

Exhibit 4

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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PATENTS COURT

HC 1999 Nos. 02916/02917
HC 1999 No. 03241

Royal Courts of Justice
Wednesday, 6th February 2002

Before:

MR. JUSTICE NEUBERGER

HOECHST MARION ROUSSEL

Claimants/Petitioners

v.

KIRIN-AMGEN INC. & OTHERS

Defendants/Patentees

*(Computer-aided transcript of the Stenograph Notes of
Marten Walsh Cherer Limited, Midway House
27/29 Cursitor Street, London EC4A 1LT
Telephone Number 0207 405 5010. Fax Number 0207 405 5026)*

MR. ANTONY WATSON QC and MR. ANDREW WAUGH QC and
MR. TOM HINCHLIFFE (instructed by Messrs.
Taylor Joynson Garrett) appeared on behalf of Kirin-Amgen.

MR. DAVID KITCHIN QC and MR. RICHARD MEADE and MISS LINDSAY LANE
(instructed by Messrs. Bird & Bird) appeared on behalf of the
TKT parties.

PROCEEDINGS
DAY 3

1 BORUN - KITCHIN
 2 I am not apportioning blame to anybody.
 3 MR. KITCHIN: I have nearly come to an end, my Lord.
 4 A. In A2, tab 2, page 159, around line 45 we are talking about
 5 the yeast expression product that says "Preliminary analysis
 6 (Reads to the words) and relatively high mannose
 7 content of the associated carbohydrate."
 8 Q. So that would provide a basis for getting some sort of claim
 9 to yeast?
 10 A. That would provide a basis for getting a claim to recombinant
 11 products that are glycosylated and that differ in terms of
 12 their glycosylation from urinary products, which are the
 13 prior art products.
 14 Q. At any rate, whether that is right or wrong was not explored
 15 with the board, but what you did have basis for was the SDS
 16 comparison on page 146. That you chose to rely upon, did you
 17 not?
 18 A. Yes, we did. It was in Prof. Cummings's chart. It was in
 19 our briefs, and we relied on it.
 20 Q. I suggest to you that when you relied upon that statement and
 21 you had access to all your scientists present, you knew that
 22 the statement in the patent was not right with regard to COS?
 23 A. I reject that suggestion.
 24 Q. You had filed the two declarations from Dr. Egrie in 1991 and
 25 the brief yourself in 1991 indicating that COS and urinary

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1 BORUN - KITCHIN
 2 scientific counselling by at least Dr. Fritsch.
 3 Q. Do you know if he had the Egrie input file with him?
 4 A. I know he was aware of it.
 5 Q. But you have no idea ---
 6 MR. JUSTICE NEUBERGER: Wait a minute.
 7 A. I do not know if he had it with him and I do not know if GI's
 8 patent counsel, who was also there -- I am afraid his name
 9 escapes me -- was familiar with the interference.
 10 MR. JUSTICE NEUBERGER: You believed that Dr. Fritsch had seen
 11 it.
 12 A. I do believe that.
 13 Q. You did not know whether he had it with him or not but you
 14 believed at some point he had seen it. Why did you believe
 15 that and what was that based on?
 16 A. Because it appeared to me that the entire Boehringer Mannheim
 17 series of arguments was being formulated by Genetics
 18 Institute and not by the counsel that was nominally
 19 representing them. The arguments were very familiar, almost
 20 identical to those raised in the interference on the issue of
 21 whether or not urinary EPO and recombinant EPO were
 22 different.
 23 MR. KITCHIN: Do you have any knowledge as to whether or not
 24 Dr. Fritsch was free to use the Egrie input file in
 25 connection with the European Patent Office proceedings?

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1 BORUN - KITCHIN
 2 migrated to the same extent on SDS?
 3 A. I agree with that.
 4 Q. We have not been able to identify any evidence from any Amgen
 5 scientist supporting a statement that COS has a higher
 6 apparent molecular weight than urinary EPO.
 7 A. In the experiment that was performed that was my
 8 understanding. I think it has been confirmed by others who
 9 have looked at the same gel. I think it is confirmed in the
 10 wording, albeit possibly ambiguous wording, of slightly or
 11 approximately equal ---
 12 MR. JUSTICE NEUBERGER: We are going over the same ground. I
 13 appreciate it is at a different stage in the process, but
 14 they are really the same point.
 15 MR. KITCHIN: They are. You also knew by this time that urinary
 16 EPO was highly variable.
 17 A. I do not understand that.
 18 Q. I suggest to you that you failed to disclose to the board
 19 what you knew about Lot 82 having the same apparent molecular
 20 weight as CHO recombinant EPO?
 21 A. I reject that. That is contrary to facts in the papers that
 22 were being relied upon by our opponents.
 23 Q. How do you know that the Roche parties at the European Patent
 24 Office had an opportunity to consider the Egrie input file?
 25 A. Because Roche parties were represented there and given

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1 BORUN - KITCHIN
 2 A. I do not. I believe it was one of the trial exhibits in
 3 Boston. If it were a trial exhibit in Boston, then all
 4 confidentiality wraps would be off. And I would agree with
 5 you, let us put it this way, that the Egrie input document in
 6 and of itself without explanatory declarations and the like
 7 does not amount to much. It is just a collection of scraps
 8 of paper, some from notebooks, some written out especially
 9 for the purpose of whatever Dr. Egrie's purpose was at the
 10 time.
 11 MR. JUSTICE NEUBERGER: Just one point. You said in answer to
 12 Mr. Kitchin the reason you believed that Roche had the Egrie
 13 file was that Dr. Fritsch had got it and you explained that.
 14 Mr. Waugh was concerned, I think possibly rightly, that
 15 Mr. Kitchin unintentionally interrupted you. You might have
 16 been going to say some other person may have had it. I did
 17 not want you to miss that opportunity.
 18 A. I can certainly supply it to you tomorrow morning, my Lord,)
 19 but his name escapes me. He is this at all. He has grey
 20 hair. Their in-house patent counsel was there throughout the
 21 proceedings.
 22 Q. Roche's in-house patent counsel or GI's?
 23 A. GI's, yes.
 24 MR. KITCHIN: The document is covered with "confidential" stamps.
 25 Do you have any direct knowledge yourself of whether or not

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33 (Pages 453 to 456)

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<p>1 BROWN - KITCHIN</p> <p>2 in our response to the appeals, we made the point that only</p> <p>3 prior art, only uEPO that was prior art was citable.</p> <p>4 Q. I am not talking about that at all. I am talking about the</p> <p>5 position here.</p> <p>6 A. This is not prior art EPO. It cannot be.</p> <p>7 MR. JUSTICE NEUBERGER: Just wait for the question.</p> <p>8 MR. KITCHIN: Thank you, Mr. Brown.</p> <p>9 A. I am sorry.</p> <p>10 Q. Could we have a look, please, together at this declaration</p> <p>11 which you submitted.</p> <p>12 MR. JUSTICE NEUBERGER: How long is it going to take? Do you</p> <p>13 want to deal with it now or tomorrow morning.</p> <p>14 MR. KITCHIN: It might just take a minute or two, so shall we</p> <p>15 take it in the morning?</p> <p>16 MR. JUSTICE NEUBERGER: What time would you like to start in the</p> <p>17 morning?</p> <p>18 MR. KITCHIN: I am in your Lordship's hands.</p> <p>19 MR. JUSTICE NEUBERGER: From what I gather, the witness would</p> <p>20 rather start sooner than later. Would it seem sensible to</p> <p>21 start at ten o'clock.</p> <p>22 MR. KITCHIN: Yes, my Lord.</p> <p>23 MR. JUSTICE NEUBERGER: Do you want to start earlier or not?</p> <p>24 MR. KITCHIN: Ten o'clock is certainly convenient for me, my</p> <p>25 Lord.</p> <p style="text-align: center;">481</p>	<p>1 BROWN - KITCHIN</p> <p>2 available. I am sure you know the rules, that you must not</p> <p>3 talk to anybody about the case. It will be 9.30, subject to</p> <p>4 reconsideration.</p> <p>5 (Adjourned at 4.35 till 9.30 tomorrow morning)</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">483</p>
<p>1 BROWN - KITCHIN</p> <p>2 MR. JUSTICE NEUBERGER: Do you want to start earlier than that?</p> <p>3 If you want a minute to think about it ---</p> <p>4 MR. WAUGH: It would assist getting finished in a day. We would</p> <p>5 advocate a little earlier. There is no one witness who is</p> <p>6 going to be subjected to a long day tomorrow.</p> <p>7 MR. JUSTICE NEUBERGER: If we could start earlier, Mr. Waugh is</p> <p>8 saying that would be better. You have got the brunt of it,</p> <p>9 because you have got this cross-examination and two others.</p> <p>10 While it would be nice to finish on Thursday, I do not want</p> <p>11 to be oppressive to you. I tell you what. I am going to say</p> <p>12 I will be ready to start at 9.30. If you do not want to</p> <p>13 start till ten o'clock, that is fine provided Mr. Watson and</p> <p>14 Mr. Waugh and everybody else knows by six o'clock whether you</p> <p>15 want to start at 9.30, 9.45 or 10 o'clock, I will leave it to</p> <p>16 you because you have the brunt of it.</p> <p>17 MR. KITCHIN: My junior is certainly going to take one of the</p> <p>18 witnesses, so that will assist.</p> <p>19 MR. JUSTICE NEUBERGER: I would rather start earlier than later.</p> <p>20 MR. KITCHIN: Would your Lordship prefer to start at half-past</p> <p>21 nine?</p> <p>22 MR. KITCHIN: Half-past nine it is, my Lord.</p> <p>23 MR. JUSTICE NEUBERGER: It you do change your mind because you</p> <p>24 have the brunt of it, let Mr. Waugh and Mr. Watson know and</p> <p>25 make sure the witness knows. I will say 9.30, and I will be</p> <p style="text-align: center;">482</p>	

40 (Pages 481 to 483)

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