UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

AMGEN'S BENCH MEMORANDUM TO EXPLAIN THE RELEVANCE OF EXHIBITS GXD AND EYV TO ISSUES OF INFRINGEMENT

In connection with the expert testimony of Dr. Leslie Z. Benet, Amgen intends to offer into evidence Exhibits GXD and EYV.[1] Exhibit GXD is a Roche Regulatory Document entitled, "RO0503821-00: In vivo stability and tissue localization of RO0503821 after single (IV or SC) or multiple (IV) dose administration to rats" ("The 2004 Roche Regulatory Document"), which Roche represented has been filed with the Food and Drug Administration in seeking approval of its peg-EPO product. Exhibit EYV is a November 7, 2005 power point presentation from Kiyo Nakai of Roche's subsidiary, Chugai Pharmaceutical Co., Ltd. to Roche regarding elimination pathways of CERA in the body ("The 2005 Chugai Presentation").[2]

The 2004 Roche Regulatory Document and the 2005 Chugai Presentation were the

[1] Exhibits GXD and EYV are attached hereto as Exhibits 1 and 2, respectively.

[2] As discussed more fully in Amgen's Bench Memorandum to the Admissibility of Exhibit EYU as a Roche Party Admission, Docket No. 1303, the 2005 Chugai presentation is an admission by an agent of a party opponent under Federal Rule of Evidence 801(d)(2)(D).

subject of Amgen filings seeking the admittance of these exhibits[3] and subsequent Electronic Orders excluding the evidence pending a showing of relevance by Amgen.[4] Amgen respectfully submits this bench memorandum to explain the relevancy of Exhibits GXD and EYV to issues of infringement in this case.[5]

Amgen's expert, Dr. Leslie Z. Benet, relies on, among other things, the 2004 Roche Regulatory Document and the 2005 Chugai Presentation to support his opinion that CERA is not materially changed from human recombinant EPO, in part, because it acts like a pro-drug.[6] Dr. Benet offers the expert opinion that Roche's peg-EPO product, CERA, like a pro-drug, is made using a parent drug with a known biological activity – epoetin beta, and it is the epoetin beta that acts on the EPO receptor to increase the production of reticulocytes and red blood cells.[7]

Dr. Benet further opines that CERA is not materially changed from Amgen's EPO because CERA, like a pro-drug, breaks down into its component parts of peg and EPO *in vivo*.[8] The 2004 Roche Regulatory Document and the 2005 Chugai presentation provide highly relevant proof that peg-EPO is not materially changed from Amgen's EPO because they demonstrate that

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[3] Amgen's Bench Memorandum to the Admissibility of Exhibit EYU as a Roche Party Admission, Docket No. 1303; Plaintiff Amgen Inc.'s Motion to Admit Exhibits into Evidence for Infringement Phase of Trial, Docket No. 1239.

[4] 10/04/07 Electronic Order entered re 1303 Brief filed by Amgen Inc re: Exhibit EYU: "Exhibit EYU is excluded without prejudice upon the ground that the relevance of the document is not apparent"; 10/03/07 Electronic ORDER entered re 1239 Motion to admit exhibits into evidence for infringement phase of trial: "The Court is satisfied from counsel's representations, that these documents are authentic and constitute admissions. The Court expresses no opinion as to whether any of these documents are relevant."

[5] Exhibit EYV consists of the identical Chugai presentation as in Exhibit EYU, which is attached hereto as Exhibit 3. Amgen seeks to admit Exhibit EYV into evidence because Exhibit EYU was produced by Roche in non-consecutive slide number order, which could be confusing to the jury, and because Amgen's expert, Dr. Benet, reviewed and relied on the slide presentation as produced in Exhibit EYV.

[6] 6/20/07 Second Rebuttal Report of Leslie Z. Benet, Ph.D. (Red Report), ¶ 11 (Dr. Benet's reports were provided to the Court on 9/4/07).

[7] *Id.* at ¶¶ 7-8.

[8] *Id.* at ¶¶ 9-11.

the peg and EPO components of peg-EPO separate *in vivo* in studies conducted on both humans and rats:

- Humans: "The residual PEG moiety within the CERA structure predominantly is excreted into the urine."[9]
- Rats: "Note that both intact CERA and 30kDa PEG are detected in the urine."[10]
- Rats: "Both RO0503821 and 30 kDa PEG were excreted in the urine."[11]

This evidence directly rebuts Ms. Ben-Ami's assertion during opening statements that "[y]ou cannot get EPO out of CERA"[12] in support of Roche's materially changed argument.

For the above reasons, this Court should admit the 2004 Roche Regulatory Document (Exhibit GXD) and the 2005 Chugai Presentation (Exhibit EYV) evidence under Federal Rule of Evidence 402 as relevant evidence of infringement.

Dated: October 12, 2007

AMGEN INC.,

By its attorneys,

/s/ Patricia R. Rich

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

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

[9] Exhibit EVY at R003265623.

[10] *Id.* at R003265602.

[11] Exhibit GXD at ITC-R-BLA-00007490.

[12] Trial Tr. 2379:14-15.

20300 Stevens Creek Boulevard, Suite 400
Cupertino, CA 95014
Telephone: (408) 873-0110
Facsimile: (408) 873-0220

WILLIAM GAEDE III (*pro hac vice*)
McDERMOTT WILL & EMERY
3150 Porter Drive
Palo Alto, CA 94304
Telephone: (650) 813-5000
Facsimile: (650) 813-5100

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 parties as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered parties.

/s/ Patricia R. Rich
Patricia R. Rich