

Superior Court Of California  
Minute Order - CIVIL LAW AND MOTION  
HONORABLE PETER KIRWAN

Calendar For: 11/19/15

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Reporter: Melissa Crawford Clerk: Ingrid Stewart

Bailiff: ~~Miguel Ramos~~ **TINA HARRELL**

Dept: Dept 1

1. 03:00PM Case: 1-15-CV-283834 Depomed, Inc. V. Horizon Pharma, PLC  
Type: Breach Of Contract/Warranty - Unlimited Date Filed: 08/03/15  
SubType:  
SV: 08/07/15  
Event: Mtn: Preliminary Injunction Result Code:  
Text: Motion by Plaintiff Depomed, Inc. for Preliminary Injunction

PLT-0001 Depomed, Inc.  
Atty: Paul J. Collins ✓ **NOAH STERN ✓**  
Atty: Brian M. Lutz ✓

DEF-0002 Horizon Pharma, Inc.

DEF-0001 Horizon Pharma, PLC  
Atty: Amy S. Park ✓ **EDWARD WELCH ✓**

**ROBERT JACKSON ATTY FOR AMICI CURIAE SCHOLARS OF CONST. AND CORP. LAW**; **JONATHAN WAGNER - ATTY FOR INTERESTED PARTY**

( ) NO APPEARANCE ( ) OFF CALENDAR (X) **CMC 2.5.16 @ 10AM DI**  
TENTATIVE RULING: (X) CONTESTED ( ) NOT CONTESTED  
(X) ADOPTED ( ) AS AMENDED ( ) SEE BELOW ( ) SEE ATTACHED

THE COURT ORDERS THIS CASE:

(X) SET FOR **TRIAL** ON **APRIL 4, 2016** AT **9** DEPT **1**  
( ) CONTINUED TO \_\_\_\_\_ AT \_\_\_\_\_ DEPT \_\_\_\_\_  
( ) DISMISSED ( ) WITH PREJUDICE ( ) WITHOUT PREJUDICE ( ) RE: \_\_\_\_\_  
( ) NO SERVICE; REISSUED TO \_\_\_\_\_ AT \_\_\_\_\_ DEPT \_\_\_\_\_

( ) TEMPORARY RESTRAINING ORDER TO REMAIN IN EFFECT  
(X) MOTION/PETITION (X) ARGUED ( ) GRANTED ( ) DENIED (X) OTHER **PARTIES TO MEET AND CONFER REGARDING ORDER**

( ) DEMURRER ( ) SUSTAINED ( ) WITH \_\_\_\_\_ DAYS LEAVE TO AMEND ( ) WITH LEAVE TO AMEND BY \_\_\_\_\_  
( ) WITHOUT LEAVE TO AMEND ( ) AS TO \_\_\_\_\_ CAUSE(S) OF ACTION  
( ) OVERRULED \_\_\_\_\_ DAYS TO ANSWER OR PLEAD FURTHER ( ) AS TO \_\_\_\_\_ CAUSE(S) OF ACTION

( ) TAKEN UNDER SUBMISSION; WRITTEN DECISION TO BE MAILED

( ) ORDER SIGNED ( ) SERVED ON COUNSEL IN COURT ( ) \_\_\_\_\_ TO PREPARE ORDER

( ) EXEMPTION: ( ) ALLOWED ( ) DISALLOWED (X) OTHER **ORDER CAN BE MADE PUBLIC**

( ) PAYMENT GRANTED \$ \_\_\_\_\_ PER \_\_\_\_\_ FROM \_\_\_\_\_ ( ) CERTIFIED COPY OF MINUTES TO SHERIFF

( ) SWORN, EXAMINED AND DISCHARGED ( ) PURGED OF CONTEMPT ( ) ORDERED RELEASED

( ) BAIL: ( ) APPLIED \$ \_\_\_\_\_ ( ) EXONERATED \$ \_\_\_\_\_ ( ) FORFEITED ( ) OTHER \_\_\_\_\_

( ) BENCH WARRANT ORDERED FOR \_\_\_\_\_ BAIL \$ \_\_\_\_\_

(X) SET FOR (X) COURT TRIAL ( ) JURY TRIAL ON \_\_\_\_\_ AT 8:45 AM. TIME ESTIMATE **10 DAYS**

( ) JURY DEMANDED BY \_\_\_\_\_ ( ) JURY WAIVED BY \_\_\_\_\_

( ) TRIAL COUNSEL PLAINTIFF \_\_\_\_\_ DEFENDANT \_\_\_\_\_

( ) SETTLEMENT CONFERENCE ON ( ) WEDNESDAY PRIOR TO TRIAL ( ) ON \_\_\_\_\_

(X) OTHER ORDERS: **SUPPLEMENTAL BRIEFS SUBMITTED RECENTLY OR NOT ITEMIZED IN SCHEDULE BRIEFS; THEY ARE DENIED BY THE COURT, WHICH DID NOT REVIEW BRIEFS AND ARE SUSTAINED.**

## Calendar Lines 1; 2

**Case Name:** *Depomed, Inc. v. Horizon Pharma PLC, et al.; Horizon Pharma, Inc. v. Anido, Jr., et al.*

**Case No.:** 1-15-CV-283834; 1-15-CV-283835

There are two motions before the Court: (1) Depomed, Inc.'s ("Depomed") Motion for Preliminary Injunction; and (2) Horizon Pharma, Inc.'s ("Horizon") Motion for Preliminary Injunction.

As a preliminary matter, the Court notes that an "Application for Leave to File Brief of Amici Curiae Scholars of Constitutional and Corporate Law and to Participate in Oral Argument" has been filed. The Court will consider the brief, but oral argument will not be permitted.

### **A. Depomed's Motion for Preliminary Injunction**

Depomed asserts that, for approximately the last five months, Horizon has engaged in a campaign to take over Depomed through an acquisition proposal that significantly undervalues Depomed. Depomed contends Horizon knows its proposal is inadequate because it has detailed confidential and non-public information about Depomed's flagship product, NUCYNTA. Depomed states that Horizon obtained this information pursuant to a confidentiality agreement (the "MNDA") entered into as part of a competitive bidding process to acquire NUCYNTA from Janssen Pharmaceuticals, Inc. ("Janssen") – a process in which Depomed was the winning bidder earlier this year. Depomed argues that Horizon is required under the MNDA to maintain this information in "trust and confidence" and use it only in connection with a potential deal with Janssen for NUCYNTA, but Horizon is now misusing this confidential information to take control of Depomed.

"In deciding whether to issue a preliminary injunction, a court must weigh two "interrelated" factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." (*Ryland Mews Homeowners Association v. Munoz* (2015) 234 Cal.App.4th 705, 711.)

Depomed's Amended Complaint ("FAC") sets forth causes of action for breach of contract, fraud, unfair competition, unjust enrichment, and conversion. Depomed argues that it is likely to succeed on its breach of contract claim because Horizon breached the MNDA and Depomed can enforce the MNDA. Horizon responds that the MNDA applied to a contemplated co-promotion of products between Horizon and Janssen, and does not extend to cover a different transaction involving an auction of the rights to the drug NUCYNTA. Horizon also argues that the right to enforce the MNDA was not assigned to Depomed pursuant to the 2015 Asset Purchase Agreement ("APA") between Depomed and Janssen pursuant to which Depomed purchased the rights to NUCYNTA.

With regard to Horizon's first argument, Horizon asserts that, in June 2013, Horizon and Janssen considered a co-promotion arrangement wherein Horizon would promote NUCYNTA and Johnson & Johnson (of which Janssen is a division) would promote Horizon's drug Duexis. The parties executed a co-promotion agreement (the MNDA) on July 24, 2013. The stated purpose of the MNDA was to assure the protection of confidential information exchanged in connection with negotiations and discussions "[f]or a potential commercial business arrangement, specifically a co-promotion arrangement whereby HORIZON would co-promote JANSSEN's NUCYNTA® drug product in the United States." (Declaration of Amy S. Park in Support of Horizon's Memorandum of Points and Authorities in Opposition to Depomed's Motion for a Preliminary Injunction ("Park Decl."), Exhibit 3, Exhibit A.) In March 2014, Janssen notified Horizon that it was no longer interested in pursuing a co-promotion and the process ended.

Horizon contends that the MNDA applied only to the co-promotion process and not to the NUCYNTA auction. Horizon points out that, on January 15, 2015, Horizon raised this issue with Johnson & Johnson in writing and proposed that the parties amend the MNDA to expand its scope to cover the NUCYNTA auction. (Park Decl., Exhibit 4.) A January 15, 2015, email from Joe Whalen, Horizon's SVP of Business Development & Alliance Management, stated, in relevant part: "In discussions with Cooley we noticed our CDA, which was done some time ago, contemplated a co-promo arrangement vs. the current proposed transaction. We need to update the CDA for this. Attached is a proposed amendment and a redline to assist in your internal review." (*Ibid.*) There was no response to the email and the MNDA was not amended.

Depomed responds that Horizon and Janssen acknowledged in writing that the MNDA applied to the NUCYNTA sales process. For example, Horizon's April 16, 2014, letter to Janssen offering to acquire NUCYNTA stated that the "preliminary offer and the information contained herein are submitted on the strict understanding that J&J and its representatives will keep both it, and any discussion arising from it, strictly confidential in accordance with the terms of our existing confidentiality agreement. . . ." (Declaration of Brian M. Lutz in Support of Motion for Preliminary Injunction ("Lutz Decl."), Exhibit 6.) Similarly, a letter from Janssen to Horizon regarding the bid proposal stated: "We appreciate your interest and your cooperation in complying with these procedures and remind you that the confidentiality agreement previously executed by you (the "CDA") remains in full force and effect and you are requested to comply with its terms." (Lutz Decl., Exhibit 8.) Depomed's evidence shows that Horizon and Janssen intended that the MNDA apply to the NUCYNTA auction and that is why no new confidentiality agreement was executed by the parties.

Horizon argues that, even if the MNDA applies, Depomed lacks standing to enforce the agreement. Horizon contends that Depomed is not a party to the MNDA, it does not claim to be a third-party beneficiary, and Depomed's assertion that it acquired rights to enforce the agreement contradicts the plain language of the APA. Horizon states that the APA excludes contracts from assignment other than those specified in Schedule 2.01(g) and the MNDA is not identified in that schedule. (Lutz Decl., Exhibit 33, Section 2.01(g).) Depomed provides evidence, however, that Janssen has confirmed that Janssen's rights under the MNDA were transferred to Depomed in connection with the APA. (Lutz Decl., Exhibit 34.) A different conclusion would be illogical as it would mean that Depomed could not protect the

confidentiality of information disclosed during the auction process regarding NUCYNTA even though Depomed now owns NUCYNTA. Janssen no longer has any incentive or interest in protecting that information.

Horizon's final argument regarding the breach of contract cause of action is that Horizon did not breach the MNDA because it has not disclosed any information it obtained from Janssen and Depomed has not demonstrated that Horizon misused "Proprietary Information" as defined in the MNDA. The MNDA defines "Proprietary Information" as information of either party disclosed or made available to the other party. (Park Decl., Exhibit 3.) Further, "information provided by a disclosing party that, by its nature and content, would be readily recognized by a reasonable person to be proprietary to the disclosing party shall also be deemed its Confidential Information." (*Ibid.*) Depomed provides evidence that Horizon used information that was not publicly available and could only have come from Janssen. (See Lutz Decl., Exhibit 1, pp. 129:19-130:5, 179:25-182:20; Exhibit 4, pp. 255:8-257:8, 261:9-262:15, 268:24-269:23, 275:6-276:16, 293:11-294:19.) Consequently, Depomed has shown that it is likely to prevail on its breach of contract claim.

The parties dispute whether Depomed can succeed on its claims for unjust enrichment, conversion, and unfair competition. In light of Depomed's showing on the breach of contract cause of action, which is sufficient on its own to support a preliminary injunction, the Court need not reach the issue of whether these additional causes of action are viable.

With regard to the relative interim harm to the parties from the issuance of an injunction, the harm to Depomed from not issuing an injunction would be greater than the harm to Horizon from issuing an injunction. While there may be some harm to Horizon and other shareholders from a delay in their right to call meetings and vote, they will still have the opportunity to do those things at a later date. On the other hand, if Horizon is ultimately successful in its takeover attempt, Depomed will no longer have any avenue of recourse even if it proves that Horizon misused confidential information. The takeover will be irreversible and Depomed will be left with no remedy. (*McMillan v. Intercargo Corp.* (Del. Ch. 2000) 768 A.2d 492, 500 ["[I]t is generally accepted that a completed merger cannot, as a practical matter, be unwound."].)

In sum, Depomed has shown a likelihood of prevailing and the balance of harms from the issuance or non-issuance of an injunction tips in its favor. Accordingly, Depomed's motion for a preliminary injunction is GRANTED.

#### **B. Horizon's Motion for Preliminary Injunction**

Horizon seeks to enjoin defendants Vicente J. Anido, Jr., Karen A. Dawes, Louis J. Lavigne, Jr., Samuel R. Saks, James A. Schoeneck, Peter D. Staple, David B. Zenoff, and Depomed, Inc. from enforcing the Rights Agreement between Depomed and Continental Stock Transfer & Trust Company (the "Poison Pill"), and Sections 2(b), 2(c), and 2(d) of the Amended and Restated Bylaws (the "Delay Amendments") of Depomed through a final trial on the merits. In light of the Court's ruling on Depomed's motion for a preliminary injunction, a ruling on Horizon's motion for preliminary injunction would have no effect as the purpose of Horizon's requested injunction is to allow Horizon to move forward with conduct leading to the takeover of

Depomed, but all such conduct is enjoined pending a trial on the merits of Depomed's claims. Accordingly, Horizon's motion for preliminary injunction is DENIED. (See *Legg v. Ford* (1960) 185 Cal.App.2d 534, 544 [court will not engage in futile act]; see also *Reverend Mother Pauline v. Bray* (1959) 168 Cal.App.2d 384, 386 [same].)