Judge Calls Allergan Plot Against UGA "SINISTER"

In currently sealed court documents are details of Allergan's "Florida Plan", aimed at reducing royalties on the breakthrough drug Restasis®. This plan, devised by Allergan's Niv Caviar, then Vice-President and head of marketing for the pharmaceutical giant, was expected to save $1 billion in future royalties otherwise due to the venture partners that were involved in the development of Restasis®.

Allergan's plan, described as "sinister" by Athens-Clarke County Superior Court Judge David Sweat, would buy out future royalties from partners Novartis, Inspire, and the University of Georgia, where Professor Renee Kaswan invented the groundbreaking drug. Allergan's plan relied on overstated risks, low sales estimates and excluding inventor Dr. Kaswan be excluded from the buy-down negotiations.

Without Dr. Kaswan, UGA was deprived of information she had from working closely with Allergan in the R&D phase of the drug and knew the company's market expectations for Restasis®. By excluding Kaswan as a valuable resource during the negotiations, the University of Georgia Research Foundation (UGARF) undermined the best interests of itself, their inventor and Georgia's taxpayers. By excluding Kaswan as a subject matter expert from negotiations, the University of Georgia Research Foundation (UGARF) not only undermined their own royalty valuation, but betrayed their inventor and Georgia taxpayers' interests.

Initially, Allergan offered less than $14 million for a royalty stream currently estimated at over $290 million. Later, their offer increased to approximately $23 million, still quite a bargain for Allergan at over a 90% discount. A 15% discount is the industry standard for royalty monetization.

So why would UGARF accept Allergan's dismal projections for Restasis®? Was it because UGARF had an impartial expert evaluation of this invention? The answer is NO. It was not until after the buy-down proposal was consummated that UGARF sent Allergan's undervalued projections to a valuation expert.

As part of the buydown deal, Allergan provided UGARF a fund of $1 million toward potential legal fees along with another requirement that they cooperate as co-defendants against future litigation. This begs the question: why were they revving up for a legal defense?

Litigation was initiated, but it was UGARF who went on the offensive, filing several lawsuits against Dr. Kaswan perhaps in an attempt to exhaust her financially and hamper her ability to finance any legal action against them.

Even more confusing is that during negotiations, Allergan Vice President and Patent Counsel Martin Voet wrote a letter to UGARF directing them to keep "negotiations for a royalty buy-out in confidence...and that no disclosure of such negotiations be made by either party to third parties including Dr. Kaswan." Allergan further required that UGARF "maintain confidentiality as an essential element in completing a definitive Agreement."

UGARF agreed, but why? The only party who could possibly benefit from this was Allergan.

In a letter dated January 7, 2002, prior to negotiations with UGARF, Allergan sought assurances from UGARF that "currently you are the sole, authorized representative of UGA and Kaswan does not speak for UGA in this matter." UGARF was unable to confirm this in their response letter of February 22, 2002. However, in court, Allergan claimed it did receive confirmation from UGARF, but was unable to produce documentation to support this allegation.

Allergan attorney Jeffrey Thomas said during a hearing on April 24, 2004, "Having been told by UGARF that Doctor Kaswan had no role, it was perfectly appropriate for Allergan to say, '...great, then let's keep these negotiations confidential.'"

Both Allergan and the University of Georgia continue to keep the terms of the deal hidden from public scrutiny. Georgia Open Records and Open Meetings Laws require that government meetings and contracts are to be on the public record.

Dr. Kaswan eventually did file a countersuit against UGARF and Allergan, claiming among other things, that Allergan tortiously interfered with her employment contract and fiduciary relationship with UGA, and that UGARF and Allergan fraudulently conspired to convey her property for an unreasonably low price.

The defense claimed UGARF had "sole discretion and total authority" to commercialize all faculty inventions. This contradicts university policy and the rightful participation of its inventor. They further cited the 1982 and 1995 Administrative Agreements executed between UGA and the Georgia Board of Regents which gave them complete authority over faculty innovations. These agreements are neither published nor circulated to faculty, but nonetheless were claimed to be binding contracts of adhesion for all faculty.

Judge Sweat ruled in favor of the defendants based upon outdated documents and the unpublished contracts instead of basing his decision on the published UGA Intellectual Property Policy. UGARF and Allergan claimed that explicit language in the UGA Invention Disclosure, Assignment agreement and Administrative Agreements overrode any implicit obligation of the university to act with "good will and fair dealings."

Judge Sweat said Allergan's Florida Plan was "sinister," but stopped short of calling it illegal. In his ruling, he said, "Well, your Florida Plan did explicitly describe a goal of the negotiations as removal of Doctor Kaswan from the picture. I mean that's in the record."

The case will be appealed and the court has recently begun to unseal documents in response to recent public and legislative outcry.

Dr. Kaswan believes her case has far reaching consequences. In a recent interview, the inventor said, "American innovation and economic advantage depends heavily on university faculty. If the appellate court determines that faculty inventors do not deserve a contractual duty of good faith and fair dealing from their university TCOs, it will set a grave precedent for inventors and the public that relies on them."