

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

AMGEN, INC.,

Plaintiff,

v.

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

Defendants.

Civil Action No. 05-CV-12237 WGY

**ROCHE'S OPPOSITION TO AMGEN'S "MOTION TO PRECLUDE ROCHE'S EXPERT
DR. GREGORY LONGMORE FROM OFFERING OPINIONS BASED ON AN
INFRINGEMENT ANALYSIS THAT IS INCONSISTENT WITH FEDERAL CIRCUIT
PRECEDENT AND WITH THE COURT'S CLAIM CONSTRUCTION RULING THAT
AMGEN'S CLAIMS ARE OPEN-ENDED (DI 1384)"**

Amgen's motion to preclude Dr. Longmore's testimony on claim 3 of the '933 patent is nothing more than an improper attempt to circumvent this Court's settled claim construction. Moreover, Amgen's assertions in its motion flatly contradict the sworn testimony of Amgen's own experts. Amgen's motion should be denied.

In its July 3, 2007 *Markman* Memorandum and Order (DI 613), this Court specifically construed the '933 claim 3's claim term "glycoprotein product of...expression in a mammalian host cell" to mean "a glycoprotein that is the product of...expression in a mammalian host cell." (DI 613 at p. 32). This definition squarely comports with the well-established principle of claim construction that the words of a claim "are generally given their ordinary and customary meaning." *Id.* at p. 9 (citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 Fed. Cir. 2005). Amgen's attempt to escape the Court's explicit claim construction, through strained analogy to a different claim term (namely, "human erythropoietin") is without merit.

There is no dispute that the claims of the '933 patent require that their claimed product be made in a mammalian host cell. *See, e.g.*, Testimony of Dr. Lodish at Trial Tr. 2507:21 - 2508:1. It is also undisputed that CERA is not made in a cell, and is not the "product of expression in a mammalian host cell" as required by the claims of the '933 patent. *See, e.g.*, Testimony of Dr. Lodish at Trial Tr. 2505:14-18 (confirming that CERA, "itself, is not made in a mammalian host cell."); *see also* Trial Tr. at 2506:13-14, 2507:17-20, 2507:21 - 2508:1

For all of the foregoing reasons, Amgen's motion should be denied.

Dated: October 15, 2007
Boston, Massachusetts

Respectfully submitted,

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

By its attorneys,

/s/ Thomas F. Fleming

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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). Pursuant to agreement of counsel dated September 9, 2007, paper copies will not be sent to those indicated as non registered participants.

/s/ Thomas F. Fleming