IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BIOGEN INC. and BIOGEN MA INC., Plaintiffs, v. SANDOZ INC. and POLPHARMA BIOLOGICS S.A., Defendants.	Civil Action No. 22-1190-GBW [redacted] REDACTED - PUBLIC VERSION Filed: June 6, 2024

Jack Blumenfeld, Karen Jacobs, Derek J. Fahnestock, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; Eric J. Marandett, Anita M.C. Spieth, Sophie F. Wang, John C. Calhoun, Jennie D. Wilusz, Emily H. Miller, Marina Pullerits, Max A. Jacobs, CHOATE HALL & STEWART LLP, Boston, Massachusetts.

Counsel for Plaintiffs

Anne Shea Gaza, Samantha G. Wilson, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; Erik J. Olson, Evelyn L. Chang, MORRISON & FOERSTER LLP, Palo Alto, California; Matthew Chivvis, Rachel S. Dolphin, MORRISON & FORESTER LLP, San Francisco, California; Aaron G. Fountain, MORRISON & FOERSTER LLP, Austin, Texas.

Counsel for Defendants

MEMORANDUM OPINION

March 5, 2024
Wilmington, Delaware

GREGORY B. WILLIAMS
UNITED STATES DISTRICT JUDGE

Plaintiffs Biogen Inc. and Biogen MA Inc. ("Biogen") allege that Defendants Polpharma Biologics S.A. ("Polpharma") and Sandoz, Inc. ("Sandoz") will infringe Plaintiffs' patents on natalizumab. D.I. 98. Polpharma moves to dismiss Biogen's Second Amended Complaint ("SAC") pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. D.I. 155 (the "Motion"). Polpharma argues that Biogen has not articulated a plausible infringement position as to Polpharma, because Sandoz, not Polpharma, was the submitter of the abbreviated Biologics License Application ("aBLA"). *Id.* at 4. Polpharma further argues that Biogen has not adequately alleged that Polpharma's future commercial activity will infringe the Asserted Patents if the FDA approves Sandoz's aBLA. *Id.* at 11. Lastly, Polpharma argues that any past or present infringing acts fall within a statutory safe harbor. *Id.* at 15. The Court denies Polpharma's motion in full.

I. BACKGROUND

On May 24, 2022, an aBLA for a proposed natalizumab biosimilar was submitted to the FDA, listing Sandoz as the named filer. SAC ¶¶ 20, 22, 27, 72-74, 97. Biogen filed a patent infringement suit, alleging the infringement of numerous patents. D.I. 2. Biogen's First Amended Complaint alleged that Sandoz submitted an application to sell and market a biosimilar to Biogen's Tysabri product (which uses natalizumab). D.I. 51 ¶¶ 18-20, 72, 73. The First Amended Complaint also alleged that Sandoz will infringe under 35 U.S.C. § 271(a), (b), or (g). Biogen filed the SAC on February 8, 2023. D.I. 98. On March 3, 2023, Polpharma again moved to dismiss, and moved to stay proceedings. D.I. 154, D.I. 157.

The SAC asserts the following facts. Polpharma is a Polish company that has no U.S. presence, sales, or operations. SAC ¶¶ 16, 27. On September 2, 2019, Sandoz and Polpharma entered into a global commercialization agreement (the "Agreement") to develop a biosimilar version of Tysabri. *Id.* at ¶¶ 22, 26, 72. Polpharma was "solely responsible for carrying out the Development of" the proposed biosimilar. *Id.* at ¶ 73. Polpharma also maintained "sole responsibility for the Manufacturing and supply" of the proposed biosimilar. *Id.* at ¶ 74. Sandoz paid Polpharma [redacted]. *Id.* at ¶¶ 84-85. Sandoz has also agreed to pay [redacted] *Id.* at ¶ 85. Sandoz, in turn, "would be responsible for commercializing and distributing [the proposed biosimilar] in all markets upon approval, though an exclusive global license." *Id.* at ¶ 22.

[redacted], a necessary part of the standard of care of treatment with natalizumab. *Id.* at ¶¶ 59, 76. Polpharma approached Biogen in 2019, seeking to license Biogen's patents[1] on Stratify, its anti-JCV antibody assay. *Id.* at ¶¶ 56, 77, 104. Biogen declined to offer Polpharma a license, so Polpharma partnered with a third party to develop the ImmunoWELL JCV IgG Test ("ImmunoWELL"), an assay that Defendants claim is "substantially equivalent" to Stratify. *Id.* at ¶¶ 77, 79. [redacted] *Id.* at ¶¶ 80-81.

[1] Including several of the patents-in-suit.

While ImmunoWELL was in development, and without authorization from Biogen, Polpharma paid another contractor to use Stratify for Defendants' clinical trials. *Id.* at ¶¶ 78, 104. [redacted]. *Id.* at ¶¶ 87, 106.

Sandoz was listed as the submitter on an aBLA seeking approval of a natalizumab biosimilar developed by Polpharma. *Id.* at ¶ 97. [redacted] *Id.* at ¶¶ 27, 88, 91-92, 97. Polpharma is also the Investigational New Drug holder associated with the aBLA and participated in meetings and correspondence with the FDA leading up to the submission. *Id.* at ¶¶ 27, 89.

II. LEGAL STANDARD

To state a claim on which relief can be granted, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Such a claim must plausibly suggest "facts sufficient to 'draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Doe v. Princeton Univ.*, 30 F.4th 335, 342 (3d Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Klotz v. Celentano Stadtmauer & Walentowicz LLP*, 991 F.3d 458, 462 (3d Cir. 2021) (quoting *Iqbal*, 556 U.S. at 678). But the Court will "'disregard legal conclusions and recitals of the elements of a cause of action supported by mere conclusory statements.'" *Princeton Univ.*, 30 F.4th at 342 (quoting *Davis v. Wells Fargo*, 824 F.3d 333, 341 (3d Cir. 2016)). Under Rule 12(b)(6), the Court must accept as true all factual allegations in the

complaint and view those facts in the light most favorable to the plaintiff. *See Fed. Trade Comm'n v. AbbVie Inc*, 976 F.3d 327, 351 (3d Cir. 2020).

III. DISCUSSION

a. Biogen Has Adequately Alleged That Polpharma Qualifies as an aBLA Submitter.

Under 35 U.S.C. § 271(e)(2)(C), it is an artificial act of infringement to "submit" an application seeking approval of a biologic product. *Sandoz Inc. v. Amgen Inc.*, 582 U.S. 1, 7 (2017). Sandoz was the signatory of the aBLA submitted to the FDA. SAC ¶ 97. A non-signatory qualifies as a submitter of an aBLA, when (1) it "is actively involved in filing the [aBLA]" (2) it "stands to benefit from it's approval." *Celgene Corp. v. Mylan Pharms., Inc.*, 17 F.4th 1111, 1129 (Fed. Cir. 2021); *see also In re Rosuvastatin Calcium Pat. Litig.*, 703 F.3d 511, 527-28 (Fed. Cir. 2012). Multiple entities can be considered submitters of the same application. *See, e.g., Purdue Pharma L.P. v. Varam, Inc. (In re OxyContin Antitrust Litig.)*, 04-MS-1603 (SHS), 2012 WL 5184949, at *5–6 (S.D.N.Y. Oct. 19, 2012) (rejecting argument that "only one entity can 'submit' the ANDA to the FDA and thus incur section 271(e)(2) liability"); *Novartis Pharms. Corp. v. Handa Neuroscience, LLC*, C.A. No. 21-645-LPS, 2022 WL 610771, at *4-5 (D. Del. Mar. 1, 2022).

1. Biogen has Adequately Alleged that Polpharma Was Actively Involved in Preparing the aBLA.

The Federal Circuit has declined to "define what all relevant acts involved in the preparation and submission of an [aBLA] might be," so the Court turns to district court opinions for guidance. *Valeant Pharms. North Am. LLC v. Mylan Pharms., Inc.*, 978 F.3d 1374, 1383 n.8 (Fed. Cir. 2020). Actively participating in the submission of an aBLA can include "prepar[ing] and execut[ing] [aBLA]-related documents," "act[ing] collaboratively in the preparation and submission" of the aBLA, and working "in concert with one another to make, use, offer to sell,

and/or sell" the final product. *Cephalon, Inc. v. Watson Pharms., Inc.*, 629 F.Supp. 2d 338, 349 (D. Del. 2009); *Novartis*, 2022 WL 610771, at *4. Active involvement may also include "play[ing] a significant role in research and development" relating to the aBLA, "correspond[ing] with the FDA," and "contract[ing] with third parties . . . to conduct various tests to be included as part of the" aBLA. *Novartis*, 2022 WL 610771, at *4-5. Lastly, active involvement can include manufacturing the drug. *Id.* at *4 (manufacturing a pilot batch is a particular sign of active involvement); *Otsuka Pharm. Co v. Hatero USA, Inc.*, C.A. No. 19-1954-LPS, 2020 WL 6822971, at *3 (D. Del. Nov. 20, 2020) (allegations that a defendant "will supply the active pharmaceutical ingredient" plausibly indicate that said defendant was involved in an ANDA submission). On the other hand, "'unadorned supposition' that the defendants 'work in concert'" is insufficient. *Celgene Corp. v. Mylan Pharm. Inc.*, 17 F.4th 1111, 1129 (Fed. Cir. 2021). Similarly, it is insufficient to appoint another party as an agent for an underlying Drug Master File, provide quality assurance and testing, and communicate with the FDA about inspections of a manufacturing facility. *Bausch Health Ir. Ltd. v. Mylan Lab'ys. Ltd.*, No. 21-10403 (SRC) (JSA), 2022 WL 683084, at *10-11 (D.N.J. Mar. 8, 2022).

Biogen has alleged that [redacted] SAC ¶¶ 27, 87-88, 92, 97. Biogen has alleged that [redacted] *Id.* at ¶¶ 22-23, 27, 72, 78-82, 89. Lastly, Biogen has alleged that Polpharma has maintained responsibility for manufacturing the proposed biosimilar. *Id.* at ¶¶ 27,

74, 107. At this stage, these detailed allegations are easily sufficient to overcome a motion to dismiss.

Polpharma argues that *Cephalon*, *Novartis*, and *Otsuka* are inapposite, because the defendants in those cases were in the same corporate family as the signatory on the aBLA. D.I. 236 at 4-5. The prior decisions are not so limited. *Cephalon* merely recognized that active involvement creating submission is "especially true" when the parties involved are in the same corporate family. 629 F. Supp. 2d at 349. *Novartis* found the allegations of active involvement sufficient even without the parties being in the same corporate family but found that the parties being in the same corporate family "provides additional support for the Court's conclusion." 2022 WL 610771, at *5. *Otsuka* denied a motion to dismiss a party "who [did] not have an agency and corporate relationship with the [aBLA] holder," when the parties cooperated and held themselves out as working together to sell pharmaceutical products. 2020 WL 6822971, at *2. Indeed, a "formal corporate relationship" is "not dispositive, and in most (maybe all) instances, will not even be pertinent to assessing whether the entity is a submitter." *Adverio Pharma GmbH v. Alembic Pharms. Ltd.*, 2019 WL 581618, at *5 (D. Del. Feb. 13, 2019); *see also In re OxyContin Antitrust Litig.*, No. 04-MD-1603 SHS, 2012 WL 5184949, at *5 (S.D.N.Y. Oct. 19, 2012) (finding a party a submitter without a corporate relationship to the signatory). The absence of a corporate relationship between Polpharma and Sandoz does not defeat Biogen's well-pled allegations that Polpharma was actively involved in the preparation of the aBLA.

2. Biogen has Adequately Alleged that Polpharma Stands to Benefit from Approval of the aBLA.

Being "paid to assist with the preparation and filing of the [aBLA]" is insufficient to find that a party stands to benefit from FDA approval, even when payment is "contingent on the FDA approving the proposed generic drug product." *Adverio*, 2019 WL 581618, at *5. Instead, a

party must "benefit from the [aBLA's] submission" and "approval" through ongoing payments, increased profits, new opportunities, or other direct benefits. *Celgene*, 17 F.4th at 1129.

Sandoz has alleged that Polpharma is entitled [redacted]. SAC ¶ 85. This is an estimated amount of [redacted]. D.I. 206 at 12 n. 5. While Polpharma asserts that only Sandoz will import, market, and sell the biosimilar in the United States, this [redacted] is sufficient to find that Polpharma "would benefit from the [aBLA's] submission." *Celgene*, 17 F.4th at 1129. If [redacted] is not "directly benefiting," [redacted], companies would be able to escape liability by laundering funds through intermediaries, and the "directly benefit" test would be overly narrow. Each sale of the proposed biosimilar results in profit for Sandoz, [redacted]—Polpharma directly benefits from the drug going on the market.

Even if this [redacted] were somehow insufficient to demonstrate direct financial benefit, supplying the active pharmaceutical ingredient plausibly indicates that a company will "directly financially benefit" from "manufacture and sale of the proposed product, after FDA approval." *Otsuka*, 2020 WL 6822971, at *3. Biogen has alleged just that. SAC ¶¶ 27, 74, 107. Thus, Polpharma stands to benefit from the submission and approval of the aBLA.

Because Polpharma was actively involved in the preparation of the aBLA and stands to benefit from the submission and approval of the aBLA, it is a submitter under 35 U.S.C. § 271(e).

b. Biogen Has Adequately Alleged that Polpharma Will Infringe if the aBLA is Granted.

Polpharma also argues that Biogen has not adequately alleged that there will be future acts of infringement under 35 U.S.C. § 271(a), (b), or (g). D.I. 155 at 11. Biogen alleges that Polpharma will commit two acts of future infringement: (1) induced infringement by manufacturing, marketing, and selling the proposed biosimilar, and (2) infringement arising out of the future use of ImmunoWELL. D.I. 206 at 17-18.

To support a count of active inducement, a plaintiff must allege that the accused infringer "knowingly aided and abetted another's direct infringement," *Rodime PLC v. Seagate Tech., Inc.*, 174 F.3d 1294, 1306 (Fed.Cir.1999), and committed an act that constitutes inducement, *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1559 (Fed.Cir.1994). Where an inducement claim is premised on the filing of an aBLA pursuant to § 271(e), a plaintiff cannot rely on alleged acts done in preparation for filing an aBLA, but rather must allege acts to be committed after the aBLA is approved, such as manufacturing, marketing, or selling the infringing products. *Pfizer Inc. v. Ranbaxy Lab'ys Ltd.*, 321 F. Supp. 2d 612, 615 (D. Del. 2004); *Forest Lab'ys, Inc. v. Ivax Pharm., Inc.*, 501 F.3d 1263, 1272 (Fed. Cir. 2007).

Allegations that a defendant "will be involved in the marketing and distribution of the generic" if the aBLA is approved "are sufficient to raise [a defendant's] active inducement above the speculative level." *Cephalon, Inc. v. Watson Pharms., Inc.*, 629 F. Supp. 2d 338, 350 (D. Del. 2009); *see also Forest Lab'ys*, 501 F.3d at 1272 (upholding a claim against a supplier who "was to manufacture and sell" infringing products "for resale in the United States" and "the plan to manufacture, import, market and sell . . . was undoubtedly a cooperative venture.").

Biogen has alleged that the manufacture, marketing, and sale of the biosimilar will be a joint effort. SAC ¶¶ 20, 27. In particular, Biogen has alleged that, if the aBLA is approved,

Polpharma will manufacture the biosimilar drug substance, the key ingredient of the proposed biosimilar. *Id.* at ¶¶ 27, 74, 107. These allegations are like those in *Cephalon* and *Forest Laboratories*, and the allegations of a collaborative plan are further bolstered by Biogen's extensive allegations of collaboration during the aBLA drafting process. *See id.* at ¶¶ 27, 87-88, 92, 97. Biogen has adequately alleged that Polpharma and Sandoz are collaborators, and that Polpharma's conduct if the aBLA is approved will induce infringement.

Independently, Biogen has alleged that Polpharma submitted the application to the FDA for ImmunoWELL, which will infringe Biogen's patents directed to Stratify. *Id.* at ¶¶ 76, 81-82. Polpharma did not respond to Biogen's argument that Polpharma's future use of ImmunoWELL will constitute infringement. See D.I. 236 at 2-3. Accordingly, the Court finds that Biogen adequately alleged that Polpharma will be liable for infringement arising out of the future use of ImmunoWELL.

c. Not All of Polpharma's Uses of Stratify Are Protected by the Safe Harbor.

Polpharma has moved to dismiss Biogen's allegations of infringement based on past or present conduct, on the grounds that the 35 U.S.C. § 271(e)(1) regulatory safe harbor bars the claims. D.I. 155 at 15. Section 271(e)(1) provides that "[i]t shall not be an act of infringement to make, use, offer to sell, or sell within the United States or import into the United States a patented invention . . . solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use or sale of drugs or veterinary biological product." 35 U.S.C. § 271(e)(1). The exemption extends to "all uses of patented inventions that are reasonably related to the development and submission of any

information under the FDCA." *Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S. 193, 202 (2005).

The Federal Circuit has limited the safe harbor in cases where the accused infringer is "not a party seeking FDA approval of a product in order to enter the market to compete with patentees." *Proveris Sci. Corp. v. Innovasystems, Inc.*, 536 F. 3d 1256, 1265 (Fed. Cir. 2008). Courts have extended this logic to find that "research tools" are not protected by the safe harbor. *Allele Biotech. & Pharms., Inc. v. Pfizer, Inc.*, No. 20-cv-01958-H-AGS, 2021 WL 1749903, at *7 (S.D. Cal. May 4, 2021); *see, e.g.*, *Regenxbio Inc. v. Sarepta Therapeutics, Inc.*, No. 20-1226-RGA, 2022 WL 609141, at *4 (D. Del. Jan. 4, 2022) (declining to apply the safe harbor when defendant was "not using the patented cultured host cells to obtain FDA approval to introduce generic cultured host cells to compete in the marketplace," but rather "to develop its own patentable product."); *Isis Pharms., Inc. v. Santaris Pharma A/S Corp.*, No. 11cv02214 BTM (KSC), 2012 WL 4111157, at *4 (S.D. Cal. Sept. 19, 2021); *PSN Ill., LLC v. Abbott Lab'ys*, No. 09 C 5879, 2011 WL 4442825, at *6 (N.D. Ill. Sept. 20, 2011).

Biogen does not contest that most of Polpharma's past and present actions fall within the safe harbor. *See* D.I. 206 at 19-20. However, Biogen identifies Polpharma's use of Stratify, when used to obtain approval for Defendants' biosimilar, as an exception. Biogen has alleged that Polpharma used Stratify both (1) to obtain approval for ImmunoWELL, a competitor to Stratify and (2) during clinical trials for Defendants' natalizumab biosimilar. SAC ¶¶ 78, 102-106. The first use is indisputably protected by the safe harbor, but the second use implicates the research tools exception. The use of an "assay to evaluate . . . antibody levels," when done not to develop a competing assay but to assist in the development of another product, is the sort of secondary use that courts have held is not covered by the regulatory safe harbor. *Allele*, 2021

WL 1749903, at *7. Defendant, when using Stratify during clinical trials for its natalizumab biosimilar, was not trying to "enter the market" for anti-JCV antibody testing "to compete with" Biogen. *Proveris*, 536 F. 3d at 1265.

Sandoz argues that their dual purposes are immaterial, where "both products under development require submission of the data to the FDA." D.I. 236 at 9. As far as the Court can tell, this is a novel issue. Many of the cases articulating a research tools exception do describe the research tools exception to the safe harbor as applying "to 'research tools' that are used in the development of FDA regulatory submissions, but are not themselves subject to FDA premarket approval." *Allele*, 2021 WL 1749903, at *4; *see also Isis Pharms.*, 2012 WL 4111157, at *4 ("'Research tools' are patented inventions that are 'used in the development of ... regulatory submissions, but [are] not [themselves] subject to the [regulatory] approval process.'") (quoting *Proveris*, 536 F.3d at 1265). The regulatory safe harbor exists to prevent an unjustified de facto extension of effective patent life caused by the regulatory approval process. *See Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 669-70 (1990) (Without the safe harbor, "[s]ince [testing] could not be commenced by those who planned to compete with the patentee until expiration of the entire patent term, the patentee's de facto monopoly would continue for an often substantial period until regulatory approval was obtained."). Thus, the safe harbor does not normally apply to research tools, because there is no FDA regulatory barrier to the development of a competitor. However, this case presents the issue of a research tool that is subject to FDA approval. SAC ¶¶ 81, 97.

The Court finds that the research tool exception still applies when a research tool is subject to FDA approval, so long as the FDA submission the research tool is being used for is not for a competing product. First, if any research tool subject to FDA approval could be used in

any FDA submission, even if the submission is not on a competitor to the research tool, patents on FDA-approved research tools would be abnormally weak. Allowing free use of FDA-approved research tools so long as the research is for a FDA submission seems unintended, arbitrary, and out of step with the statutory schema. Second, the use of a research tool for purposes other than to develop a competitor is not subject to the same distortions the Supreme Court recognized in *Eli Lilly* and the Federal Circuit emphasized in *Proveris*. There is no comparable risk of an unjustified expansion of a monopoly by delaying entry of a competitor, because companies are free to create those competitors using premarket approval and the regulatory safe harbor for competing products. Defendants are not free to "us[e] a patented invention to develop their own patentable product. . . . Section 271(e)(1) offers no protection to such activity." *PSN*, 2011 WL 4442825, at *6. Accordingly, the Court finds that Polpharma's use of Stratify falls within the "research tools" exception, and is not protected by the regulatory safe harbor.

IV. CONCLUSION

For the reasons stated above, the Court denies Polpharma's Motion to Dismiss.