IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NATERA, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:23-CV-629
	)	
NEOGENOMICS LABORATORIES, INC.,	)	
	)	
	)	
Defendant.	)	

ORDER

Plaintiff Natera, Inc. filed this lawsuit against defendant NeoGenomics Laboratories, Inc., seeking a preliminary injunction prohibiting infringement of Natera's patented process by NeoGenomics' molecular residual disease (MRD) liquid assay product, RaDaR. After briefing and oral argument, the Court found that Natera is likely to succeed on the merits of its '035 patent infringement claim and that the other requirements for a preliminary injunction are met. NeoGenomics asks the Court to require that Natera post a $400 million bond and to clarify whether specific situations involving signed contracts and testing are enjoined.

I. Jurisdiction to Amend the Injunction

As an initial matter, Natera challenges this Court's authority to modify the preliminary injunction order. *See* Doc. 186 at 8–9. The filing of a notice of appeal typically divests a district court of jurisdiction to rule on any matters involved in the appeal. *See Doe v. Public Citizen*, 749 F.3d 246, 258 (4th Cir. 2014); *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 740 (2023). But a district court maintains the power to modify a

preliminary injunction while an appeal is pending "on terms for bond or other terms that secure the opposing party's rights." *See* FED. R. CIV. P. 62(d). The filing of an appeal does not deprive the district court of "jurisdiction to proceed as to matters in aid of the appeal." *Grand Jury Proc. Under Seal v. United States*, 947 F.2d 1188, 1190 (4th Cir. 1991); *see also Dixon v. Edwards*, 290 F.3d 699, 709 n.14 (4th Cir. 2002) (holding district court aided in appeal by modifying the "imprecise wording in the injunction"). The Court has jurisdiction to modify the preliminary injunction.

II. Bond Amount

A preliminary injunction goes into effect only upon the posting of security in a sum the court deems proper or upon a determination that no bond is needed. *See* FED. R. CIV. P. 65(c); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.,* 174 F.3d 411, 421 (4th Cir. 1999) (holding that the requirement to set a bond is "is mandatory and unambiguous"). In the briefing on the motion for preliminary injunction, no party discussed the amount of an appropriate bond, and in the order granting the motion for a preliminary injunction, Doc. 169; *see also* Doc. 171, the Court did not address security.

NeoGenomics now asks the Court to require Natera to post a $400 million bond. *See* Doc. 179 at 7; Doc. 178-1 at ¶ 6 (proposed modification to preliminary injunction). NeoGenomics bases the proposed bond amount on the decline of its stock price after issuance of the Court's order and on its inability to earn any return on its investment in the RaDaR product while the injunction is in force. *See* Doc. 179 at 7.

District courts have discretion when setting the amount of a bond. *See Hoechst*, 174 F.3d at 421. Courts determine the amount "based on the record evidence" and "[t]he

burden of establishing the bond amount rests with the party to be restrained." *Lab'y Corp. of Am. Holdings v. Kearns*, 84 F. Supp. 3d 447, 465 (M.D.N.C. 2015); *see also Int'l Equity Invs., Inc. v. Opportunity Equity Partners Ltd.,* 441 F. Supp. 2d 552, 566 (S.D.N.Y. 2006) ("[T]he burden is on the party seeking security to establish a rational basis for the amount of the proposed bond.").

The amount of a bond "depends on the gravity of the potential harm to the enjoined party." *See Hoechst*, 174 F.3d at 421 n.3. It should cover "potential incidental and consequential costs as well as either the losses the unjustly enjoined or restrained party will suffer during the period he is prohibited from engaging in certain activities or the complainant's unjust enrichment caused by his adversary being improperly enjoined or restrained." *See id.* (quoting 11A CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2954 at 292 (2d ed. 1995)). Ordinarily, courts consider items like "potential lost profits, lost market share, and associated cost of relaunch" when setting the bond amount. *Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1385 (Fed. Cir. 2006) (internal quotation marks omitted).

NeoGenomics' investment costs and the change in stock price, while not irrelevant, do not provide a good measure of the potential incidental and consequential costs of a wrongfully issued injunction. If it is later determined that the preliminary injunction was wrongfully granted, NeoGenomics can exercise the full value of its investment in RaDaR. The drop in market capitalization is not the same thing as lost profits or market share, and it does not equate to the associated costs of relaunching RaDaR. *See id.* NeoGenomics has not cited any case where the court relied on changes

in market capitalization to determine the amount of security. And if the preliminary injunction is lifted, it is likely that NeoGenomics' stock price will increase.

While NeoGenomics has not established a sufficient basis for setting the security at $400 million, *see Int'l Equity Invs., Inc.*, 441 F. Supp. 2d at 566, it remains appropriate to set a reasonable amount of security. The preliminary injunction will stop almost all sales of RaDaR because it likely infringes the '035 method, and it will no doubt slow down NeoGenomics' entry into the MRD market. Indeed, Natera argued that without the injunction, NeoGenomics is "uniquely positioned to rapidly and substantially subvert Signatera's tumor-informed MRD market share," Doc. 6 at 17, and stopping that injury is the purpose of the injunction. If that were not so, the Court's preliminary injunction analysis would be affected. *See* Doc. 169 at 14–15.

The drop in market capitalization reflects the serious effect of the injunction on NeoGenomics' financial situation and supports the fact that there will likely be some lost profits and market share, even if it is not particularly helpful in determining a specific bond amount. If the preliminary injunction is vacated as wrongfully issued, there will also be some costs to relaunch the product and redevelop biopharmaceutical partnerships. *See id.* at 15.

After the injunction issued, a market research firm reduced its original forecasts of total MRD revenue for NeoGenomics from "conservative" estimates of $8.5 million in 2024 and $17.2 million in 2025 to $1.7 million in 2024 and $3.4 million in 2025. *See* Doc. 186-1 at 5. While total MRD revenue is not the same as profits from RaDaR alone,

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it is still informative. And it is clear from the preliminary injunction evidence that the MRD testing market is growing. *See, e.g.*, Doc. 94-10 at 3.

Taking all this evidence into account, the Court in its discretion will set the security at $10 million. While the parties have not pointed the Court to evidence that allows a precise calculation of potential incidental and consequential costs that NeoGenomics will suffer if the injunction is later vacated as wrongly issued, $10 million is a fair estimate based on the current evidence.

In one argument asking for a larger bond, NeoGenomics says it could take "years" for this case to be finally resolved. *See* Doc. 189 at 11. The Court cannot speak to the length of appellate proceedings, but it will move this matter promptly to final resolution. Answer is due shortly, *see* Doc. 172 (denying motion to dismiss on December 27, 2023), and given that a large amount of discovery has already occurred, the Court will likely look to try this case in around 12 to 15 months.

III. Clarification

NeoGenomics seeks clarification of paragraph three of the preliminary injunction order, which provides some carveouts for testing and research using RaDaR that has already begun. *See* Doc. 179 at 8–10; Doc. 171 at ¶ 3. NeoGenomics has three contracts for clinical testing and use of RaDaR that are signed but for which actual testing of samples has not yet started. *See* Doc. 179 at 8; Doc. 179-1 ¶ 3. The preliminary injunction will not enjoin "clinical trials in process," Doc. 171 at ¶ 3(c), which covers contracts in place for such trials. Enjoining this work would delay potentially meaningful

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scientific research and would negatively affect the third parties who have designed their experimentation and testing protocol around RaDaR. *See* Doc. 179-1 at ¶ 3.

NeoGenomics also asks whether the injunction prohibits the use of RaDaR on blood samples that were taken before the Court issued the preliminary injunction but that were not received until after the injunction issued. Doc. 179 at 9–10. NeoGenomics estimates that the tests included less than 100 patients, as of a few days ago. *See* Doc. 179-1 at ¶ 10. Natera is not opposed to allowing these tests, Doc. 186 at 21, and doing so would be in the best interests of the patients from whom blood samples have been collected. *See* Doc. 179-1 at ¶ 9. The injunction does not prevent NeoGenomics from using RaDaR on these already collected samples. *See* Doc. 171 at ¶ 3(a).

The other clarifications and modifications that NeoGenomics seeks remain under advisement.

It is **ORDERED** that:

1. Security for the preliminary injunction, Doc. 171, is set at $10,000,000, subject to future modification upon motion and additional evidence.
2. Once Natera posts this security, the preliminary injunction, Doc. 171, will go into effect.
3. The Court clarifies the preliminary injunction as follows:
    a. NeoGenomics may perform RaDaR tests on patient blood samples taken before security is posted and on samples taken thereafter for those same patients as authorized under ¶ 3(a) of the preliminary injunction, Doc. 171.

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b. NeoGenomics may also offer RaDaR for use in the three trials for which it already has signed contracts.

c. Otherwise, the motion to modify, Doc. 178, remains under advisement.

4. The motion to stay, Doc. 176, remains under advisement.

5. The parties should immediately meet and confer about a proposed scheduling order that will allow for trial in late winter or spring of 2025, and the Court will soon schedule an initial pretrial conference. In the meantime, after meeting and conferring the parties may immediately proceed with further discovery.

This the 10th day of January, 2024.

UNITED STATES DISTRICT JUDGE

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