

Court, other courts have found that submissions in foreign patent proceedings are admissions by party opponents.³

Pursuant to Fed. R. Evid. 801(d)(2), this document is “being offered against a party and is (1) the party’s own statement, in either an individual or a representative capacity or . . . (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship.” Admissions by party opponents are excluded from the category of hearsay.⁴ Parties are not prejudiced by the admission into evidence of their own statements since the parties may take the stand and contradict the statement if they so choose.⁵

This document is relevant because Roche makes statements of fact in it that directly undercut both Roche's current position that it would have been obvious to clone the EPO gene in 1983/1984 using cDNA cloning and its implied assumption today that a suitable source of EPO mRNA existed in 1983/1984. Specifically, Roche states in this document that (1) cDNA cloning requires a suitable source of EPO mRNA and (2) no suitable source of EPO mRNA was known by 1983/1984.

For the reasons set forth above, Amgen requests that a redacted version of Exhibit BWZa be moved into evidence in this matter.

³ See *Pfizer, Inc. v. Teva Pharms. USA, Inc.*, 2006 U.S. Dist. LEXIS 77970 (D.N.J. Oct. 26, 2006) citing *Hearsay Handbook* § 35:3 at 35-25 (4th ed.) (court finding that expert affidavits submitted to the European Patent Office were admissions under 801(d)(2)).

⁴ See Fed. R. Evid. 801(d)(2).

⁵ See *Globe Sav. Bank, F.S.B. v. United States*, 61 Fed. Cl. 91, 94-95 (2004), judgment entered 65 Fed. Cl. 330 (2005), *aff'd in part, rev'd in part on other grounds*, 189 Fed. Appx. 964 (Fed. Cir. 2006).

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Respectfully Submitted,

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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 no agreement was reached.

/s/ Michael R. Gottfried
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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 October 3, 2007.

/s/ Michael R. Gottfried
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