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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF VENTURA, UNLIMITED CIVIL JURISDICTION**

10
11 DON HANKS, an individual,)
12 Plaintiff,) **CASE NO.: 56-2009-00342748-CU-WT-VTA**
13 vs.) **FIRST AMENDED COMPLAINT FOR:**
14 AMGEN USA, INC., a California)
15 corporation; and DOES 1 through 40,)
16 inclusive;) **1. RETALIATION IN VIOLATION OF**
17 Defendants.) **LABOR CODE SECTION 1102.5;**
18) **2. WRONGFUL TERMINATION IN**
19) **VIOLATION OF PUBLIC POLICY;**
20) **3. UNFAIR COMPETITION IN**
21) **VIOLATION OF BUSINESS AND**
22) **PROFESSIONS CODE SECTION**
23) **17200 FOR RESTITUTION AND**
24) **INJUNCTIVE RELIEF; AND**
25) **DEMAND FOR JURY TRIAL**
26)
27) **DATE FILED: April 20, 2009**
28) **DEPT.: 42**
JUDGE: **Hon. Henry J. Walsh**

29 **GENERAL ALLEGATIONS**

30 **Introduction**

31 1. This is a whistleblower lawsuit. Plaintiff Don Hanks (hereinafter "Plaintiff"
32 or "Hanks") files this Complaint for Damages related to Plaintiff's former employment with
33 Defendant Amgen USA, Inc. (hereinafter "Defendant Amgen" or "Amgen"). Plaintiff Hanks was
34 an eighteen year employee of Amgen who merely did a computer search concerning the False
35 Claims Act and was then terminated within weeks of doing so. Plaintiff Hanks brings causes of

1 action for violation of Labor Code section 1102.5, wrongful termination in violation of public
2 policy, and Business and Professions Code section 17200 *et seq.*, against Defendant Amgen and
3 Does 1 through 40.

4
5 **Parties and jurisdiction**

6 2. At all times material to this complaint, Plaintiff is informed and believes
7 Defendant Amgen was and is a California corporation doing business in the County of Ventura
8 and, in fact, headquartered in the County of Ventura.

9 3. Defendant Does One through Forty are sued under fictitious names pursuant
10 to California Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that
11 basis alleges, that each defendant sued under such fictitious names is in some manner responsible
12 for the wrongs and damages as alleged below, and in so acting was functioning as the agent,
13 servant, manager, supervisor, and/or employee of Amgen, and in doing the actions mentioned
14 below was acting within the course and scope of his or her authority as such agent, servant,
15 manager, supervisor, and/or employee with the permission and consent of the Defendant Amgen.

16 4. This Court is the proper court and this action is properly filed in Ventura
17 County and in this judicial district because (a) Defendant Amgen transacts business in Ventura
18 County; (b) contracts of employment between Plaintiff and Amgen were made and terminated in
19 Ventura County; (c) the termination of Plaintiff occurred by and through Amgen's actions in
20 Ventura County; (d) records including records relating to Plaintiff's employment were and are
21 maintained by Amgen in Ventura County; and (e) material transactions between Plaintiff and
22 Defendants took place within Ventura County.

23 5. Plaintiff is a former employee of Defendant Amgen and a resident of the State
24 of Florida. Plaintiff voluntarily submits to the jurisdiction of Ventura County Superior Court in
25 the State of California.

26 6. Plaintiff Hanks sues under California law. California law is the applicable
27 law for this lawsuit because at the beginning of Mr. Hanks' employment with Amgen, Inc. (later
28 succeeded by Defendant Amgen USA, Inc.), Amgen imposed California law on the employment

1 relationship between Amgen and Hanks by and through its use of California law in the
2 "Proprietary Information and Inventions Agreement" contract between Amgen and Mr. Hanks.
3 Defendant Amgen specifically chose California law in a choice of law provision (see, p. 6 to the
4 Agreement at paragraph 15.1: "Governing Law. This Agreement will be governed by and
5 construed according to the laws of the State of California." Defendant Amgen then reaffirmed the
6 choice of California law when, after it terminated Mr. Hanks, it sent him a letter by and through
7 Stephanie Murray, Human Resource Operations of Defendant Amgen, on or about May 29, 2007
8 reminding him "[Your] obligations are described more fully in the enclosed Proprietary
9 Information and Inventions Agreement" and enclosing a copy of this agreement. A true and
10 correct copy of this agreement and a true and correct copy of the Amgen letter to Mr. Hanks of
11 May 29, 2007 (without the attachment) are attached hereto and incorporated herein as Exhibit A.

12 7. At all relevant times alleged herein Plaintiff was employed by Defendant
13 Amgen under an employment agreement that was partly written, partly oral, and partly implied.

14 8. As a direct and proximate result of the unlawful acts of Defendants, Plaintiff
15 has suffered and continues to suffer from loss of earnings and other damages in amounts not yet
16 ascertained, but subject to proof at trial.

17 9. Plaintiff is informed and believes, and thereon alleges, that Defendant Amgen
18 engaged in malice, fraud, and/or oppression in its actions against Plaintiff.

19
20 **Facts**

21 10. When Plaintiff Hanks first began working for Amgen as a sales representative
22 in 1989, Amgen and its employees were committed to the best traditions of medicine and saving
23 lives. Amgen was seeking Food and Drug Administration (hereinafter "FDA") approval of
24 Epogen for dialysis patients to save these patients from needing risky transfusions. At the time,
25 blood borne pathogens, including the HIV virus, created a serious risk for transfusion patients
26 receiving tainted blood with potentially deadly consequences.

27 11. Over time, the tremendous profits obtained from blockbuster drugs altered
28 Amgen. In search of ever greater profits, Amgen began seeking alternate markets and new

1 patients for several of its drugs. In particular, Amgen began to promote "overfill." Overfill was a
2 concept where a drug would be filled in an amount significantly greater than its recommended
3 dose. That way, a provider could use the extra amount on a new patient – still billing the new
4 patient and Medicare for the dosing – but not having to pay for the additional drug provided.

5 12. Amgen also began to use other marketing techniques to boost sales including
6 rebates, off invoice discounts, volume discounts, free goods, extravagant dinners and lavish
7 retreats for doctors. Amgen began payments to physicians (\$1,000), pharmacists (\$750), nurses
8 (\$500), and office billing staff (\$350) that were characterized as "honorariums" or for "roundtable
9 discussions."

10 13. Amgen also promoted and sold its drugs on "spread" or "margin" using
11 elaborate spread sheets provided to doctors including the potential "monthly income per patient"
12 for the prescription of Amgen drugs. Amgen knew or should have know that to sell on "spread"
13 or "margin" is unethical and illegal. Amgen counseled its sales representatives to hide these
14 activities by reporting them as "business reviews" or "economics" in Orion and in Gelco expense
15 reports.

16 14. Amgen also began to promote "off-label" marketing of its drugs to doctors.
17 Off-label marketing is a strategy of deliberately selling a drug for purposes other than the FDA
18 approved use. While a doctor can prescribe a drug for an off-label use, it is illegal for a
19 pharmaceutical company to market a drug for an off-label use. Amgen promoted off-label
20 marketing of its drugs in patient populations including myelodysplastic syndromes ("MDS"),
21 HIV/AIDS, and peri-surgery.

22 15. Amgen also began aggressively promoting the use of higher doses of its
23 drugs. Higher doses meant greater sales and larger profits. Unfortunately, these higher dosing
24 promotions would often lead to significantly higher side-effects for the patient. An influential
25 study – that Amgen delayed releasing – showed that these higher dosing levels actually resulted
26 in a higher mortality rate. In short, Amgen began to seek greater profits at the expense of patient
27 care and safety.

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1 16. In October 2001, Amgen launched Aranesp for chronic renal failure. Sales of
2 Aranesp were modest and below expectations. In July 2002, Amgen received FDA approval of
3 Aranesp in chemotherapy induced anemia patients. Aranesp was approved by the FDA for once a
4 week dosing for chemotherapy induced anemia patients. Amgen aggressively marketed Aranesp
5 to be used for every other week dosing – an illegal off-label marketing of non-approved dosing.

6 17. Amgen developed a very sophisticated contract tier system for marketing
7 Aranesp and Neulasta. In short, these marketing contracts created an enormous incentive to sell
8 more product – in the form of ever larger rebates and off-invoice discounts for greater use of
9 these drugs by physicians and hospitals. These tiers created a strong incentive to sell more and
10 more of Amgen's products.

11 18. Although Amgen sold its pharmaceutical products to doctors and hospitals,
12 the United States Government is the single largest payer in the form of Medicare reimbursements
13 for the drugs that Plaintiff Hanks marketed on Amgen's behalf. Indeed, these off-label marketing
14 tactics and other illegal actions of Amgen had a significant and fraudulent impact upon Medicare
15 reimbursement of these drug costs.

16 19. Plaintiff Hanks resisted many of Amgen's illegal marketing tactics. Plaintiff
17 Hanks complained that his customer were unfairly locked in to rigid contracts with Amgen.
18 Plaintiff Hanks brought his concerns directly to Amgen management located in its Thousand
19 Oaks headquarters such as Mr. Joe Turgeon, Amgen's national Marketing Sales Director.

20 20. On or about March 6, 2007, Plaintiff Hanks had his annual performance
21 evaluation. His review was outstanding, as usual, with recognition for his great sales year.

22 21. Around this time, medical data had now become public that Erythropoietic
23 Stimulating Agents such as Amgen's Epogen and Aranesp as well as its competitor, Johnson &
24 Johnson's Procrit, had significant safety issues including increased mortality at higher, off-label
25 dosing.

26 22. At this point, Plaintiff Hanks began to seek information regarding Amgen's
27 practices via his an Amgen internet connection. Plaintiff Hanks began to seek news releases
28 concerning Amgen, other whistleblowers and whistleblower claims, and False Claims Act claims

1 in the pharmaceutical business. Indeed, Plaintiff Hanks filled out a *qui tam* case evaluation with
2 the law firms Phillips and Cohen, LLP on or about April 18, 2007.

3 23. On or about May 1, 2007, Plaintiff Hanks was told to come to Thousand
4 Oaks, California to Amgen's corporate headquarters, for a meeting. In a meeting on or about
5 May 3, 2007, an Amgen Human Resources Manager, Ms. Elizabeth Egel, informed Plaintiff that
6 he had done nothing wrong, but that Amgen had pulled some of his expenses in the past six
7 months and had some questions to ask him. Plaintiff Hanks was actually verbally reprimanded
8 for having too much detail on his expense reports. Since Plaintiff Hanks often detailed in his
9 expense reports the illegal marketing tactics of Amgen such as off-label marketing. Plaintiff
10 Hanks was told by Ms. Egel that he was a "compliance risk" if the Office of Inspector General or
11 the Internal Revenue Service ever saw his expense reports.

12 24. Plaintiff Hanks was then subsequently terminated by Ms. Egel on or about
13 May 23, 2007. Ms. Egel called Mr. Hanks, firing him on the telephone from, presumably, her
14 office at Defendant Amgen's headquarters in Thousand Oaks, CA. The pre-textual reasons
15 offered by Ms. Egel was that Plaintiff Hanks represented a "risk."

16 25. Plaintiff Hanks brings this complaint based upon his attempts to counter and
17 prevent illegal actions on the part of Amgen.

18 26. The actions of Amgen described herein constitute unfair business practices in
19 violation of Business and Professions Code section 17200 *et seq.* In particular, Amgen's policy
20 and practice of terminating any whistleblower – indeed anyone who does not "toe the line" in
21 fully and unquestionably participating in Amgen's illegal off-label marketing practices –
22 constitutes a violation of Business and Professions Code section 17200 *et seq.*

23 27. Plaintiff Hanks resisted many of Amgen's illegal and unfair practices. As a
24 result, despite Hanks's laudatory employment record, he began to experience retaliation involving
25 adverse employment actions, specifically his termination. Indeed, Hanks was ultimately
26 terminated in retaliation for his refusal to engage in illegal and unfair practices and/or for his
27 complaints of fraud, inefficiency, and waste involving federal government contracts.

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