

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

AMGEN, INC.,

Plaintiff,

v.

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

Defendants.

Civil Action No. 05-12237 WGY

**ROCHE'S OPPOSITION TO AMGEN'S BENCH MEMORANDUM REQUESTING A  
CLARIFYING PRELIMINARY JURY INSTRUCTION RELATING TO ROCHE'S  
PATENT ON PEGYLATED ERYTHROPOIETIN**

This Court has already considered and rejected each and every argument raised by Amgen in its bench memorandum seeking a clarifying preliminary jury instruction relating to Roche's patent on pegylated erythropoietin. (*See* 9/05/07 Electronic Order denying D.I. 824 - Amgen's Motion in Limine No. 1 to exclude Roche from referring to its own patent on pegylated erythropoietin). Amgen specifically requested this Court to issue a jury instruction based on the Federal Circuit Bar Association Model Jury Instruction No. 8.11 in its brief in support of D.I. 824. (*See* D.I. 825). Having lost the earlier motion *in limine* on this very issue, Amgen is now merely attempting to circumvent this Court's earlier ruling.<sup>1</sup>

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<sup>1</sup> The sole case cited in Amgen's bench memorandum deals with the exclusion of evidence and makes no mention of preliminary jury instructions.

Amgen's infringement case is likely to include an effort to show that the chemical reaction employed by Roche in making CERA was routine and straightforward. Roche's patent suggests otherwise. Thus, Roche's request for an instruction focused on Roche's patent is but a thinly veiled attempt by Amgen to gain the Court's unwarranted assistance in diminishing Roche's patent in the eyes of the jury.

In addition, Roche objects to Amgen's request that the Court characterize Roche's accused product as an "improvement.". Roche will show that its MIRCERA product is a novel chemical compound materially different from any product or process within the properly defined scope of the patents in suit.

Accordingly, Roche respectfully requests this Court deny Amgen's request for a clarifying preliminary jury instruction.

DATED: October 2, 2007

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

By its attorneys,

/s/ Aaron Stiefel

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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) and paper copies will be sent to those indicated as non registered participants on the above date.

/S/ Thomas F. Fleming