

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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

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**AMGEN INC.’S MOTION TO AUTHENTICATE BY DECLARATION  
IN LIEU OF THE LIVE TESTIMONY OF CHARLES KUNG**

Amgen respectfully moves this Court to allow it to offer Charles Kung by Declaration to authenticate two labels that appear within a laboratory notebook of Dr. Thomas Strickland (Trial Exhibit CMU), a scientist that works for Amgen. Mr. Kung was formerly the chief research technologist for Dr. Eugene Goldwasser and the labels were attached to vials of urinary EPO, purified by the method of Miyake, et al., that Mr. Kung sent to Amgen from Dr. Goldwasser’s laboratory. As set forth in Mr. Kung’s Declaration, he attests that as part of his work with Dr. Goldwasser, he would send urinary EPO from Dr. Goldwasser’s laboratory to third parties, including Amgen. His practice when sending urinary EPO to third parties was to place a red or green label on the vial and mark the label in his handwriting.<sup>1</sup> He attests that the labels in Dr. Strickland’s notebook contain his handwriting and are labels that he created. He also attests that he sent vials of urinary EPO to Amgen on April 5, 1982 and October 10, 1984 — the dates

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<sup>1</sup> Mr. Kung’s Declaration is attached hereto as Exhibit A to the Declaration of Daniel A. Curto

affixed on the labels. Based on Mr. Kung's review of the labels in Dr. Strickland's notebook, he believes those were the labels he affixed to vials of urinary EPO that he sent to Amgen in April 1982 and October 1984.

Roche has filed a Motion in Limine to Preclude Amgen from Presenting Testimony of Charles Kung on the ground that he may provide expert testimony or testify about the "state of the erythropoietin art as of the date of Lin's inventions."<sup>2</sup> In point of fact, Amgen simply seeks to authenticate these two labels. Although Mr. Kung has flown from Chicago to testify at this hearing, Amgen is willing to substitute his declaration in lieu of calling him live. Amgen asks the Court to allow Mr. Kung's declaration as evidence to authenticate these labels within an Amgen laboratory notebook. Through a later witness, Amgen will show that the labels are relevant to prove that Amgen conducted experiments comparing the urinary EPO it received from Mr. Kung with recombinant EPO.

Pursuant to FRE 104 (b), Amgen asks that this court admit these documents into evidence subject to Amgen showing their relevance. In the alternative, if the court seeks live testimony from Mr. Kung, Amgen and Mr. Kung are also prepared to testify as to the authenticity of these documents at an evidentiary hearing during the afternoon of Friday, September 28, 2007.

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<sup>2</sup> See Docket No. 1187, p. 1.

Dated: September 28, 2007

Respectfully Submitted,

**AMGEN INC.,**

By its attorneys,

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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 and paper copies will be sent to those indicated as non-registered participants on September 28, 2007.

/s/ Michael R. Gottfried  
Michael R. Gottfried