

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
AMGEN INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	CIVIL ACTION No.: 05-CV-12237WGY
F. HOFFMANN-LA ROCHE LTD,)	
ROCHE DIAGNOSTICS GMBH,)	
and HOFFMANN-LA ROCHE INC.,)	
)	
Defendants.)	
_____)	

**ROCHE’S MOTION TO FILE UNDER SEAL CONFIDENTIAL EXHIBIT SUBMITTED
IN CONNECTION WITH AMGEN’S MOTION TO REMOVE THE “CONFIDENTIAL”
DESIGNATION FROM THE JUNE 21, 2007 DEPOSITION TRANSCRIPT OF
ROCHE’S EXPERT DR. THOMAS KADESCH**

Defendants F. Hoffmann-La Roche Ltd, Roche Diagnostics GmbH, and Hoffmann-La Roche Inc. (collectively “Roche”) respectfully request that the Court not accept Exhibit 2 to Amgen’s motion¹ for filing at all because it is not relevant to any issues in this case, and its confidential status should be decided on the merits of Roche’s Opposition and not through the filing under seal procedure. If the Court does accept it for filing, however, Roche respectfully requests that it be filed under seal pursuant to the Protective Order and Local Rule 7.2.

Exhibit 2 is the confidential deposition testimony of Dr. Kadesch, which is the target of Amgen’s underlying motion. As Roche argues in its opposition, however, in addition to being confidential, the document itself is not relevant to this litigation because Roche will not be calling Dr. Kadesch at trial. *See Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 163–64 (3rd Cir. 1995) (prior testimony of a non-testifying expert is inadmissible as hearsay); *In re Hidden Lake*

¹ Amgen’s Motion to Remove the “Confidential” Designation from the June 21, 2007 Deposition Transcript of Roche’s Expert Dr. Thomas Kadesch (Docket No. 1063). The document corresponding to Exhibit 2 was submitted to the Court for *in camera* inspection on September 13, 2007.

Ltd. Partnership, 247 B.R. 722, 724 (S.D. Ohio, 2000) (“the deposition of the expert witness identified by the Debtor, but not called at trial, is not admissible over the Debtor’s objection. Such testimony is inadmissible as hearsay.”). Moreover, as Amgen has indicated in its motion, its is motivated by the improper purpose of violating the Stipulated Protective Order in this case by using this information in other, unrelated litigations to the detriment of a company not even a party to this action.

Given that Exhibit 2 is only relevant to the present motion — the entire purpose of which is to determine whether this specific document qualifies as confidential — it would be premature to destroy its confidentiality by allowing it to be publicly filed in connection with the motion papers. Furthermore, it would be counterproductive for the Court to allow it to be publicly filed if the Court rules it was properly designated as “confidential.” Thus, Roche urges the Court not accept Exhibit 2 for filing at all, in the public record or otherwise, if the Court denies Amgen’s motion to remove the “Confidential” designation.

In support of this motion, Roche relies on its Memorandum in Opposition to Amgen’s motion, filed concurrently herewith.

CERTIFICATE PURSUANT TO LOCAL RULE 7.1

I certify that counsel for the parties have conferred in an attempt to resolve or narrow the issues presented by this motion and that no agreement was reached.

DATED: Boston, Massachusetts
September 19, 2007

Respectfully submitted,

F. HOFFMANN-LA ROCHE LTD,
ROCHE DIAGNOSTICS GMBH, and
HOFFMANN-LA ROCHE INC.

By their Attorneys,

/s/ Keith E. Toms

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF). Pursuant to agreement of counsel dated September 9, 2007, paper copies will not be sent to those indicated as non registered participants.

/s/ Keith E. Toms

Keith E. Toms

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