IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRISTOL-MYERS SQUIBB CO., E. R. SQUIBB & SONS, L.L.C., ONO PHARMACEUTICAL CO., LTD., and TASUKU HONJO,	
Plaintiffs,	C.A. No. 15-572-GMS
v.	**JURY TRIAL DEMANDED**
MERCK & CO., INC. and MERCK SHARP & DOHME CORP.,	
Defendants.	

DEFENDANTS MERCK & CO., INC. AND MERCK SHARP & DOHME CORP.'S ANSWER TO PLAINTIFFS' COMPLAINT

Merck & Co., Inc. and Merck Sharp & Dohme Corp. ("MSD") (collectively "Merck"), by their attorneys, hereby answer the Complaint for patent infringement ("Complaint") of Bristol-Myers Squibb Co. ("BMS"), E. R. Squibb & Sons, L.L.C. ("Squibb"), Ono Pharmaceutical Co., Ltd. ("Ono"), and Tasuku Honjo (collectively "Plaintiffs"), in accordance with the numbered paragraphs thereof, as follows. All allegations of fact and conclusions of law contained in the Complaint are denied, except those specifically admitted herein:

INTRODUCTION

1. **Complaint ¶ 1:** According to the American Cancer Society, more than one million people in the United States are diagnosed with cancer each year (http://www.cancer.org/cancer/index). Cancer is a disease that results from the uncontrolled proliferation of cells that were once normal but have transformed into cancerous cells. Although a human's natural immune system has the potential to eliminate cancerous cells, cancer cells have the ability to "turn off" the immune system thus allowing the cancer cells to continue to grow unchecked.

Answer: Merck admits that the American Cancer Society webpage states, "[m]ore than

one million people in the United States get cancer each year." (http://www.cancer.org/cancer /index, accessed March 21, 2016). Merck admits that cancer is a disease that involves the uncontrolled proliferation of cancer cells and that cancer cells result from mutations of normal cells. Merck admits that the human immune system may eliminate certain types of cancer cells and that certain cancer cells may suppress an immune response. Merck denies as stated the remaining allegations in Paragraph 1 of the Complaint.

2. **Complaint ¶ 2:** Melanoma is a type of cancer that begins in the melanocytes, the cells that produce the pigment that colors skin, hair, and eyes (http://www.melanoma.org/understand-melanoma/what-is-melanoma). Metastatic melanoma, also known as advanced melanoma, or Stage IV melanoma, is a melanoma that has spread to other parts of the body (http://www.melanoma.org/understand-melanoma/what-is-melanoma/metastatic-melanoma). Late stage melanoma is one of the most aggressive forms of cancer; when diagnosed in the late stages, the average survival rate is only six months, with a one year survival rate of 25.5% (http://news.bms.com/press-release/bristol-myers-squibb-receives-accelerated-approval-opdivo-nivolumab-us-food-and-drug-a).

Answer: Merck admits that the Melanoma Research Foundation webpage states, "[m]elanoma is usually, but not always, a cancer of the skin. It begins in melanocytes – the cells that produce the pigment melanin that colors the skin, hair and eyes." (http://www.melanoma.org/understand-melanoma/what-is-melanoma, accessed March 24, 2016). Merck also admits that the Melanoma Research Foundation webpage states, "[t]he term 'metastatic melanoma', also known as Stage IV melanoma, is used when melanoma cells of any kind . . . have spread through the lymph nodes to distant sites in the body and/or the body's organs." (http://www.melanoma.org/understand-melanoma/what-is-melanoma/metastatic-melanoma, accessed March 24, 2016). Merck further admits that in BMS's December 22, 2014 Press Release cited in Paragraph 2 of the Complaint, BMS stated, "in [melanoma's] late stages, the average survival rate is just 6 months with a 1-year survival of 25.5%, making it one of the most aggressive forms of cancer." Merck lacks sufficient knowledge or information to form a belief as to the truth

of the statements contained in the cited BMS press release and also lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 2 of the Complaint and, therefore, denies these allegations.

3. **Complaint ¶ 3:** This case relates to a groundbreaking type of cancer treatment called "immunotherapy." Treating cancer using immunotherapy is a scientific breakthrough and has the potential to revolutionize cancer treatment by using a patient's own immune system to eliminate cancer cells.

Answer: Merck admits that pembrolizumab, developed and sold by MSD, is a groundbreaking type of cancer treatment involving immunotherapy and that pembrolizumab enhances the ability of the patient's own immune system to eliminate cancer cells, but denies that pembrolizumab or the use of pembrolizumab to treat cancer was invented in the patent in suit and denies the remaining allegations in Paragraph 3 of the Complaint.

4. **Complaint ¶ 4:** T cells are an important part of the human immune system. In addition to eliminating foreign matter such as bacteria and viruses from a human body, they also help remove cancerous cells in the body. T cells carry a protein called PD-1 on their surface. PD-1 serves as an immune system checkpoint, shutting down the T cells' activity at the appropriate time to prevent an overactive immune response. Cancer cells can exploit the PD-1 protein's ability to trigger the immune checkpoint. When the PD-1 is triggered in this way, it shuts down or decreases the T cells' activity of removing the unwanted cancer cells from the body. Thus, the triggering of the PD-1 checkpoint can prevent a patient's immune system from destroying the cancer cells.

Answer: Merck admits that T cells are an important part of the human immune system that can eliminate foreign matter from the body, such as bacteria and viruses, and can help remove cancerous cells in the body. Merck admits that certain T cells carry a protein called PD-1 on their surface, and that PD-1 serves as an immune system checkpoint, suppressing T cell proliferation and activity, typically to avoid an overactive immune response. Merck admits that certain cancer cells express ligands that bind to PD-1 and result in suppression of T cell proliferation and activity. Merck admits that when PD-1 is triggered in this way, the ability of T cells to remove unwanted cancer cells from the body is decreased and the body's immune system may be prevented from effectively destroying cancer cells. Merck denies the remaining allegations in Paragraph 4 of the

Complaint.

5. **Complaint ¶ 5:** The invention at issue here covers using antibodies that bind to PD-1 ("anti-PD-1 antibodies") in a method for treating metastatic melanoma. By binding to PD-1 and blocking the PD-1 checkpoint pathway, the anti-PD-1 antibodies allow a patient's immune system to resume its ability to recognize, attack, and destroy cancer cells.

Answer: Merck admits that the patent in suit purports to claim "[a] method of treating a metastatic melanoma comprising intravenously administering an effective amount of a composition comprising a human or humanized anti-PD-1 monoclonal antibody and solubilizer in a solution to a human with the metastatic melanoma, wherein the administration of the composition treats the metastatic melanoma in the human," but denies that this was invented in the patent in suit. Merck admits that some antibodies that bind to PD-1 may block the PD-1 checkpoint pathway for some forms of cancer, thereby enhancing the patient's immune response to recognize, attack and destroy such cancer cells. Merck denies that all antibodies that bind to PD-1 may be used in a method for treating metastatic melanoma, denies that all antibodies that bind to PD-1 block the PD-1 checkpoint pathway, and denies the remaining allegations in Paragraph 5 of the Complaint.

6. **Complaint ¶ 6:** The Plaintiffs put this scientific breakthrough into practice by developing an anti-PD-1 antibody called nivolumab, the first anti-PD-1 antibody approved anywhere in the world for cancer treatment.

Answer: Merck admits that nivolumab has been approved for the treatment of certain patients with cancer in certain parts of the world. Merck denies that the alleged inventors on the patent in suit developed nivolumab and denies the remaining allegations in Paragraph 6 of the Complaint.

7. **Complaint ¶ 7:** Merck is threatening to exploit, and is exploiting, that invention with a later-developed anti-PD-1 antibody. As described below, Merck is preparing to infringe, and is infringing, plaintiffs' patent for methods of treating cancer with anti-PD-1 antibodies.

Answer: Merck denies the allegations in Paragraph 7 of the Complaint.

PARTIES

8. **Complaint ¶ 8:** BMS is a corporation organized under the laws of the state of Delaware, with a principal place of business at 345 Park Ave., New York, New York 10154. E. R. Squibb & Sons, L.L.C., is a limited liability company organized and existing under the laws of the state of Delaware, with its principal place of business at Route 206 & Province Line Road, Princeton, New Jersey 08543. Ono is a corporation organized under the laws of Japan, with a place of business at 8-2 Kyutaromachi 1-chome, Chuo-ku, Osaka 541-8654, Japan. Tasuku Honjo is an individual with a place of business at Kyoto University, Graduate School of Medicine, Yoshida, Sakyo-ku, Kyoto 606-8501, Japan.

Answer: Merck lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8 of the Complaint and, therefore, denies these allegations.

9. **Complaint ¶ 9:** On information and belief, Defendant Merck & Co., Inc. is a corporation incorporated under the laws of the state of New Jersey with a place of business at 2000 Galloping Hill Rd., Kenilworth, New Jersey, 07053. On information and belief, Defendant Merck Sharp & Dohme Corp. is a subsidiary of Merck & Co., Inc., and is a corporation incorporated under the laws of the state of New Jersey with a place of business at 2000 Galloping Hill Rd., Kenilworth, New Jersey, 07053.

Answer: Merck & Co., Inc. admits that it is a corporation incorporated under the laws of the state of New Jersey. Merck & Co., Inc. also admits that it has a place of business at 2000 Galloping Hill Road, Kenilworth, New Jersey, but denies that the zip code for this address is 07053 and states that the zip code is 07033. Merck admits that MSD is a subsidiary of Merck & Co., Inc., and is a corporation incorporated under the laws of the state of New Jersey with a place of business at One Merck Drive, Whitehouse Station, NJ, 08889, USA. Merck denies the remaining allegations in Paragraph 9 of the Complaint.

JURISDICTION AND VENUE

10. **Complaint ¶ 10:** This is an action for patent infringement arising under the Patent Laws of the United States, 35 U.S.C. § 271 et seq.

Answer: Merck admits that Plaintiffs' Complaint purports to state a claim for relief under the Patent Laws of the United States, 35 U.S.C. § 271 et seq.

11. **Complaint ¶ 11:** This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338.

Answer: Merck states that it will not contest that subject-matter jurisdiction exists over this Complaint under 28 U.S.C. §§ 1331 and 1338, but it denies committing any infringement or other tortious or unlawful act.

12. **Complaint ¶ 12:** This Court has personal jurisdiction over both Defendants because they are registered with the Delaware Department of State to transact business in Delaware and, upon information and belief, have systematic and continuous contacts in Delaware, do regularly transact business in Delaware, have derived substantial revenue from sales of pharmaceutical products in Delaware, and currently market their anti-PD-1 antibody product pembrolizumab for the treatment of metastatic melanoma in Delaware. On information and belief, Defendants have repeatedly availed themselves of the Delaware Courts.

Answer: Merck admits that MSD is registered with the Delaware Department of State to transact business in Delaware, that MSD has transacted some business within this judicial district, that MSD derives some revenues from sales in this district and that MSD currently markets pembrolizumab throughout the United States, including in Delaware. Merck admits that MSD has filed lawsuits in Delaware. Merck states that for purposes of this action it will not contest personal jurisdiction in this district. Merck denies the remaining allegations in Paragraph 12 of the Complaint.

13. **Complaint ¶ 13:** Defendants reside in this judicial district and venue is proper in this district under 28 U.S.C. §§ 1391(b), (c), and/or 1400(b).

Answer: Merck states that for purposes of this action it will not contest that venue is proper in this district under 28 U.S.C. §§ 1391(b), (c), and/or 1400(b). Merck denies the remaining allegations in Paragraph 13 of the Complaint.

INVENTION OF METHODS FOR TREATING CANCER

14. **Complaint ¶ 14:** On July 7, 2015, the United States Patent & Trademark Office ("USPTO") duly and legally issued United States Patent No. 9,073,994 (the "994 patent" (Exhibit 1)) titled "Immunopotentiative Composition." The inventors of the 994 patent showed for

the first time that anti-PD-1 antibodies were useful in methods to treat cancer. Tasuku Honjo is a co-inventor and original co-assignee of the 994 patent. Ono is an original co-assignee and exclusive licensor of BMS under the 994 patent. BMS and Squibb are each exclusive licensees of one or more exclusionary rights under the 994 patent. The 994 patent claims methods for treating cancer with an antibody against PD-1.

Answer: Merck admits that the face of U.S. Patent No. 9,073,994 (the "'994 patent") indicates that it is entitled "Immunopotentiative Composition," that it was issued on July 7, 2015, and that Tasuku Honjo and Ono are listed as assignees of the '994 patent. Merck also admits that Tasuku Honjo is listed as an inventor on the face of the '994 patent. Merck denies that the '994 patent was duly and legally issued. Merck lacks sufficient knowledge or information to form a belief as to the exact nature of Plaintiffs' respective rights in the '994 patent. Merck admits that what purports to be a copy of the '994 patent is attached as Exhibit 1 to the Complaint. Except as so admitted, Merck denies the allegations in Paragraph 14 of the Complaint.

15. **Complaint ¶ 15:** Plaintiffs have put the invention of the 994 patent into practice by developing the breakthrough biologic drug nivolumab. Nivolumab is a monoclonal antibody that recognizes and binds to the PD-1 protein. When nivolumab binds to the PD-1 protein, that PD-1 protein cannot interact with its natural binding partners. Using nivolumab to block the interaction between PD-1 and its binding partners allows a more robust T cell response by the patient's own immune system.

Answer: Merck denies that the alleged inventors on the patent in suit developed nivolumab. Merck lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 15 of the Complaint and, therefore, denies these allegations.

16. **Complaint ¶ 16:** Clinical testing of nivolumab confirms the remarkable promise of anti-PD-1 immunotherapy. After rigorous worldwide testing, on July 4, 2014, nivolumab became the first anti-PD-1 antibody approved anywhere in the world for treating cancer, when Japanese regulatory authorities approved nivolumab for the treatment of melanoma. On December 22, 2014, the FDA approved nivolumab for treatment of advanced melanoma in the United States.

Answer: Merck admits that Japanese regulatory authorities have approved nivolumab as a treatment for certain patients with melanoma. Merck also admits that on December 22, 2014, the FDA approved nivolumab as a treatment for certain patients with advanced melanoma. Except as

so admitted, Merck lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 16 of the Complaint and, therefore, denies these allegations.

17. **Complaint ¶ 17:** Plaintiffs have continued worldwide development of nivolumab for treatment of a broad range of cancers, including non-small cell lung cancer, renal cell carcinoma, head and neck cancer, glioblastoma, and non-Hodgkin lymphoma.

Answer: Merck lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 17 of the Complaint and, therefore, denies these allegations.

18. **Complaint ¶ 18:** In Phase III clinical testing, patients with advanced melanoma who received nivolumab showed superior overall survival compared to those who did not, leading BMS to stop the clinical study early and make nivolumab available to all patients in the trial (http://news.bms.com/press-release/phase-3-first-line-melanoma-study-nivolumab-investigational-pd-1-checkpoint-inhibitor-). Based on, *inter alia*, those clinical results, BMS submitted, and on September 26, 2014, the FDA accepted, a biologics license application ("BLA") for nivolumab in the United States for certain melanoma patients (http://news.bms.com/press-release/bristol-myers-squibb-announces-multiple-regulatory-milestones-opdivo-nivolumab-us-and-). On December 22, 2014, the FDA approved nivolumab for treatment of advanced melanoma in the United States. Since that date, BMS has marketed nivolumab for the treatment of metastatic melanoma.

Answer: Merck admits that in BMS's June 24, 2014 Press Release cited in Paragraph 18 of the Complaint, BMS stated, "a randomized blinded comparative Phase 3 study evaluating nivolumab versus dacarbazine (DTIC) in patients with previously untreated BRAF wild-type advanced melanoma was stopped early because an analysis conducted by the independent Data Monitoring Committee (DMC) showed evidence of superior overall survival in patients receiving nivolumab compared to the control arm." Merck also admits that in BMS's September 26, 2014 Press Release cited in Paragraph 18 of the Complaint, BMS stated, "the Food and Drug Administration (FDA) has accepted for priority review the Biologics License Application (BLA) for previously treated advanced melanoma . . . . The U.S. BLA is based on data from CheckMate -037, a multinational, multicenter randomized open-label Phase 3 trial . . . ." Merck further admits that on December 22, 2014, the FDA approved nivolumab for the treatment of certain patients with

melanoma in the United States. Merck lacks sufficient knowledge or information to form a belief as to the truth of the statements contained in the cited BMS press releases and also lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 18 of the Complaint and, therefore, denies these allegations.

MERCK'S INFRINGEMENT

19. **Complaint ¶ 19:** Merck is exploiting the invention of the 994 patent with an anti-PD-1 antibody called pembrolizumab. On information and belief, Merck started developing pembrolizumab after Plaintiffs had made and started testing nivolumab. On September 4, 2014, Merck received approval to sell pembrolizumab in the United States for the treatment of certain patients suffering from metastatic melanoma. According to Merck, pembrolizumab is a PD-1 antibody that works by blocking the PD-1 checkpoint to treat cancer.

Answer: Merck admits that MSD received approval from the FDA on September 4, 2014 to market pembrolizumab as a treatment for certain patients with melanoma. Merck further admits that on October 2, 2015, MSD received FDA approval of Keytruda® for the treatment of certain patients with non-small cell lung cancer. Merck further admits that on December 18, 2015, MSD received FDA approval for an expanded melanoma indication for Keytruda®. Merck further admits that pembrolizumab works by blocking the interaction between PD-1 and its ligands, PD-L1 and PD-L2. Merck denies the remaining allegations in Paragraph 19 of the Complaint.

20. **Complaint ¶ 20:** On information and belief, Merck has known about the 994 patent and has known that the use of pembrolizumab will infringe claims of the 994 patent since July 7, 2015, when the 994 patent was issued by the USPTO and this Complaint was filed.

Answer: Merck admits that some individuals employed by Merck have known about the '994 patent since July 7, 2015, when Plaintiffs filed the Complaint. Merck also admits that the face of the '994 patent indicates that it was issued by the USPTO on July 7, 2015. Merck denies the remaining allegations in Paragraph 20 of the Complaint.

21. **Complaint ¶ 21:** Merck and its affiliates have had knowledge of the family of patents that includes the 994 patent for many years and have instituted legal proceedings seeking to invalidate the corresponding patents in Europe. Merck initiated an opposition proceeding in the European Patent Office on June 20, 2011, against European Patent EP 1 537 878 ("EP 878

patent"), the European counterpart of U.S. Patent Number 8,728,474 (the "474 patent"), the 994 patent's parent patent. Merck made numerous submissions in that opposition proceeding and an oral hearing was held on June 4, 2014. That same day, the panel hearing oral argument rejected Merck's opposition and held the EP 878 patent valid.

Answer: Merck admits that Merck & Co., Inc. filed an opposition on June 20, 2011 in the European Patent Office seeking revocation of the EP '878 patent, a European patent that shares a common priority application with the '994 patent. Merck also admits that Merck & Co., Inc. provided the European Patent Office with information in the course of the opposition and that oral proceedings were held on June 4, 2014. Merck further admits that the Opposition Division of the European Patent Office has not as of the date of this answer revoked the EP '878 patent, but states that the European Patent Office proceedings are ongoing and that Merck & Co., Inc. initiated an appeal of the Opposition Division's decision on October 10, 2014 and filed its grounds of appeal on February 3, 2015. Except as so admitted, Merck denies the remaining allegations in Paragraph 21 of the Complaint.

22. **Complaint ¶ 22:** On May 22, 2014, Merck's European affiliate filed a revocation action in the United Kingdom seeking to revoke the U.K. patent corresponding to the EP 878 patent. BMS has filed a counterclaim alleging infringement by pembrolizumab in that action.

Answer: Merck admits that Merck Sharp & Dohme Limited filed a revocation action in the United Kingdom seeking to revoke the U.K. patent corresponding to the EP '878 patent. Merck also admits that BMS has filed a counterclaim alleging infringement by pembrolizumab in that action. Except as so admitted, Merck denies the remaining allegations in Paragraph 22 of the Complaint.

23. **Complaint ¶ 23:** On information and belief, Merck received approval from the FDA on September 4, 2014, to market pembrolizumab as a treatment for certain patients with melanoma, and thereafter began selling pembrolizumab for that purpose. Merck's pembrolizumab is especially made for use in infringing the 994 patent and is not a staple article or commodity of commerce suitable for substantial noninfringing use. By making and selling pembrolizumab as a treatment for certain patients with metastatic melanoma, Merck has the specific intent to cause infringement of the 994 patent or, at a minimum, Merck has been willfully blind to the infringement of the 994 patent that will inevitably result.

Answer: Merck admits that MSD received approval from the FDA on September 4, 2014 to market pembrolizumab as a treatment for certain patients with melanoma and that on October 2, 2015, MSD received FDA approval of Keytruda® for the treatment of certain patients with non-small cell lung cancer. Merck further admits that on December 18, 2015, MSD received FDA approval for an expanded melanoma indication for Keytruda®. Merck further admits that it has begun selling pembrolizumab in the United States and that pembrolizumab is being used by third parties for its FDA approved uses. Merck denies the remaining allegations in Paragraph 23 of the Complaint.

24. **Complaint ¶ 24:** On September 4, 2014, the day Merck received approval to sell its pembrolizumab product in the United States for treatment of melanoma, Plaintiffs filed suit against Merck in this judicial district, asserting the 474 patent, which also claims *inter alia* certain uses of a PD-1 antibody to treat melanoma.

Answer: Merck admits that MSD received approval from the FDA on September 4, 2014 to market pembrolizumab in the United States as a treatment for certain patients with melanoma. Merck also admits that on September 4, 2014, Plaintiffs filed suit against Merck in this judicial district, asserting U.S. Patent No. 8,728,474. Merck denies the remaining allegations in Paragraph 24 of the Complaint.

25. **Complaint ¶ 25:** On information and belief, Merck has begun, manufacturing, distributing, using, offering for sale, selling, and/or importing in the United States the pembrolizumab antibody product to be prescribed and used for the treatment of metastatic melanoma. Upon information and belief, such pembrolizumab is being used and will be used for the treatment of metastatic melanoma in the United States.

Answer: Merck admits that MSD received approval from the FDA on September 4, 2014 to market pembrolizumab as a treatment for certain patients with melanoma and that MSD received approval from the FDA on October 2, 2015 to market pembrolizumab as a treatment for certain patients with non-small cell lung cancer. Merck further admits that MSD received approval from FDA on December 18, 2015 to market pembrolizumab for an expanded melanoma

indication and that it has begun manufacturing, distributing, using, offering for sale, selling, and/or importing pembrolizumab in the United States. Merck further admits that pembrolizumab is being used by third parties for its FDA approved uses. Merck denies the remaining allegations in Paragraph 25 of the Complaint.

COUNT I: PATENT INFRINGEMENT

26. **Complaint ¶ 26:** Plaintiffs incorporate by reference paragraphs 1-25 as if fully set forth herein.

Answer: Merck repeats the responses contained in Paragraphs 1 through 25 as though fully set forth herein.

27. **Complaint ¶ 27:** A real, immediate, substantial, and justiciable controversy has arisen and now exists between the parties as to whether Merck is infringing the 994 patent.

Answer: Merck does not contest that a justiciable controversy has arisen and now exists between the parties as to whether Merck is infringing the '994 patent.

28. **Complaint ¶ 28:** On information and belief, Merck has been aware of the 994 patent since July 7, 2015, when the USPTO issued the 994 patent and Plaintiffs filed this Complaint.

Answer: Merck admits that some individuals employed by Merck first became aware of the '994 patent on July 7, 2015, when Plaintiffs filed the Complaint. Merck also admits that the face of the '994 patent indicates that it was issued by the USPTO on July 7, 2015. Merck denies the remaining allegations in Paragraph 28 of the Complaint.

29. **Complaint ¶ 29:** On information and belief, Merck is marketing, making, using, selling, offering for sale, and/or importing pembrolizumab in the United States for the treatment of metastatic melanoma. On information and belief, such pembrolizumab is being used for the treatment of metastatic melanoma in the United States. As set forth above, Merck thereby began infringing the 994 patent as of July 7, 2015, including by actively inducing infringement under 35 U.S.C. § 271(b) and as a contributory infringer under 35 U.S.C. § 271(c).

Answer: Merck admits that MSD is marketing, making, using, selling, offering for sale, and/or importing pembrolizumab in the United States, including for the treatment of certain types

of melanoma and lung cancer. Merck further admits that pembrolizumab is being used by third parties for its FDA approved uses, but denies the remaining allegations in Paragraph 29 of the Complaint.

30. **Complaint ¶ 30:** Merck's continuing infringement of the 994 patent beginning on July 7, 2015, is deliberate, willful, and in reckless disregard of valid patent claims of the 994 patent

Answer: Merck denies the allegations in Paragraph 30 of the Complaint.

31. **Complaint ¶ 31:** Plaintiffs have been and will continue to be injured by and have been and will continue to suffer substantial damages as a result of Merck's infringement

Answer: Merck denies the allegations in Paragraph 31 of the Complaint.

JURY DEMAND

32. Merck acknowledges that the Complaint sets forth a demand for trial by jury.

PRAYER FOR RELIEF

33. Merck denies that Plaintiffs are entitled to any of the relief requested in paragraphs (a)–(f) of Plaintiffs' prayer for relief, and further deny that Plaintiffs are entitled to any relief whatsoever. All allegations not specifically admitted are denied.

AFFIRMATIVE AND OTHER DEFENSES

34. Merck asserts the following affirmative and other defenses and reserves the right to amend this Answer as additional information becomes available.

FIRST DEFENSE
(Failure to State a Claim)

35. The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE
(Non-Infringement)

36. Merck is not infringing and has not infringed (including directly, indirectly,

contributorily, or by inducement) any valid and enforceable claim of the '994 patent, either literally or under the doctrine of equivalents.

THIRD DEFENSE
(Invalidity)

37. Each and every claim of the '994 patent is invalid for failing to comply with one or more requirements of the patent laws of the United States, including but not limited to, 35 U.S.C. §§ 101, 102, 103, and/or 112.

FORTH DEFENSE
(Prosecution-History Estoppel)

38. Plaintiffs' claims are barred, in whole or in part, by representations or actions taken during the prosecution of the '994 patent, and related patents under the doctrine of prosecution-history estoppel, and/or prosecution disclaimer.

FIFTH DEFENSE
(35 U.S.C. § 288)

39. Plaintiffs are not entitled to seek recovery of their costs pursuant to 35 U.S.C. § 288.

SIXTH DEFENSE
(Exceptional Case)

40. This case is exceptional under 35 U.S.C. § 285. Merck is entitled to an award of its attorneys' fees incurred in connection with defending and prosecuting this action.

PRAYER FOR RELIEF

WHEREFORE, Merck respectfully requests the following relief:

(a) the entry of judgment on the Complaint in favor of Merck, and against Plaintiffs, with Plaintiffs not being awarded any relief;

(b) a declaration that Merck has not infringed and is not infringing any valid

and enforceable claim of the '994 patent, either directly or indirectly, contributorily or by inducement, literally or under the doctrine of equivalents;

(c) a declaration that each and every claim of the '994 patent is invalid;

(d) denial of Plaintiffs' request for damages, attorney fees, costs, and expenses;

(e) a declaration that this is an "exceptional case" within the meaning of 35 U.S.C. § 285, and an award to Merck of its expenses, costs and attorneys' fees;

(f) an award to Merck of such other and further equitable or legal relief as the Court deems just and proper.

Respectfully submitted,

McCARTER & ENGLISH, LLP

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