EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALZHEIMER'S INSTITUTE OF AMERICA, INC.)
)
Plaintiff,)
)
v.)
)
AVID RADIOPHARMACEUTICALS, et al.,) **Civil Action No: 2:10-cv-6908-TJS**
)
Defendants,)
)
and)
)
UNIVERSITY OF SOUTH FLORIDA)
BOARD OF TRUSTEES)
)
Intervenor.)

[PROPOSED] ORDER

AND NOW this ____ day of __________, 2011, upon consideration of the Motion to Intervene of University of South Florida Board of Trustees ("USF") and any response in opposition thereto, it is HEREBY ORDERED that:

1. USF's Motion to Intervene is GRANTED;

2. The Clerk of Court shall FILE the Counterclaim of the University of South Florida Board of Trustees for Declaration of Patent Ownership attached thereto; and

3. Plaintiff Alzheimer's Institute of America, Inc. shall RESPOND to USF's Counterclaim with 30 days of the date of this Order.

BY THE COURT:

____
Timothy J. Savage, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALZHEIMER'S INSTITUTE OF AMERICA, INC.,

Plaintiff,

v.

AVID RADIOPHARMACEUTICALS, et al.,

Defendants,

and

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES

Intervenor.

Civil Action No: 2:10-cv-6908-TJS

MOTION OF UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES TO INTERVENE

The University of South Florida Board of Trustees, a Public Body Corporate of the State of Florida hereby moves to intervene in the above-captioned civil action as a matter of right, pursuant to the provisions of Rule 24(a) of the Federal Rules of Civil Procedure, to assert and defend its ownership interests in the patents at issue in the above-captioned matter, U.S. Patent Nos. 5,455,169 and 7,538,258 (the "'169 Patent" and "'258 Patent"). There are two related issued United States Patents assigned on their face to Plaintiff, Alzheimer's Institute of America, Inc. ("AIA"): U.S. Patent Nos. 6,818,448 and 5,795,963 ("'448 Patent" and "'963 Patent"). These patents all spring from the same common parent patent application, U.S. Patent Application Serial Number 07/894,211, filed June 4, 1992, which subsequently issued as the '169 Patent. As all four (4) patents are directed to related subject matter and have a common disclosure, and spring from the patent application owned by Intervenor, University of South

Florida ("USF") claim to ownership of all four of the patents identified is asserted in the pleading submitted herewith pursuant to Fed. R. Civ. P. 24(c).

I. THE COURT'S MEMORANDUM OPINION OF AUGUST 31, 2011

Defendants moved for summary judgment to dismiss the claims of patent infringement asserted in Counts I and II for lack of standing. Specifically, Defendants asserted that: (1) AIA did not own the patents in question, USF is the proper owner; and (2) Michael John Mullan, listed as the sole inventor, in fact was a co-inventor of the subject matter claimed in the '169 and '258 Patents. The argument was advanced that if Mullan was a sole inventor, AIA nonetheless lacks standing because the inventions properly belong to Imperial College of the United Kingdom, and if Imperial College is not the rightful owner of the patents-in-suit, then USF is, pursuant to Fla. Admin. Code Ann. R. 6C4-10.012(3)(c), implementing Fla. Stat. §240.229 (subsequently superseded).

Without notice to USF, AIA filed a Cross-Motion for Summary Judgment on the standing issue, relying on the representation on the face of the patents that it is the proper owner, and that Mullan is the sole inventor. AIA argued that USF waived any rights vested in USF by reason of the Florida Statute through a letter signed by then USF Vice-President for Research, George Newkome.

On August 31, 2011, this Court denied both Motions and ordered the question of standing bound over for trial. Memorandum Opinion at 23. Of paramount importance, the Court's Decision found that in fact, title in the patents-in-suit vested in USF:

> Therefore, because Mullan was employed by USF when the inventions related to the patents-in-suit were conceived and the inventions were within the field in which Mullan was employed by USF, rights to the patents-in-suit vested immediately in USF by operation of the Florida Regulation.

Memorandum Opinion at 15-16.

The Court could not grant summary judgment adverse to AIA, however, as there is a contested issue of material fact as to whether USF made an effective waiver of its rights in the patents. Memorandum Opinion at 22-23.

USF therefore intervenes to preserve and assert its ownership interest in the property that is the subject of this action, the '169 and '258 Patents, together with the remaining two patents of this family. Ownership of the two sister patents not asserted by AIA herein, the '448 and '963 Patents, necessarily follows that of the '258 and '169 Patents. Accordingly, ownership of all four is asserted in the proposed counterclaim submitted herewith. Given this Court's Memorandum Opinion of August 31, 2011, the propriety of intervention by USF, as of right, is clear. Nevertheless, the analysis called for by FRCP 24(a) follows.

A. Intervention of Right Imposes Four (4) Requirements

The Third Circuit has interpreted intervention as of right pursuant to Fed. R. Civ. P. 24(a)(2) "to require proof of four elements from the applicant seeking intervention as of right." *Kleissler v. U.S. Forest Service*, 157 F.3d 964, 969 (3d Cir. 1998). Those four (4) elements are: (1) timely application to intervene; (2) sufficient interest in the litigation; (3) a risk that the interest will be impacted or affected by the disposition of the litigation; and (4) inadequate representation of the prospective intervenor's interest by the existing parties. *Id.*, *Mountain Top Condo. Ass'n. v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 365–66 (3d Cir. 1995). The district court applied these factors to grant a motion for intervention as of right in *ADAPT of Philadelphia v. Philadelphia Housing Authority*, 2004 WL 1858345 (E.D. Pa 2004). USF meets these four criteria.

1. <u>The Motion to Intervene is Timely</u>

This Motion is filed within three weeks of the Court's decision on summary judgment, which makes clear that USF may and should intervene. Until this Court found that title to the patents vested in USF by operation of statute, and immediately, USF had a questionable right to assert. In determining whether a Motion to Intervene is timely, there are three (3) factors to consider. A court looks to the stage of the proceeding, the prejudice that delay may cause the parties and the reason for the delay. *ADAPT*, 2004 WL 1858245, at *2 (citing *Mountain Top*, 72 F.3d at 369). Although the case has been pending for some time, it remains at an early stage of the proceedings. Discovery into issues other than standing was stayed pending resolution of the standing motions. Pursuant to the Court's most recent Case Management Conference Order, fact discovery will not close until October 31, 2011. Granting this Motion to Intervene will not substantially delay things – the discovery USF needs to take is focused on the issue of patent ownership and standing only – and cross and counterclaims for infringement cannot be logically presented by USF until the issue of ownership has been resolved. (They are, therefore, not logically compulsory – potential counter-and-cross claims of patent infringement by USF arising due to the change in ownership are not yet mature).

An additional one or two months for discovery is likely all that is needed to accommodate USF's intervention. At this early stage, any prejudice to the parties from such a short delay is negligible. USF agrees to respond to discovery directed to the issue of ownership in a prompt and timely fashion to ensure the case does not fall behind target dates. Any small delay, given the benefit of having USF before this Court and able to present its own claims of patent ownership, does not unreasonably prejudice the parties to this matter.

As noted, USF's Motion to Intervene is prompted by the Court's Memorandum Opinion of August 31, 2011. Prior to the Court's Decision, it was unclear whether Florida law vested rights in USF automatically and whether and how waiver might operate to deprive USF of those rights. The Court has now found that title to the inventions and the four (4) patents that issued directed to them vested by operation of law. The question that USF intervenes to resolve in its favor is whether the purported waiver letter was sufficient to deprive USF of that interest. USF expects to take discovery of Dr. Newkome and others to demonstrate that the waiver was made without disclosure of the inventions of the patents and that, in fact, such disclosure was deliberately withheld. Deprived of the knowledge of the subject of the waiver, USF's execution of the waiver letter was not effective to transfer title. Prior to this Court's Memorandum Opinion, however, USF could not effectively present that argument. Prior to this Court's Memorandum Opinion of August 31, 2011, intervention was not warranted. Accordingly, the delay in intervening is clearly reasonable.

Grant of this Motion to Intervene will not significantly inconvenience the Court by delaying matters, nor will it cause undue inconvenience to the parties. This is not a case such as that considered in *Gaskin v. Pennsylvania,* 231 F.R.D. 195, 196 n.1 (E.D. Pa. 2005), where litigation had been pending for eleven years before intervention was sought. USF's delay in intervening is a result of the lengthy summary judgment battle over the issue of standing – absent the Court's Memorandum Opinion of August 31, 2011, there was no clear basis for USF to intervene. Accordingly, this Motion is timely, as measured by the factors to be taken into account under applicable precedents.

2. **USF Has a Sufficient Interest in the Litigation That Will Be Impacted**

The Third Circuit reviewed its own law, and that of other Circuits, on the question of what type of interest is sufficiently substantial to support intervention, at some length, in *Kleissler*, 157 F.3d at 969-973. The court found that the 1966 amendments to Rule 24(a) were intended to expand the practice of intervention to "those who might be practically disadvantaged by the disposition of the action and repudiate the view [under the former rule] that intervention must be limited to those who would be legally bound as a matter of res judicata." *Id.* at 970 (citing Wright & Miller, *Federal Practice and Procedure: Civil 2d* §1908, at 301(1986)). In the same decision, the court emphasized the importance of an elastic, rather than mechanistic, approach in applying the rule concerning intervention as of right, *Kleissler*, 157 F.3d at 971, finding a substantial interest where those having a direct or substantial interest in the logging and timber industry that a lawsuit is aimed at addressing warranted intervention, *id.* at 972.

A motion to intervene will not be granted unless the intervenor's interest in the litigation is sufficient to merit intervention. *ADAPT,* 2004 WL 1858345, at *3. Interests that relate only to the protection of information that might be generated by discovery and are peripheral to the ongoing litigation lack a sufficient interest to warrant intervention as of right. *Liberty Resources, Inc. v. Philadelphia Housing Authority v. Resident Advisory Board, Inc., Movant*, 395 Supp. 2d. 206, 208 (E.D. Pa. 2005).

Here, USF has a substantial and central interest in the property that is the subject of the litigation. This is a suit for patent infringement – the property at issue is the Mullan patents. No interest could be more substantial or more central to the dispute than proper ownership. As this Court's Memorandum Opinion of August 31, 2011 expressly found, ownership of the patents-in-suit, including the question of whether that ownership properly is resolved in favor of USF, is a

"threshold issue" in this lawsuit. Memorandum Opinion at 1. Thus, this is a case where the right and interest USF seeks to intervene to protect has already been squarely presented to the Court, unlike cases where intervention is denied because the issues were "not actually presented to or decided by the Court." *See, e.g.*, *Stauffer v. Brooks Bros. Inc.*, 2009 WL 1675397 *4 (S.D.N.Y. 2009) (patent false marking action).

The threshold nature of USF's interest in the property at issue in the litigation necessarily means it <u>will</u> be impacted. Not only is title to the patents at issue, validity and enforceability is as well. A decision on the merits will necessarily impact the property. It is true that USF would not be bound by this Court's decision, or legally estopped from pursuing its rights, in the absence of intervention. USF could separately pursue ownership in a different Court. The Court in *Kleissler* clearly expressed a preference for intervention rather than subsequent collateral attacks. 157 F.3d at 970 (citing *Brody v. Spang,* 957 F.2d 1108, 1123 (3d Cir. 1992)). Thus, the very substantial property interest USF seeks to intervene to protect and assert – its ownership over the Mullan patents, the very property at issue in this litigation – is precisely the type of "substantial interest" the rules governing intervention were expanded to protect and welcome.

3. <u>USF's Ownership Interests Are Not Adequately Represented</u>

A substantial interest alone will not warrant intervention as of right where that interest or concern is adequately represented by the extant parties to the litigation. To admit more parties is simply to make a complex case more complex, without advancing the interests of justice. The question of whether existing representation is adequate frequently arises in cases where the government is a party to lawsuit involving litigation intended to protect parties seeking to intervene. *See Kleissler,* 157 F.3d at 973 (discussing the Government's decision not to appeal an

adverse ruling in a companion case). Here, as demonstrated by a brief examination of the parties in the current litigation, the question of adequacy of representation is not complex.

Plaintiff AIA has no interests in common with USF. AIA's claims are premised on its position that AIA, not USF, is the proper and rightful owner of the Mullan patent portfolio. Without ownership of substantially the entire right, title and interest in and to those patents, AIA's lawsuit and its claims of patent infringement come to an end. The interests of USF and AIA are diametrically opposed – AIA cannot adequately represent USF's interest.

While defendants Avid, Eli Lilly & Co. and the Trustees of the University of Pennsylvania (collectively, "Defendants") would be content to have this Court find USF to be the legal and equitable owner of the Mullan patents, and indeed advanced that position on summary judgment, they also argue that Mullan was not a sole inventor and that Imperial College owns some or all of the rights in the Mullan patents. Memorandum Opinion at 6-8. This Court's finding that USF is an owner of the patents by reason of Mullan's work done at USF in connection with the inventions disclosed and claimed therein, Memorandum Opinion at 15-16, is not a bar to identification of additional inventors. While the issue of subsequent knowing waiver is the principal question left open for trial, it is not the only one.

As to these issues, the Defendants are indifferent as to which position prevails, as long as AIA does not own the patents. The Motion for Summary Judgment was filed to resolve the case, not to advance USF's patent ownership, per se. Defendants have also taken the position in their pleadings that the patents-in-suit are invalid and may not be enforced. It would ill suit USF's interests in the extreme to have its ownership of the Mullan patents validated by a "representative" that then secures a judgment that the patents are invalid and/or unenforceable. Thus, while confirming ownership in the patents in favor of USF is a satisfactory outcome for

Defendants, it is not the only outcome they would find satisfactory. Even a potential conflict that has not materialized may be sufficient to warrant intervention, where a property interest is threatened and the party seeking intervention may not ultimately be favored by a party otherwise charged with its representation. *ADAPT,* 2004 WL 1858345, at *4.

Further, while the posture of the parties to the lawsuit has not permitted settlement to date, that is no guarantee that settlement might not occur at a future date purporting to dispose of the ownership rights in the Mullan patents in a fashion adverse to USF. Further complicating this picture is the series of lawsuits brought by AIA against other defendants on the same patents. Where numerous alternative outcomes, including a settlement agreeable to the parties but disadvantageous to the proposed intervening party, cloud the immediate future, intervention under Fed. R. Civ. P. 24(a) is warranted. *Kleissler,* 157 F.3d at 974. There can be no adequate representation here of USF's central ownership interest in the patents asserted by a party other than USF itself.

B. <u>The Law of the Federal Circuit Would Be that of the Third Circuit</u>

This is a case of patent infringement. While issues of patent ownership are resolved under state law – in this case, Florida law – questions impacting patent infringement are resolved by Federal law and reviewed by the Court of Appeals for the Federal Circuit. Thus, it is possible that at some point, review of this case, and the question of propriety of intervention by USF, might be in front of the Court of Appeals for the Federal Circuit. *See, e.g., Ericsson, Inc. v. Interdigital Communications Corp.,* 418 F.3d 1217, 1220 (Fed. Cir. 2005). This possibility does not occasion different analysis, however. Intervention as of right pursuant to Fed. R. Civ. P. 24(a) is not a matter unique to patent law. Such matters are therefore governed by the law of the appropriate regional circuit. *Id.* at 1221; *Haworth, Inc. v. Steelcase, Inc.,* 12 F.3d 1090, 1092

(Fed. Cir. 1993). Thus, the law of the Third Circuit, as discussed and applied above, will govern any review of the decision to grant USF's Motion to Intervene.

II. USF's COUNTERCLAIM IS APPENDED

Intervention pursuant to Rule 24 also requires the submission of a "pleading setting forth the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). USF's Counterclaim, asserting its ownership of the Mullan patent portfolio and seeking this Court's declaration that USF is the sole and rightful owner of legal and equitable title to those patents, is submitted herewith as an attachment. It is premature to assert in this proceeding claims of infringement or other claims premised on USF's successful assertion of its ownership. USF's intervention is premised on its need to protect and assert its ownership in a portfolio of patents, a question addressed preliminarily by this Court, and bound over for trial. There are no compulsory cross or counterclaims that arise by reason of that ownership.

III. CONCLUSION

The law provides for, and welcomes, intervention by a party when it discovers, in timely fashion, that its property rights at the center of the litigation are at issue and moves seasonably to intervene, demonstrating that its rights are significant and likely to be impacted and not adequately represented by any other party to the litigation. Here, USF's ownership of the Mullan patents will be impacted by final judgment in this case. That ownership right is central to – indeed, a threshold issue for – this litigation. AIA asserts its ownership over the same patents-in-suit. USF is necessarily opposed to the position of AIA, and so advances a Counterclaim for Declaration of Ownership. While USF's interests are aligned with Defendants, those defendants would be equally satisfied by a decision that found ownership of the patents not solely in USF or

a finding that the patents are invalid or unenforceable. Accordingly, USF moves to intervene as of right.

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BOARD OF TRUSTEES)
)
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COUNTERCLAIM OF THE UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES FOR DECLARATION OF PATENT OWNERSHIP

The University of South Florida Board of Trustees, a Public Body Corporate of the State of Florida ("USF"), hereby asserts its Counterclaim for Declaration of Patent Ownership against Plaintiff Alzheimer's Institute of America, Inc. ("AIA").

INTRODUCTION

1. USF is a member institution of the State University System of Florida, with a place of business at 4202 E. Fowler Ave., Tampa, Florida 33620.

2. USF holds the entire right, title and interest in and to numerous patents and patent applications, including patents directed to Alzheimer's Disease, and animal models and examples therefor, and through a license to its Research Foundation, the University of South Florida Research Foundation, pursues and commercializes same.

3. During 1992, as an employee of USF, Michael John Mullan ("Mullan") engaged in work directed to identifying and isolating certain genetic mutations that are associated with physical phenomena of the phenotype of Alzheimer's Disease ("AD"). The mutation he identified and isolated in the course of this work subsequently became known as the "Swiss Mutation."

4. By operation of law, the inventions made by Mullan in the course of identifying and isolating the Swiss Mutation vested in USF.

5. Mullan at no time made a disclosure to USF of the inventions made by him in connection with the Swiss Mutation or otherwise informed USF and officials thereof of the nature and the character of these inventions.

6. On June 4, 1992, Mullan caused to be filed a patent application directed to the inventions made by him while a USF employee in connection with the Swiss Mutation, which was designated U.S. Patent Application Serial Number 07/894,211 (the "Patent Application").

7. Mullan did not inform USF, its Dean of Research or any other official at USF of the nature and content of the Patent Application at any time up to and through July 15, 1992.

8. On July 15, 1992, Mullan purported to assign the entire right, title and interest in and to the Patent Application and any patents to issue thereon to AIA.

9. Four (4) United States Patents ultimately issued off the disclosure in the Patent Application, and claim the benefit of priority thereto: U.S. Patent Nos. 5,455,169; 5,795,963; 6,818,448 and 7,538,258.

10. AIA registered the assignment from Mullan as conveying AIA legal title to each of the four (4) patents issuing off the Patent Application by registering the same at the United States Patent and Trademark Office.

11. On information and belief, AIA or individuals who would control AIA directed Mullan to file and then assign the Patent Application to AIA without informing USF of the nature and content of the

disclosure of that application or Mullan's inventions as an employee of USF, so as to secure an apparent waiver of those inventions and patent application by USF without providing USF the knowledge necessary to make that waiver.

VENUE

12. Venue in this judicial district is appropriate. USF seeks, by motion, to intervene as of right in the above-captioned proceeding.

JURISDICTION

13. This Court has jurisdiction over USF's counterclaim pursuant to 28 U.S.C. §2201.

COUNT I (DECLARATORY JUDGMENT)

14. Legal title in and to the Patent Application and any patent to issue thereon vested in USF by operation of law. Mullan, and AIA, did not at any time apprise USF, or attempt to inform USF, of the nature of the inventions disclosed and claimed in the Patent Application.

15. As a consequence of Mullan's and AIA's failure to inform USF and officials thereof of Mullan's inventions made while an employee of USF prior to the filing of the Patent Application, or at any time thereafter, USF at no time made a knowledgeable or enforceable waiver of any right or title in and to the Patent Application.

16. Legal title to U.S. Patent No. 5,455,169 resides in USF.

17. Legal title to U.S. Patent No. 5,795,963 resides in USF.

18. Legal title to U.S. Patent No. 6,818,448 resides in USF.

19. Legal title to U.S. Patent No. 7,538,258 resides in USF.

WHEREFORE, USF respectfully requests that this Court:

a) Enter Declaratory Judgment that USF is the legal and equitable owner of all right, title and interest in and to U.S. Patent No. 5,455,169.

b) Enter Declaratory Judgment that USF is the legal and equitable owner of all right, title and interest in and to U.S. Patent No. 5,795,963.

c) Enter Declaratory Judgment that USF is the legal and equitable owner of all right, title and interest in and to U.S. Patent No. 6,818,448.

d) Enter Declaratory Judgment that USF is the legal and equitable owner of all right, title and interest in and to U.S. Patent No. 7,538,258.

e) Enter an Order directing the United States Patent and Trademark Office to amend its records to reflect that USF is owner of U.S. Patent Nos. 5,455,169; 5,795,963; 6,919,448 and 7,538, 258.

f) Enter an Order directing AIA to pay USF's costs and expenses in intervening and contesting this matter as penalty for knowingly and deliberately failing to inform USF of the nature of Mullan's inventions while an employee of USF.

g) Such other good and equitable relief as found appropriate.

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CERTIFICATE OF SERVICE

I certify that on this 22st day of September, 2011, this Motion to Intervene, together with the attached Complaint, was electronically filed and was sent via e-mail and Federal Express to:

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