 1331 and 1338, because it involves claims arising under the
21 Patent Laws of the United States.

22 6. This Court has original jurisdiction over any non-federal claims pursuant to
23 28 U.S.C. § 1332, because the Plaintiff in this action is a citizen of a different state than
24 the Defendant. The matter in controversy exceeds the sum or value of \$75,000 exclusive
25 of interest and costs.

1 7. Alternatively, this Court has supplemental jurisdiction over any non-federal
2 claims pursuant to 28 U.S.C. § 1367, because any non-federal claims are so related to
3 claims in the action within the Court's original jurisdiction that they form part of the same
4 case or controversy.

5 8. Pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202,
6 there exists a substantial and continuing actual, justiciable case and controversy between
7 Seattle Genetics and Defendant concerning alleged infringement of the '483 patent,
8 Plaintiff's alleged breach of the 2003 MTA and Plaintiff's alleged improper use of
9 materials, information or know-how that were provided by the Arizona Institutions.

10 9. Pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202,
11 this Court can and should declare the rights and legal relations of the parties regarding the
12 alleged infringement of the '483 patent, the alleged breach of the 2003 MTA and
13 Plaintiff's alleged improper use of materials, information or know-how that were provided by
14 the Arizona Institutions.

15 10. This Court has specific personal jurisdiction over Defendant because
16 Defendant, ASU and ABOR engaged in negotiations with the Plaintiff in this forum with
17 respect to the '483 patent and entered into the '483 Patent License with the Plaintiff in this
18 forum with the understanding that the obligations under the '483 Patent License were to
19 be -- and in fact have been -- performed in this forum. Those obligations include but are
20 not limited to: (1) the Arizona Institutions' sending materials related to the '483 Patent
21 License to Plaintiff in this forum; (2) the Arizona Institutions' authorization of certain
22 commercial activities in this forum and directed to consumers in this forum pursuant to
23 the '483 Patent License; (3) the Arizona Institutions' availing themselves of this forum's
24 courts by authorizing Plaintiff, as an exclusive licensee of the '483 patent, to pursue
25 suspected infringers of the '483 patent; and (4) the Arizona Institutions' ongoing collection

1 of annual maintenance fees and other revenues from the Plaintiff in this forum under the
2 '483 Patent License.

3 11. This Court also has specific jurisdiction over Defendant because it
4 negotiated and executed the 2004 Amendment to the '483 Patent License, thereby
5 adopting the benefits and obligations of the original license agreement. Among the
6 Arizona Institutions, AzTE was the sole signatory to this 2004 Amendment and acted with
7 the authority of the patent holder. AzTE's counsel was also responsible for sending a
8 letter dated August 30, 2012 to Plaintiff detailing Plaintiff's "certain narrowed rights" in
9 the '483 patent. That letter is discussed in more detail below.

10 12. This Court also has specific personal jurisdiction over Defendant because
11 the Arizona Institutions engaged in negotiations with the Plaintiff in this forum with
12 respect to the 2003 MTA and entered into the 2003 MTA with the Plaintiff in this forum
13 with the understanding that the obligations under the 2003 MTA were to be and have been
14 performed in this forum, including but not limited to the Arizona Institutions providing
15 materials under the 2003 MTA to Plaintiff in this forum, and the Arizona Institutions
16 authorization of Plaintiff's activities in this forum pursuant to the 2003 MTA.

17 13. Venue is proper in this judicial district under 28 U.S.C. §§ 1391, because a
18 substantial part of the events or omissions giving rise to the claim occurred in this judicial
19 district, or a substantial part of property that is the subject of this action is situated in this
20 judicial district.

21 **FACTUAL BACKGROUND**

22 14. Upon information and belief, on or about June 3, 1997, the United States
23 Patent and Trademark Office issued the '483 patent, entitled "Tumor Inhibiting
24 Tetrapeptide Bearing Modified Phenethyl Amides." The named inventors on the face of
25 the '483 patent are George R. Pettit and Jozef Barkoczy. The named assignee on the face

1 of the '483 patent is the Arizona Board of Regents acting on behalf of Arizona State
2 University. A true and correct copy of the '483 patent is attached as Exhibit A.

3 15. Upon information and belief, Defendant AzTE is the exclusive intellectual
4 property management company for ASU.

5 16. In 1999, the Arizona Institutions engaged in licensing negotiations with
6 Seattle Genetics to license the technology described and claimed in the '483 patent. The
7 Arizona Institutions issued the '483 Patent License to Seattle Genetics on February 3, 2000.
8 Under the '483 Patent License, Plaintiff received a license to certain forms of a
9 compound, Auristatin E. A redacted version of the '483 Patent License is attached as
10 Exhibit B.

11 17. Soon after the '483 Patent License was issued, the Arizona Institutions
12 contacted Plaintiff to discuss an amendment to the license. On February 18, 2000, the
13 Arizona Institutions sent a letter to Plaintiff with the proposed terms of the amendment.
14 The proposed amendment was signed by the Plaintiff on February 24, 2000 (the "First
15 Amendment"). A true and correct copy of the First Amendment is attached as Exhibit C.

16 18. In March 2002 the Arizona Institutions engaged in additional negotiations
17 with Seattle Genetics to amend the '483 Patent License. In March 2002 the Arizona
18 Institutions agreed to and signed an amendment to the '483 Patent License (the "Second
19 Amendment"). A redacted version of the Second Amendment is attached as Exhibit D.

20 19. In a June 2002 letter, Seattle Genetics informed the Arizona Institutions that
21 the compounds licensed under the '483 Patent License did not appear to be suitable for
22 use in Plaintiff's studies. Seattle Genetics further informed the Arizona Institutions that it
23 had independently developed new compounds. A true and correct copy of the June 2002
24 letter is attached as Exhibit M.

1 20. In early 2003, the Arizona Institutions engaged in negotiations with Seattle
2 Genetics regarding the transfer of certain compounds known as Dil and Dap. Dil and Dap
3 were publicly known compounds at that time.

4 21. In February 2003, these negotiations resulted in the signing of the Materials
5 Transfer Agreement. A true and correct copy of the 2003 Materials Transfer Agreement
6 is attached as Exhibit I.

7 22. In approximately January 2003, the Arizona Institutions supplied Seattle
8 Genetics with certain materials.

9 23. In early 2004, the Arizona Institutions engaged in additional discussions with
10 Seattle Genetics concerning the '483 Patent License. During these discussions, Seattle
11 Genetics advised the Arizona Institutions of the discoveries it had made with respect to its
12 own development work on new compounds as disclosed in the June 2002 letter (Exhibit
13 M) and its belief that these new compounds were not covered by the '483 patent.

14 24. During these discussions, the Arizona Institutions acknowledged and agreed
15 that the '483 patent did not cover Seattle Genetics' new proprietary compounds, including
16 (i) MMAE, MMAF and AFP; and (ii) any prodrug forms of MMAE, MMAF and AFP
17 (collectively, "SGI COMPOUNDS"). The Arizona Institutions also acknowledged and
18 agreed that Plaintiff would not pay the Arizona Institutions any milestone payments or
19 royalties with respect to products utilizing or incorporating SGI COMPOUNDS or any
20 variants, analogues or derivatives thereof (collectively, "INDEPENDENT PRODUCTS").

21 25. In exchange for this acknowledgement and agreement, Plaintiff agreed to
22 pay, and did pay, the Arizona Institutions a one-time fee and predetermined annual
23 maintenance fees thereafter until the expiration of the '483 patent. This agreement to
24 amend the '483 Patent License became effective on August 17, 2004 (the "Third
25 Amendment"). A redacted version of the Third Amendment is attached as Exhibit E.

1 26. Since 2004, Seattle Genetics has developed, manufactured, and used
2 ADCETRIS[®] (brentuximab vedotin) (formerly known as SGN-35) and the SGI
3 COMPOUNDS, and has marketed and sold ADCETRIS since August 2011 when it
4 received accelerated approval by the FDA for the treatment of relapsed Hodgkin
5 lymphoma and relapsed systemic anaplastic large cell lymphoma.

6 27. Approximately eight years later, on August 20, 2012, the Vice President of
7 Chemistry at Seattle Genetics, Dr. Peter Senter, received a telephone call from one of the
8 inventors listed on the '483 patent, Dr. George Pettit (the "August 20th Telephone Call").
9 During this telephone conversation, Dr. Pettit advised Dr. Senter that ASU was about to
10 sue Seattle Genetics for infringement of the '483 patent. Declaration of Dr. Peter Senter,
11 a true and correct copy of which is attached as Exhibit H, ¶¶ 2-3.

12 28. Soon thereafter, on August 30, 2012, the General Counsel of Seattle
13 Genetics received a letter from the law firm of Irell & Manella claiming to represent
14 AzTE, the Arizona Board of Regents and ASU (the "August 30th letter"). In this letter,
15 the Arizona Institutions' counsel claimed that the '483 Patent License only granted Seattle
16 Genetics "certain narrow rights" in the '483 patent and that AzTE was now prepared to
17 grant Seattle Genetics a license to the '483 patent that encompassed the full scope of the
18 claims of the '483 patent, both literally and under the doctrine of equivalents. A true and
19 correct copy of the August 30, 2012 letter is attached as Exhibit F.

20 29. On September 5, 2012, counsel for the Arizona Institutions sent a proposed
21 confidentiality agreement to Seattle Genetics (the "Proposed Confidentiality Agreement").
22 A true and correct copy of the September 5, 2012 Proposed Confidentiality Agreement is
23 attached as Exhibit G.

24 30. In the Proposed Confidentiality Agreement, the Arizona Institutions' counsel
25 proposed that the Parties agree that communications between them would be governed by

1 Rule 408 of the Federal Rules of Evidence, and that they further agree not to contest in
2 any legal proceeding the applicability of Rule 408 to these communications. Ex. G ¶ 1.

3 31. In the Proposed Confidentiality Agreement, the Arizona Institutions' counsel
4 also proposed that the Parties agree that they would not seek to obtain through discovery,
5 attempt to admit into evidence, or attempt to use for any purpose, communications
6 between them in any legal proceeding, regardless of whether Seattle Genetics or AzTE
7 were parties to such legal proceedings, and regardless of the subject matter of such legal
8 proceedings. Ex. G ¶ 2.

9 32. The combination of the August 20th Telephone Call, the August 30th letter
10 and the September 5th Proposed Confidentiality Agreement convinced Plaintiff that the
11 Arizona Institutions were poised to file imminently a lawsuit against Seattle Genetics for
12 infringement of the '483 patent and/or breach of the '483 Patent License.

13 33. On October 5, 2012 Seattle Genetics filed a Complaint for Declaratory
14 Judgment in this Court seeking a judgment that Seattle Genetics has neither infringed the
15 '483 patent nor breached the '483 Patent License.

16 34. On October 31, 2012, Seattle Genetics received an email from the
17 Managing Director & Chief Legal Officer of AzTE attaching a complaint (the "ASU
18 Complaint") and a notice of default (the "Notice of Default"). A true and correct copy of
19 the email is attached as Exhibit J.

20 35. The plaintiffs listed on the ASU Complaint are the Arizona Board of
21 Regents, acting for and on behalf of Arizona State University, and Arizona Science and
22 Technology Enterprises d/b/a/ Arizona Technology Enterprises which is the Defendant in
23 this case. The ASU Complaint alleges a breach of the 2003 MTA and unjust enrichment
24 through Seattle Genetics' marketing and sale of ADCETRIS and other commercial
25 activities as a result of the alleged improper use of materials, information or know-how it

1 received from the Arizona Institutions pursuant to the 2003 MTA. A true and correct copy
2 of the ASU Complaint is attached as Exhibit K.

3 36. The Notice of Default concerns the '483 Patent License and alleges that
4 Seattle Genetics used know-how and technology for commercial purposes, including the
5 marketing and sale of ADCETRIS, in violation of the '483 Patent License and attempts to
6 invoke certain arbitration language found in the '483 Patent License. A true and correct
7 copy of this Notice of Default is attached as Exhibit L.

8 37. The Arizona Institutions' imminently threatened infringement action of the
9 '483 patent and breach of the '483 Patent License and allegations of beach of the 2003
10 MTA and unjust enrichment, are all based on the same conduct, *i.e.* Seattle Genetics'
11 development and commercialization of SGI COMPOUNDS and INDEPENDENT
12 PRODUCTS, particularly ADCETRIS, and all are directed to the same remedy, namely
13 obtaining a portion of Seattle Genetics' revenues from such commercialization activities.

14 38. These claims are so related that they form part of the same case or
15 controversy because they arise from the same set of operative facts and concern the same
16 parties.

17 **COUNT I – DECLARATION OF NON-INFRINGEMENT**
18 **OF U.S. PATENT NO. 5,635,483**

19 39. Seattle Genetics hereby incorporates by reference its allegations contained
20 in Paragraphs 1- 38 of this Complaint as though fully set forth herein.

21 40. Seattle Genetics' products and commercial activities do not infringe any of
22 the valid claims of the '483 patent, either literally or under the doctrine of equivalents and
23 Seattle Genetics denies any claim of infringement.

24 41. AzTE previously acknowledged in the Third Amendment that ASU's patent
25 rights did not cover Seattle Genetics' INDEPENDENT PRODUCTS. AzTE and the other

1 Arizona Institutions have therefore waived or are estopped from asserting infringement
2 against Plaintiff's INDEPENDENT PRODUCTS.

3 42. Seattle Genetics understands that the Arizona Institutions intend to assert
4 imminently allegations of infringement of the '483 patent based on Seattle Genetics'
5 marketing, manufacture, use, and/or sale of its commercial product, ADCETRIS.
6 ADCETRIS is an INDEPENDENT PRODUCT as defined by the Third Amendment and
7 therefore is not covered by ASU's patent rights. ADCETRIS is an INDEPENDENT
8 PRODUCT because it incorporates one of Plaintiff's own compounds, MMAE, which is
9 an SGI COMPOUND pursuant to the Third Amendment. Ex. E ¶ 1. Thus, a present,
10 genuine, and justiciable controversy exists between the parties with respect to alleged
11 infringement of the '483 patent.

12 43. As a result of the foregoing, there exists an actual and present controversy
13 between the parties within the meaning of the Declaratory Judgment Act, 28 U.S.C. §§
14 2201 and 2202.

15 44. Accordingly, Seattle Genetics seeks and is entitled to a judicial declaration
16 that the '483 patent is not infringed by ADCETRIS or any of Seattle Genetics'
17 commercial activities.

18 **COUNT II – DECLARATION THAT PLAINTIFF HAS NOT BREACHED THE 2003**
19 **MATERIALS TRANSFER AGREEMENT**

20 45. Seattle Genetics hereby incorporates by reference its allegations contained
21 in Paragraphs 1- 38 of this Complaint as though fully set forth herein.

22 46. The Arizona Institutions have alleged in the ASU Complaint that Seattle
23 Genetics has breached the 2003 MTA through its development, marketing, manufacture,
24 use, and/or sale of its commercial product ADCETRIS and other commercial activities.
25

1 47. Seattle Genetics has performed all of its material obligations under the 2003
2 MTA.

3 48. Seattle Genetics has not improperly used any materials, information or
4 know-how provided by Defendant to Plaintiff under the 2003 MTA.

5 49. Seattle Genetics has not breached the 2003 MTA through its development,
6 marketing, manufacture, use, and/or sale of its commercial product ADCETRIS or other
7 commercial activities.

8 50. Any such claim of breach is also barred by the statute of limitations.

9 51. Thus, a present, genuine, and justiciable controversy exists between the
10 parties with respect to the alleged breach of the 2003 Materials Transfer Agreement within
11 the meaning of the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

12 52. Accordingly, Seattle Genetics seeks and is entitled to a judicial declaration
13 that it has not breached the 2003 Materials Transfer Agreement by Plaintiff's
14 development, manufacture, marketing, use or sale of ADCETRIS or otherwise.

15 **COUNT III – DECLARATION THAT PLAINTIFF HAS NOT**
16 **BEEN UNJUSTLY ENRICHED**

17 53. Seattle Genetics hereby incorporates by reference its allegations contained
18 in Paragraphs 1- 38 of this Complaint as though fully set forth herein.

19 54. The Arizona Institutions, including Defendant, have alleged in the ASU
20 Complaint that Seattle Genetics has, without authority, employed materials and
21 information it received from Defendant pursuant to the 2003 MTA for the development of
22 ADCETRIS and other commercial activities.

23 55. The Arizona Institutions have also alleged that Seattle Genetics improperly
24 used materials and know-how it received from the Arizona Institutions to unjustly enrich
25

1 itself through the development of ADCETRIS or other commercial activities at the Arizona
2 Institutions' expense.

3 56. Seattle Genetics has not improperly used materials or information it
4 received from the Arizona Institutions under the 2003 MTA for the commercial
5 development of ADCETRIS or otherwise.

6 57. Seattle Genetics has not been unjustly enriched through its use of materials,
7 technology or know-how obtained from the Arizona Institutions or otherwise.

8 58. Any such claim of unjust enrichment is also barred by the statute of
9 limitations.

10 59. Thus, a present, genuine, and justiciable controversy exists between the
11 parties with respect to Seattle Genetics' alleged unauthorized or improper use of
12 materials, information or know-how it received from the Arizona Institutions for the
13 development of ADCETRIS or other commercial activities within the meaning of the
14 Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

15 60. Accordingly, Seattle Genetics seeks and is entitled to a judicial declaration
16 that it has not been unjustly enriched through the improper use of materials, information
17 or know-how it received from the Arizona Institutions for the development of ADCETRIS
18 or other commercial activities.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff Seattle Genetics respectfully requests that this Court issue a
21 declaratory judgment, declaring that:

- 22
- 23 A. Seattle Genetics has not infringed and does not infringe the '483 patent;
- 24 B. AzTE and the other Arizona Institutions have waived or are estopped from
25 asserting infringement of the '483 patent by Plaintiff;

- 1 C. The '483 Patent License is valid, binding and enforceable;
- 2 D. Plaintiff has no obligation to make any payments to Defendant for the
- 3 development, manufacture, marketing, use, and sale of ADCETRIS or any
- 4 other SGI COMPOUND or INDEPENDENT PRODUCT;
- 5 E. Plaintiff has not breached the 2003 Materials Transfer Agreement by its
- 6 development, manufacture, marketing, use or sale of ADCETRIS or otherwise;
- 7 F. The Arizona Institutions' allegations of breach of the 2003 Materials Transfer
- 8 Agreement are barred by the statute of limitations;
- 9 G. Plaintiff has not improperly used materials, information or know-how it
- 10 received from the Arizona Institutions for the development of ADCETRIS or
- 11 other commercial use;
- 12 H. The Arizona Institutions' allegations of unjust enrichment through the improper
- 13 use of materials, information or know-how received from the Arizona
- 14 Institutions are barred by the statute of limitations; and
- 15 I. Plaintiff is entitled to such other and further relief as this Court may deem just
- 16 and proper, including reasonable attorney's fees and costs.
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20 **JURY DEMAND**

21 Plaintiff hereby demands a trial by jury on all issues and claims so triable.

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1 Dated this 17th day of April, 2013.
2
3

4 **CORR CRONIN MICHELSON**
5 **BAUMGARDNER & PREECE LLP**

6 *s/ Guy P. Michelson*

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CERTIFICATE OF SERVICE

I certify that on April 17, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record for the parties.

s/ Guy Michelson
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