

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMGEN, INC.,
Plaintiff,
v.
F. HOFFMANN-LAROCHE LTD.,
a Swiss Company, ROCHE DIAGNOSTICS
GMBH, a German Company, and
HOFFMANN LAROCHE INC., a New
Jersey Corporation,
Defendants.
Civil Action No. 05 CV 12237 WGY

PLAINTIFF AMGEN INC.'S OPPOSITION TO ROCHE'S
MOTION TO ADMIT EXHIBITS INTO EVIDENCE

Roche seeks to admit, en mass, fifty-three (53) exhibits that it has not offered through the testimony of any witness. As set forth more fully in the detailed charts attached hereto as Exhibits A and B, there are particularized reasons why, on an exhibit-by-exhibit basis, these documents should not be admitted. Among others, these reasons include:

- The Court has already declined to admit the exhibit;
Roche has failed to disclose certain exhibits claimed to be prior art pursuant to 35 U.S.C. § 2821 and/or the exhibit is not prior art;
Roche failed to identify certain exhibits in its final Pre-Trial Exhibit List;

1 The requirements of the law are clear that "in the absence of such notice proof of the said matters may not be made at the trial except on such terms as the court requires." 35 U.S.C. §282; Advance Card. Sys. Inc. v. Medtronic, 265 F.3d 1294 (Fed. Cir. 2001) (The purpose of §282, like that of the Federal Rules, is to prevent unfair and prejudicial surprise by the production of unexpected and unprepared-for prior art references at trial, not to facilitate last-minute production of evidence.)

- Several of the documents that Roche purports to be admissions of Amgen are hand written documents that were not authenticated or identified by their unknown author<sup>2</sup>;
- Several of the documents that Roche purports to be admissions or prior art are not self-authenticating and therefore are not admissible without proper authentication<sup>3</sup>; and
- Certain documents are the subject of Amgen's Bench Memorandum Regarding Fritsch Deposition Testimony and Request for Corrective Instruction, and are inadmissible for the reasons more fully set forth in that Bench Memorandum<sup>4</sup>;

In addition to these document specific objections, Amgen objects generally to the procedures proposed by Roche for the wholesale admission of documents into evidence under Rule 403. Without any testimony that would enable the jury to understand the relevance of the documents to the matters at issue, the risk of juror confusion and unfair prejudice outweighs the probative value of these exhibits. *See Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 2007 U.S. Dist. LEXIS 48668, \*14 (D. Iowa July 3, 2007) (refusing to consider the parties "copious" exhibits in support of and in resistance to defendant's motion for preliminary injunction because neither party appeared with witnesses to establish the necessary foundation for those exhibits at the PI hearing). Given the complex nature of the issues in this case, and the significant number of issues the jury has to address, to admit the documents in this fashion would result in unfair prejudice and confusion of the jury.

---

<sup>2</sup> To introduce evidence of prior art, as with all evidence, it must be properly authenticated. Fed. R. Evid. 901(a); *Nolan v. Douglas County*, 903 F.2d 1546, 1551-52 (11th Cir. 1990) (as a condition precedent to admissibility, evidence must be authenticated).

<sup>3</sup> *See id.*

<sup>4</sup> *See* Docket Entry 1031.

**CONCLUSION**

For the reasons set forth above, Roche's motion to admit exhibits into evidence should be denied.

Dated: September 25, 2007

Respectfully Submitted,

AMGEN INC.,  
By its attorneys,

Of Counsel:

STUART L. WATT  
WENDY A. WHITEFORD  
MONIQUE L. CORDRAY  
DARRELL G. DOTSON  
KIMBERLIN L. MORLEY  
ERICA S. OLSON  
AMGEN INC.  
One Amgen Center Drive  
Thousand Oaks, CA 91320-1889  
(805) 447-5000

/s/ Patricia R. Rich  
D.DENNIS ALLEGRETTI (BBO#545511)  
MICHAEL R.GOTTFRIED (BBO#542156)  
PATRICIA R. RICH (BBO#640578)  
DUANE MORRIS LLP  
470 Atlantic Avenue, Suite 500  
Boston, MA 02210  
Telephone: (857) 488-4200  
Facsimile: (857) 488-4201

LLOYD R. DAY, JR  
DAY CASEBEER  
MADRID & BATCHELDER LLP  
20300 Stevens Creek Boulevard, Suite 400  
Cupertino, CA 95014  
Telephone: (408) 873-0110  
Facsimile: (408) 873-0220

WILLIAM GAEDE III  
McDERMOTT WILL & EMERY  
3150 Porter Drive  
Palo Alto, CA 94304  
Telephone: (650) 813-5000  
Facsimile: (650) 813-5100

KEVIN M. FLOWERS  
MARSHALL, GERSTEIN & BORUN LLP  
233 South Wacker Drive  
6300 Sears Tower  
Chicago IL 60606  
Telephone: (312) 474-6300  
Facsimile: (312) 474-0448

**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 and paper copies will be sent to those indicated as non-registered participants on September 25, 2007.

/s/ Patricia R. Rich  
Patricia R. Rich