UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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| ROBERT SUTHERS and NIWANA MARTIN, | : | Docket No.: |
| Plaintiffs, | : | |
| v. | : | |
| AMGEN, INC., a Delaware Corporation, | : | |
| Defendant. | : | A Civil Action |

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PLAINTIFFS ROBERT SUTHERS AND NIWANA MARTIN'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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## INTRODUCTION

Robert Suthers ("Mr. Suthers") and Niwana Martin ("Ms. Martin") (collectively, "plaintiffs") suffer from Parkinson's disease ("Parkinson's"), a debilitating, heartbreaking disease for which there is currently no cure. They have filed a Complaint and Jury Demand ("Complaint") against Amgen, Inc., a Delaware Corporation ("Amgen" or "defendant"), the manufacturer of glial cell line-derived neurotropic factor, or GDNF ("GDNF"), a potentially curative treatment for Parkinson's.
In their Complaint, the plaintiffs seek significant monetary damages based on promissory estoppel, breach of fiduciary duty, breach of contract, breach of the duty of good faith and fair dealing, violation of General Business Law § 349, and negligence theories. The plaintiffs also seek a preliminary injunction directing Amgen to immediately provide their doctors with GDNF for their use.

They respectfully submit this memorandum of law in support of their motion for a preliminary injunction. For the reasons stated in this memorandum, an Order directing Amgen to provide the plaintiffs' doctors with GDNF within seven days must issue in order to halt the progression of their disease.

## STATEMENT OF THE FACTS

Parkinson's is a progressive neurodegenerative disorder characterized by the loss of dopaminergic neurons in the brain and resulting tremors, shaking, slow movement, and muscle stiffness and rigidity. See Certification of Michael Hutchinson, M.D.,

Ph.D. ("Hutchinson Cert."), attached as Exhibit "A," 3. The existing therapies for Parkinson's all focus on replacing dopamine in the brains of Parkinson's sufferers, which has the effect of temporarily masking their symptoms. See Hutchinson Cert., 4. These existing therapies are not curative and do not stop the death of the brain cells that make dopamine. See Hutchinson Cert., 5.

In an effort to create a curative treatment for Parkinson's, a Colorado biotechnology company named Synergen designed a protein called glial cell line-derived neurotropic factor, or GDNF ("GDNF"). See Hutchinson Cert., 6. Synergen proceeded to test GDNF on monkeys with astounding results. See Hutchinson Cert., 7. GDNF seemed to spur the growth of dopamine-producing cells that could influence the course of Parkinson's disease, not just temporarily mask its symptoms. See Hutchinson Cert., 8.

Amgen was so impressed with the drug that, in 1994, it bought Synergen for $240,000,000.00. See Hutchinson Cert., 9. Amgen, however, much like Synergen, was confounded by the issue of how to effectively deliver it to the human brain. See Hutchinson Cert., 10. Subsequently, Steven S. Gill ("Dr. Gill") of Frenchay Hospital in Bristol, England ("Frenchay Hospital") figured out a way to do so. See Hutchinson Cert., 11. Dr. Gill designed a procedure whereby pumps are surgically implanted in a patient's abdomen and catheters are threaded through his or her chest, neck, and head, delivering GDNF directly to the brain. See Hutchinson Cert., 12.

In the first Phase I study conducted by Dr. Gill himself, all five patients tolerated the treatment and the drug without any serious adverse events, and they also showed dramatic improvement. See Hutchinson Cert., 13. In a second Phase I trial conducted by John Slevin, M.D. and Byron Young, M.D. at the University of Kentucky Medical Center ("University of Kentucky"), all ten patients in the trial showed benefit at six months, demonstrating that the drug and the treatment were safe. See Hutchinson Cert., 14.

In 2003, Amgen sponsored a placebo-controlled Phase II trial involving thirty-four patients at multiple sites, including New York University Downtown Hospital ("NYU Hospital"), University of Chicago Hospital ("University of Chicago"), University of Kentucky, and Frenchay Hospital. See Hutchinson Cert., 15. Amgen designated Dr. Hutchinson as the Principal Investigator in the trial at the NYU Hospital location. See Hutchinson Cert., 16. Dr. Hutchinson is a renowned neurologist who, besides serving as Associate Professor of Clinical Neurology at NYU School of Medicine, has had numerous peer-reviewed publications and invited lectures on Parkinson's Disease and neuroimaging. See Hutchinson Cert., 2.

The Protocol for the trial ("Protocol") was submitted to, and approved by, the Institutional Review Board at NYU Hospital. The Protocol provided that the trial was to begin with each of the subjects having pumps inserted in their abdomen and holes drilled in their skull. There would then be a six-month placebo phase during which time half of the research participants would receive no treatment whatsoever, while the other half received GDNF. See Hutchinson Cert., 17.

The informed consent process yielded the unmistakable conclusion that, at the conclusion of the placebo phase, those subjects would be guaranteed that they would receive GDNF indefinitely, so long as it was safe and effective. See Hutchinson Cert., 18. According to Mr. Suthers, "I expected to continue receiving doses of the drug indefinitely." See Certification of Robert Suthers ("Suthers Cert."), attached as Exhibit "B," 17. Similarly, Ms. Martin affirms, "I expected to continue receiving doses of the drug indefinitely." See Certification of Niwana Martin ("Martin Cert."), attached as Exhibit "C," 16.

The plaintiffs participated in the trial at the NYU Hospital location. See Hutchinson Cert., 19; see also Suthers Cert., 8; Martin Cert., 8. Prior to their doing so, Dr. Hutchinson and the plaintiffs engaged in the informed consent process consistent with the federal regulations popularly known as the Common Rule, 45 C.F.R. § 46.101, et seq. See Hutchinson Cert., 20. Thereafter, each of the plaintiffs signed the informed consent document, evidencing their agreement to participate in the research. See Hutchinson Cert., 21; see also Suthers Cert., 10; Martin Cert., 10. The plaintiffs agreed to take the substantial risks of such participation because they knew of the devastating progressive nature of their disease and because they knew that they would receive in return not only the potential benefit of a cure but knowledge that they were contributing to the greater good and the advancement of medicine. See Suthers Cert., 11; see also Martin Cert., 11.

Subsequently, both of the plaintiffs had the pumps surgically implanted in their abdomen, had catheters threaded under their skin from their abdomen to their brains, and had holes drilled in their skulls. See Suthers Cert., 12 see also Martin Cert., 12. Each of these procedures was time-consuming, painful, and emotionally trying for the patients, their caregivers, and their loved ones. See Suthers Cert., 14; see also Martin Cert., 13. In Mr. Suthers' case, he suffered a stroke that caused him damage and pain, and he had to undergo a second brain surgery to correctly place a catheter that had come loose. See Suthers Cert., 13.

Both of the plaintiffs were randomized into the placebo arm of the trial, meaning that they had pumps implanted in their abdomens and holes drilled into their skulls and received non- therapeutic saline solution, rather than GDNF, for six months. See Suthers Cert., 15; see also Martin Cert., 14. Neither individual was aware that saline solution, not GDNF, was being pumped into their brains during these six months, and neither plaintiff experienced any benefit during this time. See Suthers Cert., 15; see also Martin Cert., 14. Thus, the plaintiffs experienced no placebo effect.

After six months, pursuant to the Protocol, both plaintiffs crossed over to the GDNF arm of the trial. See Suthers Cert., 16; see also Martin Cert., 15. Both of the plaintiffs then experienced marked improvement. See Suthers Cert., 18-21; see also Martin Cert., 19. Indeed, for the first time in years, they had hope for an end to the misery that is Parkinson's disease. Mr. Suthers, who had received the placebo beginning on October 30, 2003 and received GDNF beginning on March 30, 2004, had significantly more "on" time, and felt physically, cognitively, and emotionally better once he was on GDNF. See Suthers Cert., 18-21; see also Hutchinson Cert., 27-29. In fact, he was able to walk up to two miles a day during this period of time. Suthers

Cert., 19; see also Hutchinson Cert., 27-29. Ms. Martin, who had received the placebo beginning in October 2003 and received GDNF beginning on April 4, 2004, was able to walk and run, lost her facial mask, had an improved sense of smell, and had significantly more "on" time once she was on GDNF. See Martin Cert., 19; see also Hutchinson Cert., 27-29. The subjects in the clinical trials conducted at the other locations experienced similarly remarkable results. See Certification of Edward L. Abney ("Abney Cert."), attached as Exhibit "F," 15-20; see also Certification of Delbert Jackson ("Jackson Cert."), attached as Exhibit "G," 15-20; Certification of Roger Thacker ("Thacker Cert."), attached as Exhibit "H," 15-20; Certification of Steve Kaufman ("Kaufman Cert."), attached as Exhibit "I," 15-20.

The Principal Investigators, the doctors who performed these procedures on the plaintiffs and the other subjects and who treated them and knew them best, believed that GDNF was safe and of benefit to the plaintiffs. See Hutchinson Cert., 30; see also Certification of Richard Penn, M.D. ("Penn Cert."), attached as Exhibit "D," 26; see generally Affidavit of Don M. Gash, Ph.D., John Slevin, M.D., Byron Young, M.D., and Greg Gerhardt, Ph.D. ("Gash Aff."), attached as Exhibit "E."

In August 2004, Amgen received results from certain primate studies on GDNF in which four out of seventy monkeys that were given GDNF suffered cerebellar toxicity. See Hutchinson Cert., 31. The Principal Investigators, who saw no such adverse effects in humans, had noted that the monkeys had been receiving doses outside the clinically relevant dose range, at least ten times higher than anything that had been, or would ever be, given to a human being, and that the cause of cerebellum damage in the four monkeys was abrupt withdrawal of GDNF. See Hutchinson Cert., 31. After it received the primate studies, without consulting the Principal Investigators or the IRB's at the institutions where the trials were being held, and without considering the subjects who had exposed themselves to serious risk and discomfort, Amgen announced it was unilaterally terminating the clinical trial. See Hutchinson Cert., 33.

The Principal Investigators, along with representatives from Amgen, held a meeting with representatives of the FDA to seek approval for the "compassionate use" of GDNF, which would allow the subjects continued use of GDNF even if the safety data from the animal studies proved to be correct. The FDA said that it would not stand in the way of "compassionate use." Notwithstanding this, Amgen announced it would no longer provide GDNF to the Principal Investigators and to the subjects so desperately dependent on the drug. See Hutchinson Cert., 33; see also Penn Cert., 29-31.

Amgen represented that any positive effects experienced by the subjects were a placebo effect and that GDNF simply did not work. See Hutchinson Cert., 33; see also Penn Cert., 29-31. The Principal Investigators disagree and believe GDNF is both safe and effective. See Hutchinson Cert., 44-45; see also Penn Cert., 38-39. Together, the doctors wrote that "GDNF has the potential to revolutionize treatment of Parkinson's." See Hutchinson Cert., 37. Together, the doctors wrote that "GDNF can be safely delivered within the clinically effective dose range." See Hutchinson Cert., 38. Together the doctors wrote that "[w]e strongly support making the drug available to the patients." See Hutchinson Cert., 39. Dr. Gash, as well as the other doctors, has observed that, if the patients had experienced a placebo effect, the positive effects would have been observed for only a few weeks, and then would have subsided. By contrast, the positive effects of the drug lasted as long as three years in the Phase I patients who had the opportunity to receive the treatment for that period of time. See Hutchinson Cert., 40; see generally Gash Aff.

Since GDNF was withdrawn, Mr. Suthers has been confused easily, has had serious language difficulties, has had serious walking difficulty, can no longer bathe himself, has suffered from increased tremors, and can only walk one-quarter of a mile per day, as opposed to two miles per day while he was on GDNF. See Suthers Cert., 23; see also Hutchinson Cert., 41. The devolvement of Mr. Suthers' condition was recently demonstrated to viewers of the television program "Good Morning America."

Similarly, all of the improvements that Ms. Martin showed during the period of time that she was on GDNF are gone. See Martin Cert., 21; see also Hutchinson Cert., 42.

As for the patients enrolled in the trial at the University of Kentucky location, Drs. Gash, Slevin, Young, and Gerhardt state: [i]n the six months following withdrawal of GDNF, the Parkinson's disease features in the ten patients in the Kentucky study have worsened. While the patients had experienced significant functional improvements while receiving GDNF, their disease is now progressing. They require significantly higher doses of conventional anti-parkinsonian medication, which produce unwanted side effects such as dyskinesia (shaking), dystonia (muscle cramps) and cognitive disturbances (hallucinations and dementia).
See Gash Aff., 6e.

Edward L. Abney, one such patient, has stated that, while he had significantly more "on" time, and experienced numerous improvements, while he was being treated with GDNF, since GDNF was withdrawn from his system, he has experienced irregular "on" times, including times of no "on" time, rigidity, excess saliva, slurred speech, and cramps. See Abney Cert., 15-20. Delbert Jackson, a patient also being treated there, has stated that, while he had "significantly more 'on time with less medication and more relief," "a better general overall feeling," and an increased sense of "smell, taste, and hearing" while he was on GDNF, he has "gradually fallen back into the days of old suffering," with a "loss of ability to function ... under normal conditions ... ," since GDNF left his system. See Jackson Cert., 15-20. Roger Thacker, another patient being treated there ("Mr. Thacker"), has stated that, while he experienced increased "[o]n times," more productive "[o]ff times," increased energy and appetite levels," among many other positives, while he was on GDNF, he has "drastically deteriorated" since the drug was pulled, noting that "[m]ost of the symptoms I experienced ... before GDNF have manifested one more. Speech, sleep, balance,

pain, ability to function independently, ability to socialize and to work my farm have all been adversely affected." See Thacker Cert., 15-20. Steven Kaufman, a patient being treated at the University of Chicago location, has stated that, while he "had significantly more 'on' time," "felt mentally and physically better within 1 month of receiving the GDNF," and was in fact "able to remodel [his] kitchen and build a deck" during that time, since GDNF was withdrawn from his system, he has experienced "increased tremors, leg and back pain, and lower self-esteem." See Kaufman Cert., 15-20.

Based on the observations of their physicians, and of their own sense of the fact that they were improving while they were on the drug, the plaintiffs are willing to accept any risk of continuing treatment with GDNF. The plaintiffs want the drug so they can enjoy their lives and love their families. The decision by Amgen to terminate the trial was unreasonable and contrary to its fiduciary, contractual, and ethical obligations to the plaintiffs. This decision will cause the plaintiffs immediate irreparable harm.

As to such harm, Dr. Hutchinson has concluded:

The failure to provide the drug is causing and will continue to cause the plaintiffs immediate irreparable harm and damage because there is no other drug currently being tested in the United States that could potentially serve as a cure for Parkinson's, and because, in the absence of their taking the drug, the plaintiffs' Parkinson's disease will, at best, stay the same and, at worst, continue to progressively worsen. ... Indeed, it is my opinion, to a reasonable degree of medical certainty, as principal investigator at the New York location of the trial on the efficacy of GDNF, that the drug is not toxic, and likely has great potential.

See Hutchinson Cert., 44-45.

Dr. Penn has reached a similar conclusion:

The failure to provide the drug is causing and will continue to cause the plaintiffs harm and damage because there is no other drug currently being tested in the United States that could potentially serve as a cure for Parkinson's, and because, in the absence of taking the drug, the plaintiffs' Parkinson's disease will, at best, stay the same and, at worst, continue to rapidly deteriorate. ... Indeed, it is my opinion, to a reasonable degree of medical certainty, as co-principal investigator at the University of Chicago location of the trial on the efficacy of GDNF, that the drug has been not only safe and effective for the trial patients, but also shows enormous potential for the treatment of Parkinson's Disease.

See Penn Cert., 38-39.

Drs. Gash, Slevin, Young, and Gerhardt have reached the same conclusion, opining that GDNF "is the bird in the hand. This is of utmost importance for today's advanced Parkinson's patients and their families as other methods for delivering the drug are five to ten years or more away. By the time these methods are available, it will be too late for many. They will be either dead or totally debilitated!" See Gash Aff., 6b.

Still more powerful are the words of Mr. Thacker:

GDNF works! The formula and method of administering GDNF into my brain has been totally successful. I have not experienced one side effect or negative reaction to this drug. It gave me back my life. GDNF is a means of hope and help for the million people in this country alone, who suffer from this terrible disease. It could be the miracle needed for those who will one day be diagnosed with Parkinson's Disease. How can we be denied, by a drug company who claims its purpose is to develop drugs to relieve human suffering, of a drug that does exactly that?

See Thacker Cert., 18.

LEGAL ARGUMENT:
A PRELIMINARY INJUNCTION MUST ISSUE

1. Introduction

This case is extraordinary. It presents the Court with the critical issue of what rights human subjects have in the research enterprise. Are they simply guinea pigs, nothing but a means to a drug company's ends? Or, once they have been recruited as subjects, once they have agreed to be subjected to considerable risk and personal sacrifice, do they have the right to receive what they bargained for – the benefits of a life-saving therapy?

The enrollees in the trial are not just ill souls wistfully believing that a drug works when science and medicine say that it does not. Here, the Principal Investigators, the leaders in their field, whom Amgen set up as the individuals on whom the subjects could rely to provide the best medical care and advice, believe that GDNF is safe and effective and that it is in the best therapeutic interests of the subjects to continue to receive GDNF. The question is, once a company embarks on clinical research as a sponsor, who should make the call as to whether to terminate the experiment? Should it be the physicians and eminent scientists and the safety committee and the IRB's, whom the sponsor set in place to have the only contact with the patients, to protect them as human subjects and to provide them care? Or should it be the sponsor, whose motives may present conflicts of interest and whose scientists may not be the equal of the Principal Investigators it chose to conduct the human experiment?

At trial, the plaintiffs will prove that it is the former. For now, they seek extraordinary relief.

2. Legal Standards

The legal standard regarding a request for a preliminary injunction is simply stated: "A motion for a preliminary injunction should ... be granted [when] the movant demonstrates (1) irreparable harm and (2) either (a) likelihood of success on the merits or (b) "sufficiently serious questions" on the merits and a balance of hardships "tipping decidedly" in the movant's favor. See, e.g., Brooks v. Giuliani, 84 F.3d 1454, 1462 (2d Cir. 1996) (citing Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979)). In other words, "[i]n order to justify the award of a preliminary injunction, the moving party must first demonstrate that it is likely to suffer irreparable harm in the absence of the requested relief [and] then has two options: it must either demonstrate a likelihood of success on the merits or it must raise 'sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996) (quoting Sperry Int'l Trade, Inc. v. Gov't of Israel, 670 F.2d 8, 11 (2d Cir. 1982)).

3. Analysis

(a.) The Plaintiffs Will Suffer Irreparable Harm If the Requested Relief Is Not Granted.

One can hardly imagine a case in which the issue of irreparable harm is more settled than this case. The plaintiffs suffer from a debilitating progressive disease. As each day passes before this Court issues the requested relief, the production of dopamine in their brains diminishes and they have less and less control over their body and mobility. Their enjoyment of life's pleasures melts away. They have pumps in their abdomen connected to catheters that wind their way through their bodies into their skulls. Currently, those pumps are filled with a saline solution that provides no healing power. But a drug is out there in the control of defendant which has the potential to treat their disease, to give them their life back, to provide relief.

The plaintiffs' physician, Dr. Hutchinson, an expert in the field of Parkinson's research, the individual that Amgen set up to make the decisions as to what was in the best therapeutic interests of plaintiffs, believes that GDNF is safe and effective and should be provided so they may continue to heal and not regress. His view is shared by other world renowned experts whose affidavits and certifications are before this Court and by other subjects whose lives have been changed by GDNF and whose certifications are also before this Court.

No harm will come to Amgen if it is ordered to release the drug it controls and has in its possession. If Amgen in fact believed it had some liability risk for continuing the trial if its conclusions from the primate studies were correct, the prospect of this risk has been eliminated. The plaintiffs, self-evidently, will be judicially estopped from alleging that Amgen should not have provided them with GDNF at this time. The same risk/benefit calculus that defendant must have considered before initiating a placebo-controlled trial requiring such extraordinary commitment by the subjects now weighs heavily in favor of providing GDNF. The plaintiffs, not Amgen, have taken and will continue to take all the risks; they now should reap the potential benefits.

The plaintiffs are seriously ill patients for whom there is no alternative means of avoiding progressive debilitation, suffering and harm. Unless this Court issues the injunction, the plaintiffs will continue to endure such irreparable injury.

(b.) The plaintiffs have a likelihood of succeeding on the merits or, at the least, have raised serious questions regarding the merits when viewed in the context of relative harm.

Case law makes clear that the plaintiffs' likelihood of success is to be examined in the context of the relative injuries to the parties and the public; the lower the risk of injury to the defendant if the injunction is granted, and the higher the risk to the plaintiffs if it is not, the lower showing the plaintiffs must make of likely success on the merits. See Bery, 97 F.3d at 689. Here, as set forth above, the risk to the defendant is low or virtually nonexistent, while the risk to the plaintiffs if no injunction is granted is extreme. The plaintiffs, thus, need only make a limited showing of success on the merits. They can, however, do much better than that.

1. The plaintiffs have a likelihood of success on their claims of promissory estoppel and breach of contract.

The legal standard regarding promissory estoppel is clear: "To establish a viable cause of action sounding in promissory estoppel, a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise." See, e.g., Rogers v. Town of Islip, 230 A.D. 2d 727, 728, 646 N.Y.S.2d 158, 159 (N.Y.A.D. 1996) (citing Ripple's of Clearview v. Le Havre Assoc., 88 A.D.2d 120, 122, 452 N.Y.S.2d 447) (N.Y.A.D. 1982)).

In this case, defendant's agent was Dr. Hutchinson. Amgen established a research enterprise whereby Dr. Hutchinson was the primary if not only contact with the plaintiffs. Amgen represented through its actions that Dr. Hutchinson was a leader in his field and that he would make decisions based on what was in plaintiffs' best therapeutic interests. Amgen also represented that, if plaintiffs agreed to participate in a clinical trial which required enormous commitment and sacrifice, and if Dr. Hutchinson and the other Principal Investigators believed GDNF was safe and effective, plaintiffs would continue to receive the drug indefinitely.

Dr. Hutchinson admits he made those promises to plaintiffs and plaintiffs have certified that this is what they were promised. Indeed, Dr. Hutchinson wants to keep those promises but his principal, Amgen, has caused their breach.

Plaintiffs had good reason to rely on these promises. They were ill and learned of the promising research by Dr. Gill and others of the potential of GDNF in the treatment of Parkinson's. Plaintiffs also learned of the reputations of Dr. Hutchinson and the other Principal Investigators who were conducting the clinical trials. By Amgen's own design, none of its scientists or physicians had any contact with plaintiffs and plaintiffs had no reason to believe Amgen representatives were the ones who could make medical decisions regarding their continued care

The plaintiffs and Dr. Hutchinson executed an Informed Consent Agreement binding not just on them but on the principal of Dr. Hutchinson, defendant Amgen.

This was detrimental reliance in the truest sense. Plaintiffs agreed to have pumps surgically implanted in their abdomens, catheters inserted under their skin, and holes drilled in their skulls in reliance on the promises of Amgen's agent Dr. Hutchinson. And if those promises are not kept, plaintiffs will suffer extreme harm. They will deteriorate physically, lose control of their bodies and mobility, and cease to enjoy the simple pleasures of life.

Again this is not a case where patients want treatment that science and medicine believe is either ineffective or unsafe. The question is who should make that determination: the physicians and highly regarded scientists whom Amgen placed before the plaintiffs as their caregivers and who made the promises to plaintiffs? Or representatives of the defendant, the sponsor of the experiment, whose motives may be financial, not compassion, and whose expertise is not on a par with the Principal Investigators it chose to conduct the clinical trial?

Plaintiffs thus have made a showing that they will likely succeed on their claims of promissory estoppel and breach of contract.

2. The plaintiffs have a likelihood of succeeding on their claim for breach of fiduciary duty.

Under New York law, "it is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect," and a breach of this duty is actionable. See, e.g., Birnbaum v. Birnbaum, 73 N.Y.2d 461, 466, 541 N.Y. S.2d 746 (N.Y. 1989). As to when a fiduciary relationship exists, the Appellate Division of the New York Supreme Court has stated that stated that

[t]he exact limits of such a relationship are impossible of statement ... . Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another. [See Penato v. George, 52 A.D.2d 939, 383 N.Y.S.2d 900 (N.Y.A.D. 1976).]

The very nature of scientific research on human subjects creates special relationships out of which fiduciary duties arise. Grimes v. Kennedy Krieger Inst. Inc., 366 Md. 29, 73-74 (2001). In the context of a human subject experiment, a special relationship is created between the human subject and those responsible for the design, approval and implementation of the experiment. The role of each of each participant in the research enterprise is outlined in the federal regulations under the federal Drug and Cosmetic Act, 21 U.S.C. § 301, et seq. All of the participants must comply with these regulations in order to protect the rights and safety of subjects involved in human subject experiments like the one at issue here. While only the Principal Investigator comes into personal contact with the subject, lack of personal contact does not eviscerate the special relationship between the human subject and the other parties in the research enterprise responsible for the safety of the human subject. The special relationship between the researchers and the subject in a human subject experiment mandates that those parties responsible for ensuring that the experiment is ethical and that the subject is not put at undue risk owe a fiduciary duty to the human subject.

In 1979, the National Commission for the Protection of Research Subjects in Biomedical and Behavioral Research issued "The Belmont Report," which sets forth three principles to guide human subject research: The first is "respect for persons," which demands that researchers fully inform their subjects of all material information about the study and treat them as autonomous human beings; the second is "beneficence," which requires that subjects be treated with compassion and care and not be seen a mere means to an end; and the third is "justice," which requires equitable treatment of research subjects.

Congress passed the National Research Act in 1974, authorizing the implementation of regulations to protect research subjects. In 1991, the regulations were integrated into the Common Rule for seventeen departments and agencies, the most familiar of which is the Department of Heath and Human Services regulations at 45 C.F.R. part 46. The Common Rule is published in the Federal Register at 56 Fed. Reg. 28, 012 (June 18, 1991). These regulations, among other things, establish the roles of each participant in the research enterprise consistent with the principles of the Belmont Report.

Viewing human subject research in this historical context, the highest court of Maryland recently considered the issue before this Court: whether researchers owed a fiduciary duty to their subjects. In Grimes, the court held, in the context of a human subject experiment, that (1) informed consent agreements can constitute "special relationships" giving rise to duties; (2) normally, such "special relationships" are created between researchers and human subjects used by researchers; and (3) government regulations can create duties on the part of researchers toward human subjects out of which "special relationships" can arise. Grimes, 66 Md. at 113. The plaintiffs in Grimes claimed, in part, that the sponsor was negligent because it designed a study that placed

children at unnecessary risk and failed to inform the subjects of all of the risks involved in the experiment. The experiment involved following children who lived in homes that were subject to lead abatement to see what happened to the lead levels in the children's blood. The court held that "[a] 'special relationship' exists in circumstances where such experiments are conducted" based upon the consent form, the relationship between researcher and research subject, federal regulations and the Nuremberg Code. Id. at 89, 91-100, 103. At a minimum, the court held, genuine issues of material facts existed concerning the relationship and duties of the parties, and compliance with the regulations. Id. at 99.

First, with respect to the informed consent document, the court found that the representations made on this form created a bilateral contract between the parties. The court held that informed consent imposes obligations and confers consideration on both researcher and subject. The court stated that "[r]esearchers cannot ever be permitted to completely immunize themselves by reliance on consents, especially when the information ... is incomplete in a material respect. A researcher's duty is not created by, or extinguished by, the consent of a research subject or IRB approval. The duty to a vulnerable research subject is independent of consent." Id. at 101.

The court went on to describe the nature of the "special relationship":

A special relationship giving rise to duties, the breach of which might constitute negligence, might also arise because, generally, the investigators are in a better position to anticipate, discover, and understand the potential risks to the health of their subjects. Practical inequalities exist between researchers, who have superior knowledge, and participants. . .

This duty requires the protection of the research subjects from unreasonable harm and requires the researcher to completely and promptly inform the subjects of potential hazards existing from time to time because of the profound trust that participants place in investigators, institutions, and the research enterprise as a whole to protect them from harm. "Faced with seemingly knowledgeable and prestigious investigators engaged in a noble pursuit, participants may simply assume that research is socially important or of benefit to them individually; they may not be aware that participation could be harmful to their interests."

[Id. at 101-02 (citing National Bioethics Advisory Commission, Ethical and Policy Issues in Research Involving Human Participants, (Dec. 19, 2000)).]

Just like the researchers in Grimes, Amgen, as the principal of its agent Dr. Hutchinson, owed a fiduciary duty to the plaintiffs who agreed to be subjects in the clinical trial. This duty included the obligations to treat the plaintiffs in a manner consistent with The Belmont Report: to treat them with respect as autonomous beings and to treat them in a manner that reflects beneficence and justice. Here, Amgen has treated the plaintiffs as mere guinea pigs, as material to be discarded without regard to what will happen if they are deprived of GDNF. And it has ignored the principles of beneficence and justice, treating the subjects not with compassion but with disdain, denying them what they need to alleviate their pain and to enjoy their life and their loved ones. Such a fiduciary duty in the context of medical care certainly includes the duty to ameliorate pain and to treat the sick with the best medicine available. This duty is embedded in the professional and ethical standards of physicians and other caregivers. Allowing a patient to experience unnecessary pain and suffering is, at the very least, substandard medical practice. See, e.g., Ben A. Rich, A Prescription for the Pain: The Emerging Standard of Care for Pain Management, 26 Wm. Mitchell L. Rev. 1 (2000). This duty is thus not just a legal one, but a moral and ethical duty as well. See, e.g., Post, et al., Pain, Ethics, Culture, and Informed Consent to Relief, 24 Law, Med. & Ethics 348 (1996). Though they are all too often ignored, these guiding principles have been in place since the inception of medical ethics especially when the physician is also involved in research to advance medical science. See, e.g. Amundsen, Medicine, Society, and Faith in the Ancient and Medieval Worlds, 33 (Johns Hopkins Univ. Press 1966). As Mainmonides, who is often considered the first bioethicist, instructed physicians almost a millennium ago: "May I never see in the patient anything but a fellow creature in pain."

By denying these plaintiffs the right to continue treatment with GDNF, treatment defendant's agent believes is safe, effective and in the plaintiffs' best therapeutic interest, Amgen has breached its fiduciary duty. At the very least, the plaintiffs have made a showing of the likelihood that they will prevail on that claim.

CONCLUSION

It is respectfully concluded that, for the foregoing reasons, a preliminary injunction directing Amgen to provide Dr. Hutchinson with GDNF and allow him to administer it to the plaintiffs, within seven days, must issue.

Dated: Monday, April 25, 2005

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