UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMGEN INC., Plaintiff, 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.	Civil Action No.: 1:05-CV-12237 WGY

AMGEN'S BENCH MEMORANDUM AS TO THE ADMISSIBILITY OF EXHIBIT EYU AS A ROCHE PARTY ADMISSION

Amgen Inc. intends to move into evidence Exhibit EYU.[1] This document is a November 7, 2005 power point presentation from Kiyo Nakai of Chugai Pharmaceutical Co., Ltd. ("Chugai"), to Roche, that reflects a proposal to Roche and the results of experiments conducted regarding the elimination pathways of CERA in the human body. Amgen offers this document as an admission of a party opponent pursuant to Federal Rule of Evidence 801(d)(2)(D). Chugai and Roche are partners in developing and marketing CERA. It is well-established that a party's partner acts as a party's agent within the meaning of the Rule with respect to matters concerning the subject matter of the partnership. This Chugai document, transmitted to Roche, concerns CERA experiments made while both were working towards developing and commercializing CERA. Because it falls within the parameters of Chugai's relationship with Roche, it satisfies the requirements of Rule 801(d)(2)(D) and should be admitted.

[1] A copy of Exhibit EYU is attached to the supporting Declaration of Andrew A. Kumamoto ("Kumamoto Decl."), Exh. 1.

A. STATEMENTS OF ROCHE'S MAJORITY OWNED SUBSIDIARY AND PARTNER ARE ADMISSIBLE UNDER FED. R. EVID. 801(d)(2)(D)

Federal Rule of Evidence 801(d)(2)(D) provides that a statement by a "party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship" is not hearsay and, therefore, is admissible as an admission of a party opponent. In the context of a partnership, such as the relationship between Chugai and Roche, the Rule applies to statements made by employees of the non-party partner so long as the statements are made in furtherance of the partnership's purpose at a time during the existence of the partnership.[2]

There can be no dispute that Exhibit EYU, Chugai's November 7, 2005 report to Roche about its experiments with CERA, was made in furtherance of the purpose of Roche and Chugai's partnership. In 2001, Roche acquired a 50.1% interest in Chugai, which combined Chugai's and Roche's rights to epoetin beta.[3] Following this acquisition, Chugai and Roche have worked towards getting Roche's CERA through clinical testing and onto the market. According to Chugai's website, in 2005, the year that Chugai created Exhibit EYU, Chugai was involved in the development and clinical testing of CERA.[4] Currently, according to Chugai,

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[2] *See United States v. Saks*, 964 F.2d 1514, 1523 (5th Cir. 1992) (admitting deposition testimony of non-party partner on the ground that the partner acted as the agent of his co-partner within the meaning of Rule 801(d)(2)(D) when making statements concerning matters related to the partnership interests); *In re Houbigant, Inc.*, 1996 WL 527334, at *3 (S.D.N.Y. 1996) (holding that the parties to a joint venture act as each other's agents under Rule 801(d)(2)(D) when "carrying forth the purpose of the [joint venture]"); *see also United States v. Agne*, 214 F.3d 47 (1st Cir. 2000) (holding that statements of a corporate employee may be admitted against the officer of an affiliated corporation where the employee made statements in connection with work he performed on behalf of the officer).

[3] Kumamoto Decl., Exh. 2 – 2002 Annual Letter From The Chairman ("Thanks to NeoRecormon (Roche) and Epogin (Chugai), we now control the global marketing rights to epoetin beta. . . .")

[4] Kumamoto Decl., Exh. 3 – Chugai Overview of R&D Activities – available on Chugai's website at www.chugai-pharm.co.jp/html/meeting/pdf/050805e_2.pdf (This public Chugai document lists CERA as a Chugai project under development as of July 2005 and states that CERA is in Phase II clinical trials. The document also states that it will make future regulatory filings for CERA).

Chugai remains directly involved in the research and development of CERA.[5] More importantly, Roche considers Chugai is "project partner" in developing and getting CERA to market.[6] Roche cannot dispute that the subject matter in Exhibit EYU – tests done by Chugai and reported to Roche relating to the suggested elimination pathways of CERA in CKD patients – is directly related to Roche and Chugai's collective efforts to develop and market CERA. Accordingly, this document is an admission by an agent of a party opponent and falls squarely within Rule 801(d)(2)(D) and should be admitted.

DATED: October 4, 2007

Respectfully Submitted,

AMGEN INC.,

/s/ Michael R. Gottfried

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[5] Kumamoto Decl., Exh. 4 – Chugai's July 31, 2007 Development Pipeline – available on Chugai's website at www.chugai-pharm.co.jp/English/ir/pipeline/index.html. (This public Chugai document lists CERA as a product from a collaboration with Roche, and that the product is currently in Phase III clinical studies).

[6] Kumamoto Decl., Exh. 5 – Roche's current "Pharma Pipeline" – available on Roche's website at www.roche.com/home/investors/inv_pipeline/inv_pipeline_det.htm?ta=%25&Phase=filed&submit=Show+pipeline. (This public Roche document lists Chugai as a "project partner" for CERA.)

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the Electronic Case Filing (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/ Michael R. Gottfried
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