

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SINOMAB BIOSCIENCE LIMITED, )  
SKYTECH TECHNOLOGY LIMITED, )  
and SHUI-ON LEUNG )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
IMMUNOMEDICS, INC., )  
 )  
Defendant. )

C.A. No. 2471-VCS

MEMORANDUM OPINION

Date Submitted: May 13, 2009

Date Decided: June 16, 2009

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**STRINE, Vice Chancellor.**

## I. Introduction

In this action, a biopharmaceutical firm and its former employee dispute whether that former employee violated his contractual and common law obligations. According to defendant Immunomedics, Inc., plaintiff Shui-on Leung breached his contractual commitments by failing to assign his patent rights in an invention that Immunomedics alleges was conceived while Leung was at Immunomedics, but which Leung claims was developed after Leung left Immunomedics. Immunomedics also asserts that Leung, along with two companies that Leung helped establish, plaintiffs SinoMab Bioscience Limited and Skytech Technology Limited, misappropriated Immunomedics' trade secrets and confidential information.

These disputes revolve around three sets of issues: (1) "Framework Patching," an idea that Leung only attempted to patent after leaving Immunomedics, but which Immunomedics alleges was developed while Leung was an Immunomedics employee; (2) Leung's post-Immunomedics use of a DNA sequence that he first developed while at Immunomedics; and (3) Leung's retention of certain Immunomedics documents after ending his employment.

In this post-trial opinion, I find that Leung does not have an obligation to assign his patents and patent applications to Immunomedics. Immunomedics' claim is based solely on a presumption created in one of Leung's employment contracts that any idea Leung disclosed within a year of leaving Immunomedics was conceived at Immunomedics. At trial, Leung presented persuasive evidence that he conceived of Framework Patching after leaving Immunomedics and surrounding information

corroborates Leung's version of events. This evidence rebutted the presumption in Immunomedics' favor by convincing me that it is more likely than not that Leung invented Framework Patching after leaving Immunomedics. As a result, I find for Leung on this claim and award him an injunction requiring that Immunomedics remove the "Obligation to Assign" notices that it placed on Leung's patents and patent applications.

But, I also conclude that in filing his application, Leung sought to prohibit Immunomedics and others from practicing related work that Immunomedics was already doing. In so doing, I find that Leung violated the terms of a non-competition agreement that he signed with Immunomedics. For this violation I award Immunomedics nominal damages of one dollar as well as the reasonable attorneys' fees that it expended in getting Leung to amend his application so that it did not cover techniques that Immunomedics was already using.

With respect to the DNA sequence that Immunomedics claims that Leung took, I find that this sequence is not the type of protectable information that New Jersey protects as a trade secret. It was a slight variation on publicly known information which Leung created in a few hours using publicly known methods. And, there is no record evidence that this sequence was particularly valuable to either Leung or Immunomedics or that the Sequence gave Leung some unfair advantage vis-à-vis his former employer. Thus, Leung's use of the DNA sequence in question is not actionable as the misappropriation of a trade secret.

Finally, I address Immunomedics' claims that Leung violated the implied covenant of good faith and fair dealing that attached to stock options Immunomedics

granted him by keeping Immunomedics documents after leaving that company and that by keeping those documents Leung engaged in unfair competition. Both of these allegations revolve around documents that Leung had on his home computer when he left Immunomedics. First, Immunomedics argues that by falsely representing that he did not have confidential information, Leung breached the implied covenant which attached to his stock options. But, under New Jersey law, violating the implied covenant requires an improper motive, and I find that Leung had no such motive. Alternatively, Immunomedics argues that Leung engaged in unfair competition by keeping these documents. But, there is no evidence that he ever used these documents to compete with Immunomedics and thus I find there was no unfair competition.

## II. Background Facts

These are the facts as I find them after trial.

### A. Leung's Employment At Immunomedics

Leung is an Oxford- and Yale-trained molecular biologist from Hong Kong. He joined Immunomedics in 1992.

Immunomedics is a biotechnology company focused on developing antibody-based treatments. That work involves large initial outlays of time and money in hopes of producing a patentable drug or treatment that will justify the large upfront costs of biotechnology research. It is thus unsurprising that Leung's employment at Immunomedics involved a number of restrictive agreements meant to protect Immunomedics' confidential information.

Most notably, Leung signed an Assignment and Confidentiality Agreement (the “Assignment Agreement”) as a condition of his employment. That Agreement gave Immunomedics the right to any invention that Leung made while an employee of Immunomedics:

I agree that I will promptly disclose to [Immunomedics], all ideas, inventions, discoveries, and improvements (whether patentable or subject to copyright protection) which I make, originate, conceive, or reduce to practice during my employment with [Immunomedics] and which relate directly or indirectly to the business of [Immunomedics] or to work or investigations done for [Immunomedics] (collectively, “Inventions”). All Inventions shall be the sole and exclusive property of [Immunomedics], and I hereby assign to [Immunomedics] all rights therein, except as may otherwise be specifically agreed by [Immunomedics].<sup>1</sup>

Although this right was time limited in the sense that Immunomedics was only entitled to inventions conceived while Leung was an employee, the Assignment Agreement was also designed to protect against Leung’s keeping novel ideas secret until after his employment:

In the event that any Invention is described in a patent application or is disclosed to third parties by me, directly or indirectly, within one year after leaving the employ of [Immunomedics], it is to be presumed that the Invention was conceived or made during the period of my employment by [Immunomedics].<sup>2</sup>

Thus, although Immunomedics only had the right to any invention made while Leung was employed at Immunomedics, any invention that he patented or disclosed within a year of leaving Immunomedics was presumed to have been conceived when Leung was an Immunomedics employee and therefore Immunomedics property.

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<sup>1</sup> JX-3 (Confidentiality and Assignment Agreement (June 14, 1991)) (“Assignment Agreement”) § 3(a).

<sup>2</sup> Assignment Agreement § 3(c).

The Assignment Agreement also protected confidential Immunomedics information that was not part of any invention:

I understand that my position with [Immunomedics] creates a relationship of trust and confidence between me and [Immunomedics]. I agree that I will not at any time during or after the termination of my employment with [Immunomedics], communicate, disclose, or otherwise make available to any person or entity other than [Immunomedics] . . . or use for my account or for the benefit of any other person or entity, any information or materials proprietary to [Immunomedics] that relate to [Immunomedics'] business or affairs which [Immunomedics] regards as confidential, or which I should reasonably understand to be a confidential nature . . . .<sup>3</sup>

And, Leung agreed that Immunomedics should be able to enforce the Assignment Agreement through an injunction:

I understand that if I violate this Agreement [Immunomedics] will have no adequate remedy at law. [Immunomedics] shall have the right, in addition to any other rights it may have, to obtain in any court of competent jurisdiction injunctive relief to restrain any breach of or threatened breach of, or otherwise to specifically enforce, this Agreement.<sup>4</sup>

Separately from the Assignment Agreement, Leung signed a “Non-Competition Agreement” in which he promised that if he left Immunomedics, he would not engage in any “Competitive Activity” *in the United States* for two years.<sup>5</sup> Such activity was defined broadly, so that Leung promised not to:

[D]irectly or indirectly, enter into, participate in, engage in, render services to, offer or sell any products or services to, manage, operate, control, supervise, or engage in the solicitation of any business or activity which is competitive, or purposes to be competitive, with any line of

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<sup>3</sup> Assignment Agreement § 2(a).

<sup>4</sup> Assignment Agreement § 8.

<sup>5</sup> JX-50 (Non-Competition Agreement (Feb. 5, 1996)) (“Non-Competition Agreement”) § 2.

business or field of research and development activities in which [Immunomedics] is engaged or proposes to engage.<sup>6</sup>

Over the course of his employment, Leung's service was also rewarded with several thousand shares of Immunomedics stock options. But, those stock options were themselves designed to protect confidential information and keep Immunomedics from rewarding employees that were acting disloyally. If Leung had left Immunomedics without exercising any option, his options would have terminated.<sup>7</sup> Under the terms of the options, if Leung left Immunomedics within 180 days of exercising his options, Immunomedics then had up to 90 days after Leung's departure to rescind Leung's exercise of his options if Immunomedics found that Leung had "breached a material duty or obligation to Immunomedics."<sup>8</sup>

In total, Leung was bound by three agreements. Under his Assignment Agreement, Leung had to assign any invention that he conceived of while at Immunomedics and keep Immunomedics information confidential. The Non-Competition Agreement prevented Leung from competing with Immunomedics in the United States for two years after terminating employment. And, Leung's stock options gave him rights that Immunomedics could revoke if it found that Leung had violated his duties to the company.

Having bound Leung with these agreements, Immunomedics employed Leung for almost eight years. He was initially hired as an Associate Director of Molecular Biology,

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<sup>6</sup> Non-Competition Agreement § 2(a).

<sup>7</sup> JX-35 (Stock Option Agreement (June 27, 1997)) ("Stock Option Agreement") § 2(a).

<sup>8</sup> Stock Option Agreement § 3.

but within a year he became a full Director of Molecular Biology, and in 1995 he was made Executive Director of Biology Research, a position from which he supervised other researchers.<sup>9</sup>

Much of this case turns on the details of two types of work that Leung did at Immunomedics: (1) antibody humanization; and (2) genetically engineering an antibody known as RFB4.

### 1. Antibody Humanization

When Leung first started at Immunomedics, the majority of his time focused on humanizing antibodies from mice so that they could safely be used in humans. Resolving the issues in this litigation requires understanding how and why this is done.

When a vertebrate like a human or a mouse is infected by a pathogen, the body naturally produces antibodies that target the offending pathogen.<sup>10</sup> Importantly, in humans and mice, these antibodies are specific, which means that each antibody has a target pathogen.<sup>11</sup> The antibody will only bind with, and thus attack, that specific pathogen.

Leung's research focused on using murine immune systems to mass produce what are known as monoclonal antibodies ("mAbs"), which can be used to treat diseases in humans. The idea is to use the mouse's immune system to produce mAbs that can then be injected into a human to treat the disease the mAb targets.

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<sup>9</sup> Tr. at 1008 (Goldenberg).

<sup>10</sup> Tr. at 9-10 (Leung).

<sup>11</sup> Tr. at 9-10, 17 (Leung).

The problem is that the human body considers the resulting mAbs to themselves be foreign bodies and attacks them as it would any other foreign body. A person's immune system will therefore clear out the antibodies that are supposed to be beneficial, at times causing an allergic reaction in the process.<sup>12</sup> To get around this issue, Leung worked on modifying mAbs so that the human body does not see them as a threat. In practice, this means replacing all of the mouse amino acid sequences comprising the mAb with human amino acid sequences, except for those in the "Variable Domain," which controls what pathogen the mAb targets, and then trying to make as many changes as possible to the Variable Region without harming the mAb's effectiveness.

Scientific research divides each Variable Domain into three "complimentary determining regions" ("CDRs"), which control pathogen specificity, split up by four "framework regions" ("FRs"), which do not directly determine specificity. Thus, each Variable Domain can be subdivided into a sequence of FRs and CDRs: FR1-CDR1-FR2-CDR2-FR3-CDR3-FR4. Because the CDRs directly determine specificity, they cannot be changed. Rather, efforts at reducing immunogenicity revolve around altering the FRs so that they appear as natural to the human immune system as possible. But, even though the FRs do not directly control specificity, changing a FR can affect how well the mAb binds to its chosen target.<sup>13</sup> Furthermore, because of the way that antibodies fold, certain sequences within a FR are more important than other sequences for maintaining specificity.

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<sup>12</sup> Tr. at 19 (Leung).

<sup>13</sup> Tr. at 412-13 (Foote).

Leung and other scientists balance these issues by changing enough of the FRs so that the human body does not treat the resulting mAb as a foreign organism to be destroyed while still maintaining enough of the original FRs so that the mAb binds to its intended target. This is commonly done through variants on a method pioneered by a group at Protein Design Labs led by Cary Queen (the “Queen Method”).<sup>14</sup> This Method involves these two steps: (1) known human amino acid sequences are compared to the murine FRs to find the single human antibody whose FRs are most homologous (i.e., similar) to the murine FRs;<sup>15</sup> and (2) some of the human amino acids that have been used in step (1) are replaced with the original murine amino acids if they are projected to be important in maintaining specificity.<sup>16</sup>

By the early 1990s, before Leung even started at Immunomedics, one relevant refinement to the Queen Method had become common. Scientists in the field started “humanizing” mouse antibodies by changing FR4 separately from the other FRs, whereas in the original Queen Method all four FRs were analyzed as a single unit.<sup>17</sup> Scientists treated FR4 differently because, genetically, it is coded separately.

Accordingly, researchers in the field commonly made two determinations when deciding what human amino acid sequences to graft onto the Variable Domain: (1) what

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<sup>14</sup> Tr. at 24 (Leung).

<sup>15</sup> JX-258 (U.S. Patent No. 5,693,762 (Dec. 2, 1997)).

<sup>16</sup> Tr. at 412 (Foote).

<sup>17</sup> See JX-260 (Clyde Shearman et al., *Construction, Expression and Characterization of Humanized Antibodies Directed Against the Human  $\alpha/\beta$  Cell Receptor*, 147 J. OF IMMUNOLOGY 4366 (1991)); Tr. at 415 (Foote).

human sequence is most similar to the murine FRs 1-3; and (2) what human sequence is most similar to the murine FR4.

Leung used this approach early in his career at Immunomedics,<sup>18</sup> and during his time at Immunomedics, Leung and other Immunomedics employees disclosed this process in published articles.<sup>19</sup> Nevertheless, some of Leung's superiors at Immunomedics believed that this process was unique to Immunomedics. For his part, Leung never disabused his superiors of that belief. To the contrary, in internal Immunomedics memos, Leung reinforced this misconception by referring to the separate FR4 determination as Immunomedics' "unique method of humanization."<sup>20</sup>

But, at trial, Immunomedics did not present any reliable evidence that making a separate FR4 determination was anything but a known method among molecular biologists which had been publicly disclosed by Immunomedics and which was done by scientists not affiliated with Immunomedics.

## 2. Leung's Work On RFB4

The other major area of Leung's work that is relevant to this litigation involves Immunomedics' efforts to develop a patentable drug based on an antibody known as RFB4, which targets lymphoma cells.<sup>21</sup> In performing this research, Leung and Immunomedics were building upon public information. RFB4 had already been studied

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<sup>18</sup> Tr. at 38 (Leung).

<sup>19</sup> See, e.g., JX-4 (Shui-on Leung et al., *Construction and Characterization of a Humanized, Internalizing, B-Cell (CD22)-Specific Leukemia/Lymphoma Antibody, LL2*, 32 MOLECULAR IMMUNOLOGY 1413 (1996)) at JF-225.

<sup>20</sup> JX-153.

<sup>21</sup> Tr. at 596 (Hansen).

by the National Institutes of Health, which published both the amino acid sequence that makes up RFB4 and a DNA sequence that codes for those amino acids (the “Mansfield Sequence”).<sup>22</sup> The idea behind Leung’s work was to take the publicly known Mansfield Sequence and use that information to create a bacterium that would produce a tumor-targeting immunotoxin.<sup>23</sup>

Because the NIH had already disclosed the Mansfield Sequence, Leung and Immunomedics did not need to infect a mouse in order to begin producing RFB4. Instead, they planned to simply synthesize the DNA for RFB4. But, Leung chose not to conduct his bacteria research with the publicly available Mansfield Sequence. Instead, Leung modified that Sequence to create a genetic sequence that he thought would be easier to work with and more likely to express in bacteria.

Understanding how Leung did this requires an understanding of how DNA codes for amino acids. The strings of nucleotides that make up DNA are divided into sets of three nucleotides known as codons. Each codon of three nucleotides codes for a single amino acid. But, a single amino acid can have many possible codons. This means that a codon can be changed without modifying the amino acid it expresses, provided that the original and the modified codon both express the same amino acid.<sup>24</sup> Essentially, what Leung did was modify the codons in a way that Leung believed would make the DNA more likely to express in bacteria while still maintaining the same amino acid sequence.

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<sup>22</sup> See JX-12 (Elizabeth Mansfield et al., *Recombinant RFB4 Immunotoxins Exhibit Potent Cytotoxic Activity for CD22-Bearing Cells and Tumors*, 90 BLOOD 2020 (1997)).

<sup>23</sup> Tr. at 51 (Leung).

<sup>24</sup> Tr. at 472 (Foote).

That involved three types of changes. First, Leung had to alter the amino acids at the ends of the Mansfield Sequence so that the DNA sequence would work with Leung's already chosen "expression vectors," molecular biology tools which insert DNA into the targeted cells. These changes were governed by the expression vectors that Leung had already chosen, and all of the experts in this litigation agreed that, given Leung's choice of materials, these changes were not discretionary.<sup>25</sup> Altogether, this required changing ten codons.

The other changes were not as mechanical. The second set of changes involved creating and removing "restriction sites," which are nucleotide sequences with palindromic symmetry.<sup>26</sup> Because existing technology requires that DNA be sequenced in pieces of 120 nucleotides, scientists sequence DNA in small pieces that they combine later. Restriction sites are convenient places to cut and reassemble a gene sequence so that it can be handled in smaller parts. In creating these sites, Leung modified three codons to create the symmetry desired. Although the changes Leung made were not mandatory, to a large extent these modifications were governed by the pattern of nucleotides in the Mansfield Sequence. Leung eliminated restriction sites that he estimated might create design problems in the future.<sup>27</sup> Although done for practical considerations, these changes involved Leung's guesses into what type of research may be needed in the future, thus these types of determinations are not governed by mandatory rules and can be done differently.

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<sup>25</sup> *See, e.g.*, Tr. at 779 (Vasquez).

<sup>26</sup> Tr. at 1078 (Leung).

<sup>27</sup> Tr. at 1079-80 (Leung).

Finally, and most importantly, Leung also changed several arginine codons in a way that was highly discretionary and largely based on Leung's own scientific intuitions. To wit, Leung worried that if the sequence used codons that frequently do not express in bacteria, the DNA sequence might not actually produce the intended amino acid sequence.<sup>28</sup> So Leung simply swapped out codons that he perceived as disfavored with those that he thought would be more likely to express. In total, this meant changing five codons in an alternating pattern. Here, Leung was not guided by any mandatory rule, but rather by what he thought at the time would make better arginine codons.<sup>29</sup>

Taking all of these changes together, Leung altered twenty-three codons.<sup>30</sup> Ten of the codon changes were necessary given Leung's chosen tools.<sup>31</sup> In contrast, most of the other thirteen changes, although guided by scientific principles, were more or less discretionary judgments in which Leung had several options most of which were not clearly superior to any other option. Accordingly, the same scientist could easily produce different sequences if she made the same alterations on two occasions because she might choose to address the various problems described above differently on each occasion. And, absent testing to confirm whether the resulting sequence worked, none of these changes were actually known to provide an advantage.

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<sup>28</sup> Tr. at 61 (Leung). Specifically, Leung worried that "AGG" and "AGA" codons would not properly express arginine.

<sup>29</sup> Tr. at 474 (Foote).

<sup>30</sup> Pls.' Demonstrative Ex. 13; Pls.' Demonstrative Ex. 16.

<sup>31</sup> See Tr. at 779 (Vasquez). These changes correspond to altering the codons at the end of the heavy and light chains to create an expression vector and inserting restriction sites.

Although complicated, this process was completed quickly. Leung testified that it probably did not take him more than a few hours to create the altered DNA sequence (the “the Immunomedics Sequence”).<sup>32</sup> But, it took several months for Immunomedics to produce an RFB4 antibody based on the Immunomedics Sequence. Between May 2000 and August 2000, Leung supervised the team that was working on that process.<sup>33</sup>

#### B. Leung Leaves Immunomedics

The dates of the RFB4 research are important here because at the same time Leung was supervising that research, he was also planning his exit from Immunomedics.

In May 2000, Leung accepted an offer to work at the Hong Kong Institute of Biotechnology (“HKIB”), a nonprofit organization in Hong Kong that is funded by the Hong Kong Jockey Club and the Hong Kong government’s Innovation and Technology Fund (“ITF”).<sup>34</sup>

Leung, however, waited three months, until August 1, to tell Immunomedics.<sup>35</sup> In the meantime, Leung continued his duties at Immunomedics and, understandably given that his options had to be exercised before leaving Immunomedics, exercised almost all of his outstanding stock options, which were worth over \$1.3 million.<sup>36</sup>

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<sup>32</sup> Tr. at 67 (Leung). Immunomedics’ own expert testified that modifying the DNA sequence by hand would not take more than one day. Tr. at 876 (Vasquez).

<sup>33</sup> JX-9 (memorandum from Timothy Qu to Shawn Leung (June 20, 2000)); JX-7 (memorandum from Timothy Qu to Shawn Leung (July 12, 2000)). Before returning to Hong Kong, Leung occasionally went by Shawn Leung instead of Shui-on Leung.

<sup>34</sup> Tr. at 75-82 (Leung).

<sup>35</sup> Tr. at 215 (Leung); JX-8 (e-mail from Shawn Leung to Hans Hansen (Aug. 1, 2000)).

<sup>36</sup> Tr. at 706 (Sullivan).

When Leung finally announced his departure, Immunomedics began its normal exit procedure. As one would expect from a company dependent on the value of its intellectual property, this included an exit interview in which Leung was specifically asked whether he was “taking” any Immunomedics files with him.<sup>37</sup> Leung responded that he had no such files and he signed a form that indicated “Computer Files/password Reviewed.”<sup>38</sup> Immunomedics’ factual presentation on the substance of the interview was extremely weak. The person who conducted the exit interview was not presented as a witness. The form used is not compelling evidence as it fails to include any specific questions, much less one prompting the departing employee to specifically review pre-existing home computer files. Rather, it appears the interviewer only asked whether Leung was “taking” — in the present tense sense — any files with him. But, Leung did admit that during the interview he did not reveal that he already had 146 Immunomedics computer files on a home computer which he had used to do work while at Immunomedics.<sup>39</sup>

Based on this lapse, Immunomedics argues that Leung intentionally kept Immunomedics property for his own purposes and then lied to cover up this theft. But, none of the surrounding facts support such a stark judgment. According to Leung, the files in question were simply documents that Leung worked on over his eight years at Immunomedics while on his home computer. Leung testified credibly that he did not

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<sup>37</sup> Tr. at 226 (Leung).

<sup>38</sup> Tr. at 226-27 (Leung); JX-54.

<sup>39</sup> Tr. at 231 (Leung); Tr. at 653 (Hansen).

think about these files during his exit interview.<sup>40</sup> Rather, when asked whether he was “taking” any files, Leung’s mind naturally went to whether as part of leaving he had taken documents for his continued use, not whether there might be documents already on his home computer which actually belonged to Immunomedics.

The surrounding evidence supports this version of events. This is not a case where a former employer discovered that its employee had covertly kept copies of the corporation’s most secret documents. Only a handful of the 146 documents were confidential. Moreover, Immunomedics has not pointed to a single one of these 146 documents which would offer Leung some sort of competitive advantage.<sup>41</sup> Nor, critically, is there any evidence that Leung actually used these computer files in any business activity. In fact, aside from merely opening these documents, the only evidence about Leung’s use is that he used one “PowerPoint” file to structure a presentation that he never actually gave.<sup>42</sup>

Given that none of these files had any non-trivial value and there is no evidence that Leung ever used them to compete with Immunomedics, I conclude that it is more likely than not Leung did not think about these files during his exit interview and thus did not intend to mislead Immunomedics into believing that Leung did not have files on his home computer.

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<sup>40</sup> Tr. at 85 (Leung); Tr. at 226-27 (Leung).

<sup>41</sup> See Tr. at 652 (Hansen).

<sup>42</sup> Tr. at 365-66 (Leung).

### C. Leung Begins Work At HKIB

Upon returning to Hong Kong, Leung sought to resume his antibody humanization efforts. Soon after arriving, Leung submitted a proposal to HKIB seeking funding for moving HKIB into the production of mAbs.<sup>43</sup> The first target that Leung proposed was RFB4, the antibody that Leung had worked with and supervised research on at Immunomedics.

After preparing his lab at HKIB, Leung directed Dr. Lei Yang, one of his new subordinates, to begin work on RFB4.<sup>44</sup> Importantly, Leung did not tell Yang to use the publicly available Mansfield Sequence. Instead, he gave her the Immunomedics Sequence.

A great deal of time and briefing in this action has focused on what, if any, conclusion I can draw from the fact that Leung's work at HKIB involved the unique genetic code for RFB4 that Leung developed for Immunomedics. Immunomedics asserts that the only reasonable conclusion for me to draw is that Leung stole the Immunomedics Sequence. For his part, Leung testified that he did not take the Immunomedics Sequence and instead began from scratch, once again taking the publicly available sequence and making the modifications that he thought were prudent.<sup>45</sup> According to Leung, the genetic codes of the Immunomedics and HKIB versions of RFB4 are the same because they were edited by the same person; the changes that Leung made are simply the way that he modifies antibodies' genetic codes (i.e., his "habit").

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<sup>43</sup> Tr. at 93 (Leung); JX-14.

<sup>44</sup> Tr. at 249-50 (Leung).

<sup>45</sup> Tr. at 132 (Leung).

But, Leung has not provided any other evidence of this supposed habit and, as we shall see, Leung has proved more than willing to not tell the truth when doing so suits his ends. And, as Immunomedics points out, several of Leung's changes were discretionary, and so one would not expect Leung to modify the Mansfield Sequence in the identical way every time. Plus, when Leung got to HKIB, he was not planning on expressing RFB4 in bacteria immediately; rather, his first RFB4 work in Hong Kong involved expression in mammalian cells, not bacteria cells.<sup>46</sup> Although, Leung claims to have made the changes to the Mansfield Sequence to create "flexibility,"<sup>47</sup> it was only years later that Leung resumed worked on expressing RFB4 in bacteria cells.<sup>48</sup>

By mid-2001, however, Leung had a more pressing problem: finding funding for his antibody humanization efforts. In January 2001, Leung requested a grant from the ITF, which provided some of HKIB's funding.<sup>49</sup> In that proposal, Leung sought funding for the type of humanization research he had done at Immunomedics.<sup>50</sup> But, in mid-March 2001, when Leung met with the ITF's Biotechnology Projects Vetting Committee to discuss his grant proposal, the Committee raised concerns about the patents that Leung would need to perform antibody humanization.<sup>51</sup> In early May, the ITF formally rejected Leung's grant. Among other reasons, the ITF explained that there was "no strong evidence . . . to support how and when an IP strategy would be formulated and

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<sup>46</sup> Tr. at 1074-75 (Leung).

<sup>47</sup> Tr. at 1075 (Leung).

<sup>48</sup> Tr. at 1075 (Leung).

<sup>49</sup> JX-325.

<sup>50</sup> *Id.*; Tr. at 96 (Leung).

<sup>51</sup> Tr. at 97 (Leung).

implemented to ‘get around’ the patent families the project would likely infringe on.”<sup>52</sup>

Having quit his job and moved to Hong Kong to work on humanization, Leung was being denied the funding he needed to do the work he set out to perform.

In the meantime, Leung, having realized that he would not get the grant, began working on a way to create a patent of his own.<sup>53</sup>

### 1. Leung Conceives Of Framework Patching

After the ITF expressed concerns about Leung’s intellectual property problems in mid-March, Leung claims to have experienced a creative flash and within a few weeks developed a new variant on antibody humanization methodology which Leung refers to as Framework Patching.

As has been discussed, during the 1990s, Immunomedics and others in the field were already making humanized antibodies by using one human antibody to replace the amino acids in FRs 1-3 and another human antibody to replace FR4. Framework Patching takes the next step by evaluating each FR independently. Whereas the method that Immunomedics was using in the 1990s would, at most, result in a scientist using two human antibodies — one for FRs 1-3 and another for FR4 — Framework Patching could result in each of the four FRs coming from a different human antibody. By increasing the number of determinations, Leung hoped to create more possible amino acid sequences and therefore get closer human matches and further reduce the need to include murine sequences that might cause an immunogenic response.

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<sup>52</sup> JX-327 (letter from Wendy Wong, Innovation and Technology Fund, to Shawn Leung, Hong Kong Institute of Biotechnology Ltd.).

<sup>53</sup> Tr. at 99 (Leung).

But, in so doing, Leung was proposing to create combinations that do not naturally exist. As discussed above, FR1, FR2, and FR3 are encoded in one set of genes, separately from FR4. In contrast, the Queen Method variant that Leung used at Immunomedics created FR combinations that can appear in nature.

Leung theorized that these unnatural FR combinations would not produce an immunogenic response. Research conducted in the late 1990s had shown that the immune system evaluates foreign bodies in pieces instead of as a whole.<sup>54</sup> Thus, Leung concluded that even if he used Framework Patching to create a mAb that contained an unnatural combination of human FRs, the human immune system would only look and see that the mAb contained human amino acid sequences.

By March 20, only four days after Leung's meeting with the ITF, computer documents show that Leung was applying Framework Patching.<sup>55</sup> This is also corroborated by Leung's personal notebook, which contain its first — albeit, oblique — references to Framework Patching in an entry that appears to be from around this time.<sup>56</sup>

By contrast, there is no evidence that Leung ever engaged in Framework Patching before March 2001. In his original proposal upon starting at HKIB and in his ITF grant application, documents prepared soon after Leung's return to Hong Kong and which Leung used in seeking funding for his work, Leung never claimed to have a novel method

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<sup>54</sup> Tr. at 106 (Leung).

<sup>55</sup> Tr. at 109-10 (Leung); JX-329; JX-331.

<sup>56</sup> JX-18 at AWKC-H 01952-57. The notes are not dated, but based upon the surrounding entries, it seems most likely that the entry in question was made in early 2001.

of antibody humanization, something that a researcher looking for funding would have likely mentioned.

In late June 2001, Leung submitted an application to the United States Patent and Trademark Office (“USPTO”) to patent Framework Patching (the “Initial Application”).<sup>57</sup> But, as even Leung now admits, the Initial Application contained unpatentable claims. Claim 1 of the Initial Application was drafted so broadly that it would cover an antibody in which any FR was patched, including one in which only FR4 was replaced. The Initial Application thus covered the work that Leung had been doing at Immunomedics and which was known in the field.<sup>58</sup>

Recognizing this problem, the USPTO rejected Claim 1 as anticipated by the prior art, and it never issued a patent on that claim.<sup>59</sup> Leung, however, filed several later applications that trace their authority back to this Initial Application. Therefore, although Claim 1 was never given patent protection, the ownership of the Initial Application is the critical piece from which all of the Leung’s claimed patent rights flow.

But, importantly for this action, Leung also distorted the truth in the Initial Application, and thus the very documents that Leung claims creates his rights also cast serious doubt on his credibility. In the Initial Application, Leung included a series of

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<sup>57</sup> Tr. at 116 (Leung).

<sup>58</sup> At trial, Leung claimed that this admittedly overbroad patent was a simple mistake that can be attributed to the fact that he is not a native English speaker with no legal experience. Tr. at 123 (Leung). Before Leung returned to Hong Kong he spent over a decade in England and the United States where, by all accounts, he had a successful academic and then business experience. Thus, there is no reason to believe that Leung was not able to understand the plain meaning of his words.

<sup>59</sup> Pre-Trial Stip. ¶ 25.

figures that purported to show the results of experiments on framework-patched antibodies.<sup>60</sup> As Leung admitted at trial, when he submitted these results to the USPTO, these experiments had not been performed.<sup>61</sup> Rather, they were what Leung euphemistically calls “prophetic data.”<sup>62</sup> Put more plainly, Leung made up non-existent lab results in order to bolster his patent application.

And, years later, in 2004, Leung compounded this distortion. In that year, Yang, Leung’s subordinate, succeeded in creating a framework-patched version of RFB4 that worked as Leung anticipated. Leung used this opportunity to create a record to substantiate his fake test results by directing Yang to backdate her results so that it looked like the 2004 results, which supported the claims in the Initial Application, had been obtained before he filed the Initial Application.<sup>63</sup>

## 2. Leung Forms SinoMab

In May 2001, less than a year after Leung returned to Hong Kong, HKIB was the subject of an ownership battle between the Chinese University of Hong Kong and the ITF. Caught in the middle, Leung chose to leave HKIB and form his own company.

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<sup>60</sup> JX-20 at SL-H 182-84.

<sup>61</sup> Tr. at 303 (Leung).

<sup>62</sup> Leung claimed at trial that this was all a mistake in verb tense that occurred because he is not a native English speaker and Cantonese does not have verb tenses. Tr. at 119 (Leung). Leung, however, has not provided any evidence from the over a decade that he spent in England and the United which might indicate that he had trouble using correct verb tenses. In short, I do not find Leung’s assertion that this was all an accident credible.

<sup>63</sup> Tr. at 133-34 (Leung); 300-04 (Leung). Leung claims that he soon realized that backdating lab results was a bad idea and that, with the exception of this litigation, he has not shown the falsified lab data to anyone. Tr. at 135 (Leung). This claimed — but not documented — conversion, however, does not change the fact that Leung was, at least at one point, willing to lie to preserve his patents.

Or, more specifically, he created two companies. Plaintiff SinoMab BioScience Limited was created to conduct research into antibody humanization. And, Leung purchased plaintiff Skytech Technology Limited, a British Virgin Islands company to hold his 30% stake in SinoMab.

Leung also transferred his rights under the Initial Application to Skytech and, eventually, the rights to all patent applications that claim priority based on that Application. Skytech, in turn, granted SinoMab a 10-year exclusive license, first for just China and, later, worldwide. After a transitional period, Leung left HKIB and has served as SinoMab's CEO since January 2003.

Once SinoMab obtained offices, laboratory space, and employees, Leung used SinoMab to continue his work on RFB4 using the Immunomedics Sequence.<sup>64</sup> In 2003, SinoMab combined the two strands of Leung's research by beginning work on a framework-patched version of RFB4.<sup>65</sup> SinoMab is currently conducting clinical trials on a RFB4 antibody that uses the Immunomedics Sequence.<sup>66</sup>

#### D. Immunomedics' And Leung's Later Patents Give Rise To This Litigation

Both before and after he starting work for SinoMab, Leung used the Initial Application as the basis for several ensuing applications, including applications in the United States and applications in Europe, India, Singapore, and Japan.<sup>67</sup> He also filed for

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<sup>64</sup> Tr. at 131 (Leung).

<sup>65</sup> Tr. at 133. It was the results from SinoMab's work on RFB4 that Leung backdated to provide a false basis for the results that Leung submitted to the USPTO years earlier in the Initial Application.

<sup>66</sup> Tr. at 1090-91 (Leung).

<sup>67</sup> Pre-Trial Stip. ¶¶ 27-30.

and received a separate Chinese patent for Framework Patching that does not relate to the Initial Application.<sup>68</sup>

In 2004, Immunomedics learned of the Initial Application, and maintains that under the Assignment Agreement, the Initial Application had to be assigned to Immunomedics. Accordingly, Immunomedics filed “Obligation to Assign” notices on some of Leung’s patent applications.<sup>69</sup> As part of its “litigation strategy” Immunomedics has also filed its own patent which claims to be a continuation of the claims in the Initial Application.<sup>70</sup>

The result of that dispute has been this litigation. SinoMab, Skytech, and Leung seek a declaration that Leung does not have to assign his Initial Application to Immunomedics as well as an injunction requiring that Immunomedics remove its “Obligation to Assign” notices. Immunomedics has counterclaimed seeking the opposite declaration and argues that the filing of the Initial Application was itself a breach of Leung’s Non-Competition Agreement.

Immunomedics has also filed a number of separate claims based upon other conduct it discovered during this litigation. Most prominently, Immunomedics claims that by using the Immunomedics Sequence, Leung misappropriated Immunomedics’ trade secrets and engaged in unfair competition. Immunomedics also claims that Leung violated the implied covenant of good faith and fair dealing that attached to his stock options and was unjustly enriched by exercising those options because Leung had

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<sup>68</sup> Pre-Trial Stip. ¶ 26.

<sup>69</sup> Pre-Trial Stip. ¶¶ 33-34.

<sup>70</sup> See JX-222 at 179.

Immunomedics documents on his computer and did not tell Immunomedics that he was leaving upon accepting his job at HKIB. Finally, Immunomedics asserts that by keeping the computer files on his home computer after leaving Immunomedics, Leung engaged in unfair competition.<sup>71</sup>

### III. Analysis

I will address the claims in this litigation in the following sequence. I first address the claims that relate to Framework Patching, specifically the claim that Leung violated his Assignment Agreement by not assigning his Initial Application and that Leung violated his Non-Competition Agreement by filing the Initial Application in the first place. Next, I address Immunomedics claim that Leung misappropriated trade secrets and engaged in unfair competition when it used the Immunomedics Sequence. Finally, I turn to Immunomedics' implied covenant and unfair competition claims which center on the idea that Leung violated his responsibilities to Immunomedics in ways that do not relate to Framework Patching or RFB4.

In all of these claims, Immunomedics is asserting that Leung, SinoMab, or Skytech acted wrongfully or did not satisfy contractual commitments, harming Immunomedics. Therefore, as to most of the claims in this litigation, Immunomedics bears the burden of proof.<sup>72</sup> To prevail on those claims Immunomedics must show by a

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<sup>71</sup> Before trial, Immunomedics also asserted claims against Leung for breach of his duty of loyalty and against all three defendants for converting Immunomedics property. But, Immunomedics did not address those claims in post-trial briefing, and they are waived. See *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (“Issues not briefed are deemed waived.”); *In re IBP, Inc. v S’holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001) (deeming a party to have waived arguments that were not presented in its opening post-trial brief).

preponderance of the evidence that it is entitled to recover.<sup>73</sup> “Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not.”<sup>74</sup>

The only exception is the claim that Leung violated his Assignment Agreement by not assigning his Initial Application. Here, Leung agreed to a presumption that any invention he disclosed within a year of leaving Immunomedics was invented when Leung was at Immunomedics. As explained below, this presumption switches who bears the burden of proof. Thus, Leung has the burden of showing by a preponderance of the evidence that he did not invent Framework Patching while at Immunomedics.

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<sup>72</sup> None of the parties has addressed the question of what burden of proof applies to these claims, almost all of which arise under New Jersey law. See RESTATEMENT (SECOND) OF CONFLICTS § 133 (1971) (“The forum will apply its own local law in determining which party has the burden of persuading the trier of fact on a particular issue unless the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect decision of the issue rather than to regulate the conduct of the trial. In that event, the rule of the state of the otherwise applicable law will be applied.”). But, I need not address this question because Delaware and New Jersey law appear to place the burdens on the same parties. See *Daystar Const. Mgmt., Inc. v. Mitchell*, 2006 WL 2053649, at \*4 (Del. Super. July 12, 2006) (“The Court begins with the fundamental observation that plaintiff bears the burden of proving its breach of contract claim by a preponderance of the evidence.”); *Cumberland Cty. Improvement Auth. v. GSP Recycling Co., Inc.*, 818 A.2d 431, 442 (N.J. Super. Ct. App. Div. 2003) (to prevail on a breach of contract claim, party had the “burden of proof to establish all elements of its cause of action, including damages”); see also *Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at \*5 (Del. Ch. Apr. 5, 2005) (“A plaintiff alleging misappropriation of a trade secret must prove its case by a preponderance of the evidence.”), *aff’d*, 913 A.2d 569 (Del. 2006); *Rycoline Prods., Inc. v. Walsh*, 756 A.2d 1047, 1052 (N.J. Super. Ct. App. Div. 2000) (placing the burden of proof on the party claiming misappropriation of a trade secret).

<sup>73</sup> See *Liberty Mut. Ins. Co. v. Land*, 892 A.2d 1240, 1243 (N.J. 2006) (“As a general rule, the preponderance of the evidence standard applies in civil actions.”).

<sup>74</sup> *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at \*17 (Del. Ch. Oct. 23, 2002) (quoting Del. P.J.I. Civ. § 4.1 (2000)); see also *Liberty Mut.*, 892 A.2d at 1243 (“Under the preponderance standard, a litigant must establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met.” (internal quotations omitted)).

But, before I address the merits of the parties' claims, I turn to the issue of Leung's credibility, which is relevant to several of the factual disputes in this litigation. For example, the parties' Framework Patching claims revolve around whether Leung is telling the truth when he says that he conceived of that idea in March 2001. Unfortunately, in certain discrete instances, Leung has, I find, been less than candid. Most notably, Leung's Initial Application falsely claimed that Leung had already performed Framework Patching experiments and submitted fake data in order to corroborate those claims. In addition, over two years later, when Leung actually performed these experiments, he had a subordinate falsify lab data to create a false paper trail.

Because of this duplicity, I have only given Leung's testimony weight where it is also convincingly corroborated by other record evidence.

Having addressed that global issue, I now focus on the parties' specific claims.

A. Leung Did Not Violate His Assignment Agreement

The original impetus for this litigation was a simple one: does the Assignment Agreement require that Leung assign his patents and his patent applications to Immunomedics? The Assignment Agreement only entitles Immunomedics to inventions that Leung made while he was at Immunomedics. If Leung invented Framework Patching while at Immunomedics, he had to assign that invention to Immunomedics and violated his Assignment Agreement by not doing so. But, if Leung invented it after leaving Immunomedics, as he claims, he had no such obligation.

Under the Assignment Agreement, these questions are governed by New Jersey law.<sup>75</sup> This means that I must interpret the Assignment Agreement in light of the “intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded.”<sup>76</sup> Even if an agreement is clear on its face, a court applying New Jersey law must consider other evidence that may shed light on the intentions of the parties.<sup>77</sup> And, “when the terms of an agreement have more than one possible interpretation, by one of which the agreement would be valid and by the other void or illegal, the former will be preferred.”<sup>78</sup>

This last point is important because New Jersey law only enforces post-employment restrictive covenants where those covenants are reasonable.<sup>79</sup> New Jersey courts make that determination by balancing three considerations identified by the New Jersey Supreme Court in *Whitmyer Brothers, Inc. v. Doyle*: (1) whether the restraint is no greater than necessary to protect a legitimate interest; (2) whether the restraint is unduly

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<sup>75</sup> Assignment Agreement § 5.

<sup>76</sup> *Onderdonk v. Presbyterian Homes of N.J.*, 425 A.2d 1057, 1063 (N.J. 1981) (quoting *Atl. N. Airlines v. Schwimmer*, 96 A.2d 652, 656 (N.J. 1953)).

<sup>77</sup> *Conway v. 287 Corporate Ctr. Assocs.*, 901 A.2d 341, 346 (N.J. 2006) (“We consider all of the relevant evidence that will assist in determining the intent and meaning of the contract.”); see also *Schwimmer*, 96 A.2d at 656 (“Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement. This is so even when the contract on its face is free from ambiguity.”).

<sup>78</sup> *New Jersey Bank v. Palladino*, 389 A.2d 454, 461 (N.J. 1978).

<sup>79</sup> See, e.g., *Ingersoll-Rand Co. v. Ciavatta*, 542 A.2d 879, 896 (N.J. 1988) (declining to enforce a post-employment covenant where it was found to be unreasonable); *Whitmyer Bros., Inc. v. Doyle*, 274 A.2d 577, 583 (N.J. 1971) (overturning trial court where it did not give “any effect to the important limiting considerations governing the postemployment restrictive covenant”).

harsh or oppressive to the employee; and (3) whether the restraint is injurious to the public.<sup>80</sup> As applied in New Jersey, this requires that a former employer present some judicially cognizable interest that justifies the post-employment restraint; a former employer's interest in simply lessening competition is not enough to enforce a post-employment covenant.<sup>81</sup>

Here, the question of what Leung had an obligation to assign is complicated because, as we have already seen, when Leung filed the Initial Application, he filed a claim that covered not only Framework Patching, but also the known method which Immunomedics and others in the field had already been using. Therefore, there are two related questions: (1) did Leung have an obligation to assign the Initial Application because its claims include replacing only FR4, something which Leung did at Immunomedics but which was also widely known in the art?; and (2) did Leung have an obligation to assign the Initial Application in so far as it relates to Framework Patching because Leung conceived of Framework Patching while at Immunomedics?

The first issue is a straightforward contractual question. Under the Assignment Agreement, Leung only agreed to assign "Inventions," which are defined to include "all ideas, inventions, discoveries, and improvements (whether or not patentable or subject to

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<sup>80</sup> *Ingersoll-Rand*, 542 A.2d at 890.

<sup>81</sup> See *Whitmyer Bros.*, 274 A.2d at 582; *Raven v. A. Klein & Co., Inc.*, 478 A.2d 1208, 1210 (N.J. Super. Ct. App. Div. 1984) ("[D]efendant is not entitled to enforce a restrictive covenant principally directed at lessening competition. Rather, the covenant must be directed at protecting the employer's legitimate interests, here urged to be its trade secrets." (citations omitted)); *Flow Control, Inc. v. Herron Valve*, 2004 WL 2563563, at \*3 (N.J. Super. Ct. App. Div. Apr. 20, 2004) ("Although an employer has a legitimate interest in protecting confidential information, an employee will not be precluded from using non-confidential information simply to prevent competition.").

copyright protection) which I make, originate, conceive, or reduce to practice during my employment with [Immunomedics].”<sup>82</sup> In other words, Leung promised to assign new creations. But, just replacing FR4 was not a new idea, nor was it an idea that belonged to Immunomedics. Rather, the record shows that using a separate sequence for FR4 was generally known to molecular biologists. Thus, Leung had no obligation to assign it.<sup>83</sup>

On the other hand Framework Patching is, at least to some extent, a new idea.<sup>84</sup>

Thus, the second, more complicated question is whether Leung had to assign his Framework Patching idea because Leung actually conceived of that invention during his time at Immunomedics. Leung submitted his patent application in June 2001, only ten

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<sup>82</sup> Assignment Agreement § 3(a).

<sup>83</sup> Even if only replacing FR4 was included within the Assignment Agreement, under New Jersey law, Immunomedics would not be able to control Leung’s use of general skills and expertise. *Ingersoll-Rand*, 542 A.2d at 892 (“[I]n cases where the employer’s interests do not rise to the level of a proprietary interest deserving of judicial protection, a court will conclude that a restrictive agreement merely stifles competition and therefore is unenforceable.”).

<sup>84</sup> In finding that claims about Framework Patching are governed by § 3(c) of the Assignment Agreement, I am not deciding whether that method is the type of novel breakthrough that federal law is willing to protect with the temporary monopoly offered by a patent. The Assignment Agreement covers “ideas, inventions, discoveries, and improvements (whether or not patentable or subject to copyright protection).” Assignment Agreement § 3(a). All of the evidence in the record indicates that this variant on the Queen Method was new and potentially covered by the Assignment Agreement. But, that does not mean that Framework Patching meets the high bar that the federal government requires for patents. In fact, to this layperson, Framework Patching seems a rather natural extension of the techniques suggested by the Queen Method. Leung did not have some magic revelatory moment of science in which he opened up a new road for scientific work. At best, Leung was the first to take one of the obvious next steps in the evolving art of antibody humanization. It is also important to note that the USPTO has not granted a patent on Framework Patching as a method, but instead has only granted patents on specific antibodies that have been assembled using that method. And, SinoMab’s lawyers have represented to this court in no uncertain terms that the family of patents emanating from the Initial Application has been exhausted, and have therefore barred SinoMab and Leung from filing any additional patents that trace their authority to the Initial Application. 5/13/09 Tr. at 7-8. In other words, SinoMab and Leung will not and cannot resume their pursuit of a broad patent prohibiting the world from using Framework Patching. Because the plaintiffs have made this representation to the court, this court’s final order will contain a provision embodying that representation as an integral part of the disposition of this matter.

months after leaving Immunomedics, so Immunomedics is entitled to a presumption under § 3(c) of the Assignment Agreement that Leung invented Framework Patching while at Immunomedics. Unfortunately, the contract is silent as to the strength of this presumption, in the sense of describing what exactly is needed to overcome it. Given its silence, I read it as simply reversing the natural order of things: instead of Immunomedics having to show that it is more likely than not that Leung invented Framework Patching while at Immunomedics,<sup>85</sup> Leung must prove it is more likely than not that he invented Framework Patching after he left Immunomedics. Altering the burden of proof in this way gives meaning to the presumption that Leung agreed to when he began working at Immunomedics, while avoiding reading the contract as imposing the onerous type of post-employment restrictive covenant that the New Jersey Supreme Court has found to be unreasonable.<sup>86</sup>

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<sup>85</sup> Cf. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 2510 (2007) (interpreting the “strong inference” requirement of the Private Securities Litigation Reform Act as requiring an inference that is as likely as the other evidence in the complaint).

<sup>86</sup> See *Richards Mfg. Co. v. Thomas & Betts Corp.*, 2005 WL 2373413, at \*4 (D.N.J. Sept. 27, 2005) (“Where restrictive covenants are found to [be unreasonable], rather than deem the covenant void *ab initio*, Courts will enforce them to the extent reasonable under the circumstances.”). If the presumption was stronger than this it would give Immunomedics rights through a presumption that Immunomedics could not get through an outright contract. Although neither party has cited to a New Jersey case addressing presumptions like the one in § 3(c), New Jersey has addressed pure “holdover provisions” which, instead of applying a presumption, simply require the assignment of post-employment inventions made within a certain period of time. In *Ingersoll-Rand Company v. Ciavatta*, the New Jersey Supreme Court found that such provisions are subject to the same reasonableness test as non-competition agreements. *Ingersoll-Rand*, 542 A.2d at 888. This means that they may only provide “that limited measure of relief within the terms of the noncompetitive agreement which would be reasonably necessary to protect [an employer’s] legitimate interests, would cause no undue hardship on the employee, and would not impair the public interest.” *Id.* (quotes omitted). Applying this test to holdover provisions, the Court determined that holdover provisions can be reasonable to the extent necessary to protect certain narrow employer interests, like that in confidential information. *Id.*

As it turns out, the simple presumption in § 3(c) of the Assignment Agreement is the entirety of Immunomedics' case. It has not offered any record evidence showing that Leung conceived of Framework Patching while he was at Immunomedics.

On the other hand, Leung has produced conception notes that I conclude were most likely made after Leung returned to Hong Kong.<sup>87</sup> Likewise, the plaintiffs have produced Leung's earliest known work on Framework Patching, which I find was most likely performed no earlier than March 2001. And, until March 2001, Leung continued to practice normal humanization techniques and submit applications that made no mention of his claimed breakthrough. Leung's testimony also fits with the fact that in March 2001 Leung was having trouble getting funding and was under unique pressure to make a breakthrough.

In most cases, this array of evidence would be enough to overcome the presumption in the Assignment Agreement. But, much of the evidence depends on Leung's integrity. He was willing to include false results in his Initial Application and have an employee forge lab notes in order to secure a Framework Patching patent.

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But, the New Jersey Supreme Court also noted that “[w]e expect courts to construe narrowly this interest.” *Id.* And, Framework Patching does not involve any confidential information nor is there any evidence that Leung would not have conceived of Framework Patching but for his exposure to Immunomedics' unique workplace; it is based on publicly known techniques. *Cf. Campbell Soup Co. v. ConAgra, Inc.*, 801 F. Supp. 1298, 1306-07 (D.N.J. 1991) (finding that a holdover provision was reasonable with regard to a patent allegedly used former employer's trade secrets), *rev'd on other grounds*, 977 F.2d 86 (3d Cir. 1992). Admittedly, this case is distinct from a pure holdover provision case because the Assignment Agreement does not, of course, require a blanket assignment. Rather, Immunomedics seeks to use the presumption in § 3(c) to capture Framework Patching within the ambit of inventions that Leung conceived of while at Immunomedics. But, that presumption raises many of the same concerns that a holdover clause implicates and unless it can be rebutted by an appropriate showing, the presumption in § 3(c) would likely violate New Jersey law.

<sup>87</sup> JX-18.

Therefore, I cannot reject out of hand the possibility that Leung conceived of Framework Patching while at Immunomedics and just waited several months to disclose his idea. It is also not impossible that Leung faked all of his notes, and that the ITF's rejection just provided a cover for a story that Leung had already cooked up.

But, the only way for me to reconcile the record evidence that Leung presented with Immunomedics' contention that Leung invented Framework Patching while at Immunomedics would be for me to find that Leung is fence-post stupid. That is, I would have to find that he carefully plotted to subvert his Assignment Agreement by stowing the Framework Patching idea he had secretly conceived of at Immunomedics, but then insanely revealed his plot only two months before the presumption in § 3(c) expired. In other words, one would have to conclude that Leung conceived of Framework Patching while at Immunomedics and then resolved to keep that idea secret until he had left Immunomedics so that Leung could keep Framework Patching all for himself. Then, I would need to conclude that the proposals, notes, and grant applications that date back to Leung's time in Hong Kong were all created in bad faith to create a (false) paper record about when Leung actually conceived of Framework Patching.

But then, and here is the part that Immunomedics has not attempted to explain, I would need to conclude that Leung, despite having engaged in an elaborate charade for the better part of a year, "jumped the gun" in June 2001, by filing the Initial Application, when, if Leung had only waited another two months for the contractual presumption to expire, Immunomedics would not have had any case. Simply put, I do not find this contorted version of events credible.

Instead, I find that Leung conceived of Framework Patching after leaving Immunomedics and therefore did not have an obligation to assign the Initial Application or any of his other Framework Patching applications and patents to Immunomedics. Accordingly, the plaintiffs' request for a declaration that Leung has no obligation to assign any of his patents or patent applications is granted. I also find that the plaintiffs are entitled to an injunction requiring that Immunomedics withdraw its Obligation to Assign notices from Leung's patents and applications. And, I grant the plaintiffs an injunction preventing Immunomedics from prosecuting any patents based on the theory that it has a claim to the ideas described in the Initial Application besides the idea of making a separate FR4 determination.

**B. Leung Breached His Non-Competition Agreement By Filing Claims That Covered Leung's Work At HKIB**

But, even though Leung did not have to assign the claims in his Initial Application, he breached his Non-Competition Agreement by filing claims that included the humanization work that he had been doing while at Immunomedics. As a condition of his employment, Leung signed a Non-Competition Agreement in which he promised not to compete with Immunomedics in the United States for two years after he ended his employment. Although most of Leung's post-Immunomedics work was done in Hong Kong, Leung chose to file his Initial Application in the United States, the territory that he had agreed not to compete in.

Seeking to avoid liability for filing an overly broad patent in the United States, Leung responds that New Jersey law protects Leung's rights to use his skills and

therefore the Non-Competition Agreement is not enforceable against him in so far as it purports to limit Leung's right to file his Initial Application. But, in filing that Application, Leung did not just seek the right to use his skills, he also sought to prevent Immunomedics from making separate FR4 determinations, something that Immunomedics was already doing while Leung was an employee there. And, I find that New Jersey's normal scrutiny of post-employment covenants does not provide immunity for an employee's filing of ideas that her former employer was already practicing. Accordingly, I conclude that the Non-Competition Agreement is reasonable in so far as it barred Leung from patenting work that he had done at Immunomedics and that by seeking a patent on that work that would have, if granted, prevented Immunomedics from continuing to do such work itself, Leung violated the Agreement.

In his Non-Competition Agreement, Leung agreed not to engage in "Competitive Activities" within *the United States* for two years.<sup>88</sup> This included a broad promise not to "engage in . . . any . . . activity which is competitive . . . with any . . . field of research and development activities in which [Immunomedics] is engaged or proposes to engage."<sup>89</sup> Most of Leung's post-employment work, of course, was conducted in Hong Kong. But, Leung filed his Initial Application in the United States. And, when Leung filed that Application, he sought to give himself a monopoly over any humanization method that involved making separate FR4 determinations. This would have given Leung control over a type of research that Immunomedics had been doing for years. Thus, in filing his

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<sup>88</sup> Non-Competition Agreement § 2(b).

<sup>89</sup> Non-Competition Agreement § 2(a). Like the Assignment Agreement, the Non-Competition Agreement is governed by New Jersey law. Non-Competition Agreement § 8.

Initial Application, Leung engaged in an “activity which [was] competitive with . . . [a] field of research and development activities in which [Immunomedics was] engaged.”<sup>90</sup>

Nonetheless, Leung argues that, under New Jersey law, a covenant barring Leung from filing a patent would be void as unreasonable. As has already been discussed, New Jersey law limits the enforcement of post-employment covenants to where those covenants reasonable in light of: (1) the need to protect an employer’s legitimate interests; (2) the hardship the restriction would place on the employee; and (3) the danger that the agreement would harm the public interest.<sup>91</sup> As applied in New Jersey, this means that courts will only enforce a non-competition agreement where doing so is necessary to protect a legally cognizable interest; the desire to lessen competition is not enough to justify post-employment restrictions.<sup>92</sup> For this reason, a former employee normally has broad rights to his own inventions as long as those inventions are a product of confidential information. In *Ingersoll-Rand Co. v. Ciavatta*, for example, the New Jersey Supreme Court refused to enforce a holdover provision requiring that a former employee assign his post-employment invention, in part, because of the employee’s right

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<sup>90</sup> Non-Competition Agreement § 2(a). Leung has argued that filing a patent is a preparatory act and preparatory acts are not actionable competition under New Jersey law. Pls.’ Op. Post-Trial Br. at 34. The cases that Leung cites for the proposition that preparatory acts are not competing activities, however, deal with breaches of the duty of loyalty, not a breach of a contract not to compete, as is alleged here. See, *Intermedics, Inc. v. Vermedco, Inc.*, 1986 WL 10335, at \*14 (D.N.J. Sept. 16, 1986); *Midland-Ross Corp. v. Yokana*, 185 F. Supp. 594, 598 (D.N.J. 1960), *aff’d*, 293 F.2d 411 (3d Cir. 1961); *Auxton Computer Enters. v. Parker*, 416 A.2d 952, 955 (N.J. Super. Ct. App. Div. 1980). And, even if there was a general immunity for preparatory acts, it is hard to see how, in an industry where obtaining intellectual property protection for a treatment is an important goal in and of itself, filing a patent would be such a mere preparatory act.

<sup>91</sup> *Ingersoll-Rand*, 542 A.2d at 892.

<sup>92</sup> *Richards Mfg.*, 2005 WL 2373413, at \*3; see also *Hosp. Group, Inc. v. More*, 869 A.2d 884, 897 (N.J. 2005) (“JFK, like every other employer, however, does not have a legitimate business interest in restricting competition.”).

to use his skills and of society's interest in "a more productive worker."<sup>93</sup> Seizing upon this line of reasoning, Leung argues that the Non-Competition Agreement was unreasonable in so far as it sought to bar Leung's filing of a patent like the Initial Application.

But, the issue here is not just Leung's own inventions and thus I find that the Non-Competition Agreement was reasonable to the extent that it barred Leung from filing patents on work that he did for Immunomedics. For starters, neither Leung nor the public had a legitimate interest that is threatened by not allowing Leung to file patents on ideas that Immunomedics was already practicing. Leung's interest in using his skills to find productive employment did not require that he be able to file patent applications seeking to bar his former employer from continuing work that it had been doing for years. To permit Leung free license to act in this manner would actually subvert New Jersey's non-competition public policy. By his contractually improper conduct, Leung sought to narrow the ability not only of Immunomedics, but of others, to practice techniques they were already pursuing. Thus, it was Leung's own behavior, and not Immunomedics', which threatened New Jersey public policy, as it was he who was wrongly seeking to gag

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<sup>93</sup> *Ingersoll-Rand*, 542 A.2d at 894; *see also id.* ("Courts, however, must be aware that holdover agreements impose restrictions on employees. Such agreements clearly limit an employee's employment opportunities and in many instances probably interfere with an employee securing a position in which he could most effectively use his skills . . .").

the marketplace of ideas by excluding his former employer from a sphere it already safely occupied along with others.<sup>94</sup>

Thus, I conclude that Leung's Non-Competition Agreement was reasonable in so far as it prevented Leung from patenting ideas that he had practiced while at Immunomedics. And, by filing his Initial Application and attempting to give himself a monopoly over a type of antibody humanization method that Immunomedics used in its research, Leung violated that Agreement.

Immunomedics, however, has not shown that it was actually harmed by Leung's attempt to patent making separate FR4 determinations. Leung's overly broad patent claim never issued and, in approximately September 2006, it was canceled.<sup>95</sup> Thus, Immunomedics was never prevented from making the separate FR4 determinations that it had been making for years. For that reason, it is unsurprising that Immunomedics has not provided any evidence upon which this court could base an award of compensatory damages. Nonetheless, Immunomedics is entitled to nominal damages. Unlike compensatory damages, nominal damages do not purport to put the offended party back in the place that it was before it suffered harm, rather they are "in recognition of a technical injury and by way of declaring the rights of the plaintiff. Nominal damages are usually assessed in a trivial amount, selected simply for the purpose of declaring an

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<sup>94</sup> *Ingersoll-Rand*, 542 A.2d at 894 (finding that the information protected by a reasonable holdover provision can "under certain circumstances exceed the limitation of trade secrets and confidential information").

<sup>95</sup> Pre-Trial Stip. ¶ 25; JX-187.

infraction of the Plaintiff's rights and the commission of a wrong.”<sup>96</sup> Accordingly, I award Immunomedics nominal damages in the amount of one dollar.

In addition, Immunomedics is entitled to the reasonable attorneys' fees that Immunomedics incurred because of Leung's breach. In his Non-Competition Agreement, Leung agreed that Immunomedics could hold him “liable for all costs and expenses of [Immunomedics] resulting from such breach (including, without limitation, reasonable attorneys' fees and expenses in dealing with [his] breach and/or any suits or actions with regard thereto).”<sup>97</sup> Thus, I award Immunomedics the limited amount of its attorneys' fees that correspond to the effort that was spent in forcing Leung to withdraw his overly broad claims in the United States.

### C. Misappropriation Of Trade Secrets

I find that Leung did not misappropriate an Immunomedics trade secret by using the Immunomedics Sequence because that information does not rise to the level of a trade secret.

Under New Jersey law, a claim for misappropriation of a trade secret requires a showing that: (1) a trade secret exists; (2) the information comprising the trade secret was communicated in confidence by plaintiff to the employee; (3) the secret information was disclosed by that employee and in breach of that confidence; (4) the secret

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<sup>96</sup> *Ivize of Milwaukee, LLC v. Complex Litig. Support, LLC*, 2009 WL 1111179, at \*12 (Del. Ch. Apr. 27, 2009) (quoting *Penn Mart Supermarkets, Inc. v. New Castle Shopping LLC*, 2005 WL 3502054, at \*15 (Del. Ch. Dec. 15, 2005)); *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 477 A.2d 1224, 1229-30 (N.J. 1984) (holding that where a party shows that it suffered an intentional tort but cannot prove compensatory damages, nominal damages are appropriate).

<sup>97</sup> See Non-Competition Agreement § 5.

information was acquired by a competitor with knowledge of the employee's breach of confidence; (5) the secret information was used by the competitor to the detriment of plaintiff; and (6) the plaintiff took precautions to maintain the secrecy of the trade secret.<sup>98</sup> As the party claiming misappropriation of trade secrets, Immunomedics must show that all of these elements exist.<sup>99</sup>

Here, as the plaintiffs point out, Immunomedics has not met its burden in showing that Immunomedics Sequence is a trade secret. New Jersey trade secret law only protects information that gives the misappropriator some type of competitive advantage. But, there is no evidence that the Immunomedics Sequence provided such an advantage. Rather, the record is clear that the Immunomedics Sequence is a small, unproven variation on a publicly available sequence. Under New Jersey law, such insignificant variations on a well established formula do not rise to the level of a trade secret. Accordingly, regardless of whether Leung took the Immunomedics Sequence, there was no misappropriation of a trade secret.

Before addressing the legal aspect of this question, it is useful to repeat the underlying science behind RFB4 and the Immunomedics Sequence. The RFB4 antibody itself is a sequence of amino acids. That sequence of amino acids is what determines whether the antibody works or not; the DNA sequence does not affect performance. What the DNA sequence does do is code for the amino acid sequence. Therefore, any

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<sup>98</sup> *Rycoline Prods.*, 756 A.2d at 1052.

<sup>99</sup> *See Nucar Consulting*, 2005 WL 820706, at \*5 (“A plaintiff alleging misappropriation of a trade secret must prove its case by a preponderance of the evidence.”); *Rycoline Prods.*, 756 A.2d at 1052 (placing the burden of proof on the party claiming misappropriation of trade secrets).

DNA sequence for RFB4 is only useful to the extent that the DNA codes for the amino acids. And, there are a number of different DNA sequences that can perform this function. In addition, as we have seen, the NIH has published both the amino acid sequence and the Mansfield Sequence which encoded for the RFB4.

Thus, all the Immunomedics Sequence involves are a few discrete changes that Leung made to the Mansfield Sequence. And, these changes were not based on proprietary concepts. Rather, they were made by taking publicly known concerns about arginine expression and more general issues about working with DNA sequences, and then addressing those problems using publicly known methods. Although obtuse to a layman, this process is by all accounts straightforward to a molecular biologist like Leung and took only a few hours. And, the result had not been tested before Leung left Immunomedics, so when Leung left there was no reason to believe that the Immunomedics Sequence would actually work as anticipated. Put succinctly, what Leung created at Immunomedics was a best guess as to what might be an (modest) improvement on an already known piece of information.

To determine whether information like this qualifies for trade secret protection, New Jersey courts have generally used the definition of a trade secret found in *the Restatement (First) of Torts*, which defines a trade secret as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”<sup>100</sup> In

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<sup>100</sup> *Ingersoll-Rand*, 542 A.2d at 893 (quoting RESTATEMENT (FIRST) OF TORTS § 757, cmt. b (1939)). *The Restatement (Second) of Torts* does not address trade secret misappropriation.

other words, a trade secret cannot be any piece of information; it must have the potential to give the holder some advantage. New Jersey courts have also considered the six factors that the Restatement adopts:

- (1) the extent to which the information is known outside of the business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken by the owner to guard the secrecy of the information;
- (4) the value of the information to the business and to its competitors;
- (5) the amount of effort or money expended in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.<sup>101</sup>

When viewed in light of these factors, the Immunomedics Sequence does not rise to the level of a trade secret.

First, although the Immunomedics Sequence is not known outside of Immunomedics, it is a rather basic modification of a sequence that is publicly known and free for all to use. And, although Leung's changes were, to some extent, discretionary, his rationale and methods were familiar to molecular biologists.

With regard to factors two and three (the extent to which the information was known within Immunomedics and the extent to which Immunomedics acted to protect the claimed secret), Immunomedics has failed to present any evidence to support its position. Immunomedics has not provided any record evidence indicating that the Immunomedics Sequence was a vital piece of information whose details were kept secret to protect the

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Some New Jersey courts have cited to *the Restatement (Third) of Unfair Competition*, which does discuss trade secret misappropriation. See *Trump's Castle Assocs. v. Tallone*, 645 A.2d 1207, 1208 (N.J. Super. Ct. App. Div. 1994); *Platinum Mgmt., Inc. v. Dahms*, 666 A.2d 1028, 1038 (N.J. Super. Law Div. 1995); see also *Duffy v. Charles Schwab & Co., Inc.*, 123 F. Supp. 2d 802, 813 (D.N.J. 2000). But, New Jersey courts have not formally adopted it.

<sup>101</sup> *Ingersoll-Rand*, 542 A.2d at 893.

secret from Immunomedics' own employees. On the contrary, by all accounts the Immunomedics Sequence was not regarded as a critical piece of Immunomedics' long-term business strategy, but rather as work product that a former employee prepared in a few hours and which largely sat unused and ignored until Immunomedics realized that Leung had used the Sequence and that it might give Immunomedics some leverage in this litigation. Similarly, Immunomedics has not provided record evidence of any special effort to protect the Sequence which might indicate that Immunomedics believed that Leung's modest variation on the Mansfield Sequence gave it some marketable advantage.<sup>102</sup>

Skipping the issue of value for a moment, the last two factors (time invested in obtaining the information and the time that it would take for a competitor to replicate the information) weigh heavily against the presence of a trade secret. As discussed above, Leung spent a few hours developing the Immunomedics Sequence. And, he did so according to well-known methods of modifying DNA sequences. A competitor focused on the same issues also could have come up with the Immunomedics Sequence, or a sequence that would likely function identically, in a few hours. In other words, the Immunomedics Sequence was not novel information that afforded a competitive

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<sup>102</sup> Cf. *Phibro-Tech, Inc. v. Osmose Holdings, Inc.*, 2007 WL 1989431, at \*14 (N.J. Super. Ct. App. Div. June 25, 2007) (finding a trade secret where the inventors took steps to limit who could access the information and worked to create a "chain of custody of the information and sample").

advantage, but rather a set of modest changes that any skilled molecular biologist could make in a few hours.<sup>103</sup>

Finally, although slightly more complicated, the issue of value does not elevate the Immunomedics Sequence to a trade secret. Admittedly, Leung made the minor changes that he did for a reason: he hoped that the Immunomedics Sequence would be easier to work with and more likely to express in bacteria. But, Immunomedics has not met its burden of showing that the Immunomedics Sequence actually provided these moderate advantages over the Mansfield Sequence.<sup>104</sup> And, given the aggressive way in which Immunomedics has pursued this action, it is safe to assume that Immunomedics would have found such an advantage if it existed. Nor has Immunomedics provided a basis for concluding that the Immunomedics Sequence otherwise had some independent worth; that is, Immunomedics has not made the important showing that a third party would have

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<sup>103</sup> *Cf. Campbell*, 801 F. Supp. 1298, 1305 (awarding a preliminary injunction where developing the alleged trade secret involved several rounds of testing and it was unlikely that the alleged misappropriator could have developed the information on its own).

<sup>104</sup> At best, Immunomedics' expert says that there was some value to Leung because he knew that Immunomedics had not yet had problems in its work with the Immunomedics Sequence. Tr. at 879-80 (Vasquez). Unfortunately, Immunomedics' expert only mentioned this value in an ad-hoc manner during cross-examination and this claimed source of value is not discussed in his expert report. Immunomedics also has not provided other evidence explaining this so-called value. The idea, however, appears to be that although Immunomedics never tested its Sequence, it did spend time creating a strand of DNA bearing the Sequence and, before Leung left, none of his subordinates had run into any type of insurmountable problem in that assembly. According to Immunomedics, this means that Leung knew that the Immunomedics Sequence could be used to create a strand of DNA or at least to get as far along in the process as Immunomedics got before Leung left. But, Immunomedics has not explained how this was an appreciable advantage. There is no record evidence that assembly problems are common. And, by all accounts, the Mansfield Sequence also could have been assembled. The ease of assembly was also, at most, tangentially related to Leung's chief concern in designing the Immunomedics Sequence: arginine expression. Therefore, this single piece of testimony is not enough to meet Immunomedics' burden of showing some material commercial value in the Immunomedics' Sequence.

been willing to pay cash for the Immunomedics' Sequence.<sup>105</sup> Rather, the record evidence is clear that the Immunomedics Sequence was just Leung's slightly different way of doing something that was public knowledge: encoding RFB4. This type of common change is not protectable under New Jersey law: "routine or trivial differences in practices and methods [will not] suffice to support restraint of the employee's competition."<sup>106</sup>

Put another way, even if Leung took the Immunomedics Sequence, doing so did not give Leung an unfair competitive advantage. At most it saved him two hours of additional work.

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<sup>105</sup> The fact that value is an issue makes this case somewhat of an oddity. Because there is little point in litigating about secrets that have no value, value is rarely an issue in intellectual property litigation. ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* § 24.2.2 (2003) ("Value is seldom a practical issue in trade secret cases. The high cost of enforcing intellectual property rights suggests that plaintiffs will only commence litigation concerning information of considerable value.").

<sup>106</sup> *Whitmyer Bros.*, 274 A.2d at 581; see also *Comprehensive Med. Communc'ns, Inc. v. Pinnacle Commc'ns Group, Inc.*, 2005 WL 280452, at \*14 (N.J. Super. Ct. App. Div. Jan. 31, 2005). It is also worth noting that even if this type of small variation was protected as a trade secret, the sheer absence of value would mean that Immunomedics would not have a non-punitive remedy. Immunomedics has not even attempted to prove that it suffered damages like lost profits. Instead, it has asked for an injunction barring Leung's use of the Immunomedics Sequence, an injunction that would cover research materials and therapeutic antibodies that Leung created years ago and has since done research on for nine years. But, Immunomedics has not shown that Leung's research was at all advanced by using the Immunomedics Sequence as opposed to the Mansfield or any other sequence. Rather, based upon the record evidence, the only reasonable conclusion is that this was a small decision at the beginning of Leung's research that did not likely affect Leung's results at all. Therefore, even if I found that there was a trade secret and Leung took it, barring Leung from using of years' worth of effort would be to grant Immunomedics a remedy that is entirely disproportionate to its harm. See *Kurnik v. Cooper Health Sys.*, 2008 WL 2829963, at \*16-17 (N.J. Super. Ct. App. Div. July 24, 2008) (punitive damages not available for breach of employment contract absent a breach of fiduciary or other special duty); *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 447-48 (Del. 1996) (punitive damages not available for breach of an employment contract).

Accordingly, I find that Leung did not misappropriate a trade secret.<sup>107</sup>

D. Breach Of The Implied Covenant Of Good Faith And Fair Dealing

Immunomedics also argues that Leung breached the covenant of good faith and fair dealing that attached to his stock options by exercising his stock options while planning to leave Immunomedics and by stating at his exit interview that he was not taking any Immunomedics computer files.

All contracts under New Jersey law, like those under Delaware law, contain an implied covenant of good faith and fair dealing.<sup>108</sup> Under the implied covenant, parties cannot engage in bad faith conduct that has the “effect of destroying or injuring the right of the other party to receive the fruits of the contract.”<sup>109</sup> Over the course of his employment, Leung was granted several thousand stock options. But, those options were subject to termination if Leung left Immunomedics for HKIB without exercising the options.<sup>110</sup> As a result, when he was planning to leave Immunomedics, Leung exercised several thousand stock options that were in total worth over \$1.3 million.<sup>111</sup>

Immunomedics stresses, however, that because Leung left, his exercise of his options was conditional. Immunomedics’ board had the right to revoke Leung’s stock

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<sup>107</sup> For the same reason, I reject Immunomedics’ claim that Leung engaged in unfair competition by using the Immunomedics Sequence. As Immunomedics itself notes: “[u]nfair competition ‘consists of the misappropriation of one’s property by another — property that has some sort of commercial or pecuniary value.’” Immunomedics Op. Post-Trial Br. at 29 (quoting *New Jersey Optometric Ass’n v. Hillman-Kohan Eyeglasses, Inc.*, 365 A.2d 956, 965 (N.J. Super. Ct. Ch. Div. 1976)). Because Immunomedics has not shown that there was any value in the Immunomedics Sequence I find that Leung did not engage in unfair competition.

<sup>108</sup> *Wilson v. Amerada Hess Corp.*, 773 A.2d 1121, 1126 (N.J. 2001); *Sons of Thunder, Inc. v. Borden, Inc.*, 690 A.2d 575, 587 (N.J. 1997).

<sup>109</sup> *Wade v. Kessler Inst.*, 798 A.2d 1251, 1259 (N.J. 2002).

<sup>110</sup> Stock Option Agreement § 2(a).

<sup>111</sup> Tr. at 706 (Sullivan).

options within 90 days of Leung ending his employment if it found that Leung had “breached a material duty or obligation to [Immunomedics].”<sup>112</sup> According to Immunomedics, by keeping Immunomedics documents on his computer, Leung violated such a duty or obligation. And, according to Immunomedics, Leung acted in bad faith when he left by not telling Immunomedics that he was keeping computer files, despite the fact that Leung had Immunomedics documents on his home computer.

But, while New Jersey has noted that bad faith conduct cannot be rigidly defined,<sup>113</sup> it has noted that, at a minimum, a violation of the implied covenant requires some type of “improper motive.”<sup>114</sup>

I do not find any such motive on Leung’s part. Leung worked at home and occasionally saved files to his home computer. Some of these files had confidential information, and Leung should have returned all of the documents to Immunomedics. But the fact that he did not remember them does not prove that he intended to steal information from Immunomedics. Rather, Leung appears to have responded reasonably to an exit interview and questionnaire that were, at best, foggily phrased. Specifically, there is no evidence that Leung was asked at his exit interview if he had computer files at home or advised that he had to bring back or delete all documents on his home computer.

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<sup>112</sup> Stock Option Agreement § 3.

<sup>113</sup> *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs.*, 864 A.2d 387, 395 (N.J. 2005) (“Good faith is a concept that defies precise definition.”).

<sup>114</sup> *Wade*, 798 A.2d at 1260 (“We have cautioned, however, that ‘an allegation of bad faith or unfair dealing should not be permitted to be advanced the abstract and absent an improper motive.’” (quoting *Wilson*, 773 A.2d at 1130)); see also *Black Horse Lane Assoc., L.P. v. Dow. Chem. Corp.*, 228 F.3d 275, 288 (3d Cir. 2000) (“A party to a contract breaches the covenant if it acts in bad faith or engages in some other form of inequitable conduct in the performance of a contractual obligation.”).

Rather, by Immunomedics' own account, Leung was asked whether he was "taking" any files and he responded that he was not.<sup>115</sup> Leung reasonably interpreted this question as asking whether Leung was boxing up information in order to take with him, not whether he already had some files on his home computer from work that he did for Immunomedics while on that computer. Similarly, the questionnaire states: "Computer Files/password Reviewed."<sup>116</sup> It is hard to see how that prompt would make a person think about files on a home computer as opposed to the files that he regularly accessed at his office. Nor, critically, did Immunomedics offer the testimony of the employee who interviewed Leung, leaving no basis at all to conclude that Leung was asked an unambiguous question about whether he had Immunomedics documents on his home computer and responded that he did not have any such documents.

Furthermore, there is no evidence that Leung ever used these documents in any meaningful sense, and Immunomedics has not shown that any of these files contained valuable information. If Leung was going to lie in his exit interview and take Immunomedics documents, one would have expected him to take things with value that would have helped him in Hong Kong. And, even if Immunomedics could show some type of bad intention, the fact that Leung's computer contained documents which had no appreciable value and which Leung did not use in any significant way would not be a *material* breach.

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<sup>115</sup> Immunomedics Op. Post-Trial Br. at 5.

<sup>116</sup> JX-54.

Immunomedics also attempts to use the fact that Leung exercised options while planning to leave for HKIB to show bad faith. Immunomedics, however, has not shown that Leung had a freestanding obligation to tell his employer when he was leaving. Immunomedics was entitled to Leung's loyalty while he was an employee. There is no evidence that it did not get that for the eight years during which Leung earned the options. Leung did not tell Immunomedics that he was leaving because he wanted to work at Immunomedics until he finished making his other arrangements. And, the fact that Leung exercised his stock options is not proof of any plan to harm his soon-to-be former employer. Had he not exercised his options, Leung would have had to forfeit those rights.

For all these reasons, I find that Leung did not violate the implied covenant of good faith and fair dealing.<sup>117</sup>

#### E. Leung Did Not Engage In Unfair Competition

Alternatively, Immunomedics seeks to use the documents that were on Leung's home computer to sustain a claim of unfair competition.

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<sup>117</sup> Immunomedics has also brought a separate count claiming that Leung was unjustly enriched by exercising his stock options while violating the implied covenant of good faith and fair dealing. Because I find that Leung did not violate the implied covenant, there is no basis for that claim. But, even if there were, Immunomedics' claim would fail for the simple reason that unjust enrichment is inapposite where there is an operative agreement between the parties. *See Kuroda v. SPJS Holdings, L.L.C.*, --- A.2d ---, 2009 WL 1110669, at \*11 (Del. Ch. Apr. 15, 2009) ("A claim for unjust enrichment is not available if there is a contract that governs the relationship between parties that gives rise to the unjust enrichment claim. In other words, if 'the contract is the measure of [Kuroda's] right, there can be no recovery under an unjust enrichment theory independent of it.'" (quoting *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 942 (Del. 1979))).

But, Immunomedics' fundamental problem here is that there is no evidence at all that Leung used these documents to compete with Immunomedics. The only document that Leung ever printed or modified was a "PowerPoint" presentation that he never actually presented to anyone.<sup>118</sup>

Although the tort of unfair competition is not rigidly defined,<sup>119</sup> at a minimum, it requires "an injury to a judicially cognizable right."<sup>120</sup> And, while a lot of time was spent at trial proving that these documents were on Leung's computer and that he opened some of these documents, there is no evidence in the record that Leung ever used the documents to compete with Immunomedics.<sup>121</sup> Simply put, lacking any evidence that Leung used the documents to compete with Immunomedics, Immunomedics has failed to prove its claim of unfair competition.<sup>122</sup>

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<sup>118</sup> JX-133.

<sup>119</sup> See *N.J. Optometric Ass'n*, 365 A.2d at 965 ("The law of unfair competition is an amorphous area of jurisprudence.").

<sup>120</sup> *Id.*

<sup>121</sup> Tr. at 90 (Leung).

<sup>122</sup> Immunomedics claims that it met its burden in showing unfair competition because under *Collins v. Throckmorton*, 425 A.2d 146 (Del. 1980), "where a litigant intentionally suppresses or destroys pertinent evidence, an inference arises that such evidence would be unfavorable to his case." *Id.* at 150. Here, Leung eventually deleted the offending documents, and thus Immunomedics claims it is entitled to an inference that Leung used the information. But *Collins* only stands for the sensible proposition that where evidence is intentionally spoiled, a court should assume that the evidence was spoiled because it contained information that would be damaging to the offending party. In this instance, there is no debate about what was in the documents because they were all recovered from an image of Leung's hard drive by an expert in computer forensics. Neither side contests that they are Immunomedics files, some of which contain confidential information, and that Leung should have returned the files. Instead, Immunomedics' problem is that it has no evidence that Leung ever used these documents. That question does not relate to the contents of the destroyed documents, and Immunomedics has not shown how the destruction of those computer files prejudiced its ability to show that Leung competed with Immunomedics. Accordingly, Immunomedics is not entitled to an inference on that subject.

#### IV. Conclusion

For the foregoing reasons, I conclude that Leung did not have an obligation to assign the Initial Application to Immunomedics and award the plaintiffs an injunction requiring that Immunomedics withdraw its Notices of Obligation to Assign from Leung's patents and that Immunomedics not prosecute any patent claims based upon its purported ownership of the Initial Application or the claims therein. I also conclude that Leung did not misappropriate a trade secret or breach the implied covenant of good faith and fair dealing that attached to his stock options; nor did Leung, Skytech, or SinoMab engage in unfair competition. Those claims are therefore dismissed. I do, however, find that Leung breached his Non-Competition Agreement by filing a patent application that covered work that Leung did at Immunomedics and therefore award Immunomedics nominal damages in the amount of one dollar for that breach. Immunomedics is also entitled to the attorneys' fees that relate specifically to this breach of the Non-Competition Agreement. In all other respects, each side shall bear its own costs.<sup>123</sup> The parties shall collaborate on a form of implementing order and submit it within fifteen days. IT IS SO ORDERED.

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<sup>123</sup> In their Post-Trial Answering Brief, the plaintiffs requested attorneys' fees on the grounds that Immunomedics has engaged in vexatious litigation tactics. As a threshold matter, the plaintiffs did not ask for attorneys' fees in their Opening Post-Trial Brief and therefore they waived that request. But, even if it had not, the plaintiffs have not shown that Immunomedics has engaged in the sort of bad faith that would justify shifting fees, and Leung's own lack of candor no doubt fueled Immunomedics' suspicions and thus its litigation ardor. *Cf. Stavrou v. Conotgouris*, 2002 WL 31439765, at \*4 (Del. Ch. Oct. 11, 2002) (awarding attorneys' fees because of bad faith conduct).