

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

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

AMGEN INC.’S BENCH MEMORANDUM THAT THE DIGITAL PHOTOGRAPH OF DR. CATLIN’S IEF EXPERIMENT (TRIAL EXHIBIT FTF) IS ADMISSIBLE AFTER DR. AJIT VARKI EXPLAINS THE RELEVANCE OF DR. CATLIN’S EXPERIMENT

Amgen has already presented the testimony of Dr. Don Catlin establishing the authenticity of the isoelectric focusing (“IEF”) experiment he conducted, and that the digital photograph of his results— trial exhibit FTF — is a true and accurate photograph of his test. As this Court acknowledged during Dr. Catlin’s testimony, he “authenticated” the digital photo.¹ Amgen now intends — as the Court suggested — to offer the expert testimony of Dr. Ajit Varki, who will testify to the relevance of Dr. Catlin’s IEF test and the digital photograph. Once Dr. Varki testifies as to the significance of Dr. Catlin’s IEF test and the digital photograph, trial exhibit FTF should be admitted into evidence.

Roche has no legitimate objection to the admission of trial exhibit FTF. A photograph is appropriately admitted into evidence once it is established that it is true and accurate, and it is

¹ 9/25/2007 Trial Tr., p. 1401: 10-14.

relevant.² Dr. Catlin has already established its authenticity. Dr. Ajit Varki will opine as to its relevance. Moreover, the Court should recall that Roche's own expert, Dr. Bertozzi, claimed that Dr. Catlin's photograph was relevant to her opinion when she opined that she reviewed it and that it allegedly comported with her testimony.³ Any claim by Roche that FRE 1002 requires an "original" is specious. First, as Dr. Catlin testified, the original image is digital, and thus there is no original paper photograph⁴. Furthermore, FRE 1003 states that duplicates are admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original. In light of the fact that Roche referenced exhibit FTF during its direct examination of its own expert and claimed it supported her opinion — without ever asserting the photograph was not genuine — Roche has no legitimate basis to object to the genuineness of the paper copy of trial exhibit FTF.

² *U.S. v. Rembert*, 863 F.2d 1023, 1026 (D.C. Cir. 1988) (stating that under FRE 901(b)(1) a photograph is authentic when "a sponsoring witness (whether or not he is the photographer) who has personal knowledge of the scene depicted testifies that the photograph fairly and accurately portrays that scene"); *U.S. v. Hobbs*, 403 F.2d 977, 978-979 (6th Cir. 1968) (test for determining whether a photograph can be admitted into evidence is "whether the proffered photograph is an accurate representation of the scene depicted"). *See also 2 McCormick on Evidence* § 215 (6th ed.) (stating "[o]nce personal knowledge is shown, the witness can say whether the photograph correctly and accurately portrays what the witness saw. The photograph thus verified is admissible as a graphic portrayal of the verifying witness's testimony").

³ 9/14/2007 Trial Tr., p. 1062: 4-9.

⁴ 9/25/2007 Trial Tr., p. 1406-07.

Dated: October 1, 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 91320-1789
(805) 447-5000

/s/ Michael R. Gottfried

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. (*pro hac vice*)
DAY CASEBEER, MADRID &
BATCHELDER LLP
20300 Stevens Creek Boulevard, Suite 400
Cupertino, CA 95014
Telephone: (408) 873-0110
Facsimile: (408) 873-0220

Michael Kendall (BBO#544866)
Daniel A. Curto (BBO #639883)
McDERMOTT WILL & EMERY
28 State Street
Boston, MA 02109
Telephone: (617) 535-4000
Facsimile: (617) 535-3800

Kevin M. Flowers (*pro hac vice*)
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 October 1, 2007.

/s/ Michael R. Gottfried
Michael R. Gottfried