

# Exhibit 5

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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AMGEN INC., :  
Plaintiff :  
: CIVIL ACTION  
VS. :  
: NO. 87-2617-Y  
CHUGAI PHARMACEUTICAL CO., :  
LTD., and GENETICS INSTITUTE, :  
INC., :  
Defendants :

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CIVIL NONJURY TRIAL  
LIABILITY PHASE  
DAY THIRTY-SIX

BEFORE THE HONORABLE PATTI B. SARIS  
United States Magistrate

Courtroom 9  
U.S.P.O. & Courthouse  
Boston, Massachusetts  
Wednesday, October 18, 1989

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1 has the sole and exclusive responsibility for control of  
2 the lawsuit?

3 A. I'm not really sure what that means in legal terms.

4 Q. Well, does Chugai control this lawsuit on behalf of  
5 itself and Genetics Institute?

6 MR. RICHTER: I object.

7 MR. LEE: I object. Of course.

8 MR. ALLEGRETTI: I'm attempting to determine,  
9 your Honor, whether the willfulness is entirely determined  
10 by Chugai and dictated by it or whether it's jointly  
11 willfulness by Chugai and GI or it's just GI.

12 MR. RICHTER: Willfulness of what, your Honor?

13 MR. ALLEGRETTI: Infringement of the '008 patent.

14 THE COURT: Sustained.

15 BY MR. ALLEGRETTI:

16 Q. Mr. Schmergel, there has been produced in this case a  
17 number of documents by Chugai, and they relate to  
18 communications between Chugai and Genetics Institute, and  
19 they also relate to internal documents of Chugai. And I  
20 have just a few of them, and I simply want to explore  
21 whether you have any knowledge of the subject matter of  
22 these documents. First, let me direct your attention to  
23 December of 1983.

24 There was an announcement by GI that it had  
25 successfully cloned EPO at that time, correct -- excuse

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1 me, by Amgen that it had successfully cloned EPO, correct?

2 A. I recall a press announcement, yes.

3 Q. I want to focus your attention to a month immediately  
4 following that announcement, which is January of 1984.

5 You were in communication with Chugai at that  
6 time with respect to the announcement by Amgen, were you  
7 not?

8 A. Our company was in communication, yes.

9 Q. And in that respect Mr. Yang was communicating with  
10 various people at Chugai, correct?

11 A. I recall seeing correspondence, yes.

12 Q. And he indicated that you had -- "you" meaning GI --  
13 had heard that Amgen had cloned EPO, and that subject was  
14 under discussion with Chugai at that time?

15 A. Correct.

16 Q. Who was Mr. Sadahiro at Chugai?

17 A. Dr. Sadahiro at that time was a senior manager in  
18 the -- in one of the technical departments, I think  
19 licensing or something like that.

20 Q. Were you made aware in January of 1984 that  
21 Mr. Sadahiro had expressed to Mr. Yang in a communication  
22 the view that Chugai assumed that Amgen's first cloning of  
23 EPO is certainly patentable?

24 A. I was aware that we tried to evaluate the significance  
25 of the Amgen press announcement.

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1 Q. And that, if patentable, the procurement of a patent  
2 would seriously damage the commercial interest of the EPO  
3 project?

4 A. We were trying to -- as I said, we were trying to  
5 understand what the press announcement might mean.

6 Q. Okay.

7 A. Press announcements are not necessarily accurate.  
8 Press announcements do not mean that the patent will be  
9 issued. It's -- competitor press announcements have to be  
10 taken as one input in an overall decision-making process.

11 Q. I will show you, Mr. Schmergel, Plaintiff's  
12 Exhibit 320, which is a letter dated January 16, 1984,  
13 from Mr. Yang to Mr. Sadahiro at Chugai, with a copy  
14 designated to you.

15 Are you familiar with that letter, Mr. Schmergel?

16 A. Yes.

17 Q. I call your attention to the first paragraph of the  
18 letter. Mr. Yang states in the second sentence:

19 We came to the conclusion that although we  
20 missed the chance to be the first one to clone  
21 EPO, we will continue to pursue this project  
22 aggressively, for the following two major  
23 reasons:

24 And there follows two headings. One is the  
25 patent situation and the other on page 2, Item 2, is

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1 development of commercializable product.

2 My question to you, Mr. Schmergel, is, Did you  
3 reach an agreement with Chugai that any patent procured by  
4 Amgen enforceable against the EPO project work would be  
5 vigorously resisted?

6 A. No.

7 Q. Let me call your attention, Mr. Schmergel, to the last  
8 two sentences of Section 1 of the patent situation which  
9 appears on page 2, the first full paragraph on page 2.

10 The last two sentences read:

11 It may take several years before the content  
12 of the patent is known. Valuable time could be  
13 lost if we wait until all the facts are known.

14 It is correct, is it not, Mr. Schmergel, that a  
15 business decision was made to proceed full force with the  
16 EPO project and to deal with patents obtained by Amgen  
17 when and if they arose?

18 A. Well, a business decision was obviously reached to  
19 proceed with the project, not knowing who might get what  
20 patents when.

21 Q. Would you turn next to the third page of the document.  
22 There is a paragraph beginning:

23 Regarding to the specific points in your  
24 telex, I have reviewed it with Dr. Fritsch and  
25 the management staffs of GI. Following are

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1 Dr. Fritsch's answers.

2 Did you discuss the subject matter of those  
3 specific points, 1 through 5, conveyed to Mr. Sadahiro by  
4 Dr. Fritsch through Mr. Yang?

5 A. Most of those paragraphs deal with scientific matters.  
6 I would not have discussed them.

7 Q. In January of 1984 the first paragraph of  
8 Dr. Fritsch's answers states that:

9 To clone EPO, Amgen used new sequence  
10 information obtained from tryptic fragments of  
11 EPO from Dr. Goldwasser.

12 Now, January of 1984 is well prior to the  
13 arrangement with Dr. Miyake and the procurement of  
14 purified material from him, is it not?

15 A. For GI, you mean?

16 Q. Yes, for GI.

17 A. Yes.

18 Q. So that before you began your work with purified  
19 material obtained from Dr. Miyake that ultimately led to  
20 the cloning of EPO at GI, you knew through Dr. Fritsch  
21 that Amgen had used sequence information obtained from  
22 tryptic fragments of EPO obtained from Dr. Goldwasser, did  
23 you not?

24 A. I can't answer that Dr. Yang is saying that  
25 Dr. Fritsch said that. That's unclear to me.

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