

EXHIBIT 2

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3

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4 AMGEN INC.,)
)
5)
 Plaintiff,)
6)
 vs.) No. 05 Civ. 12237 WGY

7)
)
8 F. HOFFMAN-LA ROCHE LTD,)
 ROCHE DIAGNOSTICS, GmbH, and)
9 HOFFMAN-LA ROCHE INC.,)
)
10)
 Defendants.)

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14
15 CONFIDENTIAL VIDEOTAPED
16 DEPOSITION OF STUART WATT
17 Westlake Village, California
18 Thursday, March 29, 2007
19

20 (This transcript contains testimony
21 designated confidential as per Section 5(c)
22 of the Amended Protective Order. Please
23 treat the entire transcript in accordance
24 with the protective order.)

25
26 Reported By Susan A. Sullivan, CSR No. 3522
27 PRS Job No. 118-372540

1 would be happy to --

2 Q That's actually pretty accurate. My only
3 followup question is do you also understand that the
4 double patenting immunity also applies to District
5 Court proceedings?

6 MR. FLOWERS: Same instruction as to --

7 A I don't know whether that's in Section 121
8 or not. If you represent that it is, I have no
9 reason to doubt your representation.

10 MR. SUH: I'm not going to mark this as an
11 exhibit but I'm going to read into the record
12 35 U.S.C. Section 121 from www.usptl.gov and it
13 is an excerpt and it states, "The patent
14 issuing on an application with respect to which
15 a requirement for restriction under this
16 section has been made, or on an application
17 filed as a result of such requirement, shall
18 not be used as a reference either in the Patent
19 and Trademark Office or in the courts against
20 the additional application or against the
21 original application."

22 Q So based upon that, Mr. Watt, do you
23 understand Section 121 is offering an applicant
24 immunity from a double patent attack both in the
25 patent office and in District Court proceedings?

1 MR. FLOWERS: I will object to the preamble
2 to the question. I can't tell what you are
3 reading from, Mr. Suh. Also I will repeat my
4 prior instruction to Mr. Watt that to the
5 extent the answer to that question would
6 require you to reveal any mental impressions
7 formed during or in anticipation of litigation
8 at any point, or any other work product, I
9 would instruct you not to include any such
10 information in your answer.

11 I would also note that this is not included
12 within any 30(b)(6) topic before which Mr. Watt
13 has been designated as a designee by Amgen, and
14 I think we're straying from any 30(b)(6) topic
15 or Mr. Watt's role here as a fact witness.

16 If you understand the instruction, then
17 provide what answer you can, Mr. Watt.

18 A Thank you.

19 I believe that that's consistent with the
20 statute as I understand it. I have no reason to
21 doubt that that's the language of the statute and it
22 does provide immunity in District Court proceedings
23 as well as in the patent office.

24 Q Now, Mr. Watt, looking at Exhibit Number 2
25 which is Amgen's supplemental responses to Roche's

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1 interrogatory, if you look at Page 3, the third
2 paragraph, it is the paragraph that starts with
3 "Amgen will assert at trial." Do you see that?

4 A Yes, I do.

5 Q Okay. So based upon this particular
6 paragraph do you see that Amgen is asserting the
7 '868 patent, the '698 patent, the '349 patent, the
8 '422 patent, the '933 patent and the '080 patent
9 against Roche in this case?

10 A Yes.

11 Q Okay. Now on that same exhibit if you
12 could go to Page 31, and under "Supplemental
13 Response To Interrogatory No. 10," it is the second
14 paragraph, it states, there are some objections in
15 the prior paragraph but the second paragraph states
16 U.S. Patents Nos. '933, '080, '349, '698 and '422
17 are exempt by action of 35 U.S.C. Section 121
18 because later issued claims were subject to a
19 restriction requirement during the prosecution of
20 the application which later issued as U.S. Patent
21 No. '008 and the later issued claims are consonant
22 with the examiner's restriction requirement. Do you
23 see that?

24 A Yes, I do see what.

25 Q Do you see that the '868 patent is not

1 listed among the patents in the second paragraph?

2 A I believe that you are correct, it is not
3 listed.

4 Q Do you have an understanding as to whether
5 Amgen is relying upon Section 121 in response to a
6 double patent attack on the '868 patent?

7 MR. FLOWERS: I will instruct Mr. Watt, I
8 believe that invades the attorney-client
9 privilege and attorney work product doctrine
10 protection and I will instruct Mr. Watt not to
11 answer that question on that basis.

12 MR. SUH: I think it is discoverable
13 information to the extent that he was asked in
14 a discovery request. I know the parties have
15 been trying to negotiate supplemental
16 responses. To the extent that the witness
17 today can actually provide supplementation
18 through discoverable subject matter, I would
19 like to get that information.

20 MR. FLOWERS: I understand what you may
21 like to get but my instruction stands. Mr.
22 Watt is not here to provide an explanation of
23 all of Amgen's or any of Amgen's contentions in
24 the litigation, he is here as a fact witness.
25 If there's a 30(b)(6) topic that Roche

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1 THE VIDEOGRAPHER: This is the end of Tape
2 Number 1 of the videotaped deposition of Stuart
3 Watt. The time on the video monitor is 10:07
4 a.m.

5 (Recess)

6 THE VIDEOGRAPHER: This is the start of
7 Tape Number 2 of the videotaped deposition of
8 Stuart Watt. Going back on the record, the
9 time on the video monitor is 10:17 a.m.

10 BY MR. SUH:

11 Q Mr. Watt, Exhibit 6 is the prosecution file
12 history of the '868 patent. Were you involved at
13 one point in the prosecution of the '868 patent?

14 A Yes.

15 Q Okay. And by virtue of your involvement in
16 the prosecution of the '868 patent, did you become
17 familiar with the file history?

18 MR. FLOWERS: Objection; vague and
19 ambiguous.

20 A Well, I certainly was familiar with the
21 parts that I was involved with. If you are asking
22 did I go back and look at the complete file history
23 from the beginning, I don't remember that I did. I
24 may have, but I don't remember that I did.

25 Q Okay. And I'm just going to ask you a

1 MR. FLOWERS: Objection to the extent it
2 mischaracterizes his prior testimony.

3 MR. SUH: That wasn't my intent.

4 A I appreciate that you are trying to
5 summarize my prior testimony.

6 Q Yes.

7 Do you recall that in the course of your
8 involvement of the '868 patent file history the
9 issue of an obligate glycoprotein was raised in the
10 context of a double patenting rejection issued by
11 the patent office on the current pending application
12 based upon an earlier issued '008 patent?

13 A Yes, I think I recall that happening.

14 Q Before we actually get to the office action
15 rejection based on double patenting, do you recall
16 that in the course of the prosecution of the '868
17 patent that Amgen informed the patent office that
18 numerous other mammalian cells capable of effecting
19 glycosylation of the expressed polypeptides were
20 known to those skilled in the art at the time of the
21 '868 invention?

22 MR. FLOWERS: Vague and ambiguous to the
23 extent it lacks foundation. You are just
24 asking for his recollection?

25 Q Yes.

1 A I don't disagree that we might have made
2 that statement but I have no recollection that that
3 was the precise language that was used in any
4 particular file history.

5 Q Sure. Sticking with the '868 file history,
6 it is behind Tab 33, it is another amendment that
7 Amgen proffered to the patent office and I want to
8 direct your attention, sir, to it is Page 5 of the
9 amendment.

10 A Yes.

11 Q And here Amgen is responding to rejection
12 based upon Sections 101 and 112 and under Point 2,
13 Paragraph 2, Amgen is attempting to traverse the
14 non-enablement and indefiniteness objections under
15 Section 112. Do you see that?

16 MR. FLOWERS: Objection to the extent you
17 mischaracterized the document.

18 A I see that the page that you referenced me
19 to, I see that we are responding to Section 101 and
20 112 rejections.

21 Q And within that paragraph, Paragraph 2, do
22 you see that Amgen is telling the patent office that
23 its patent specification discloses examples of
24 expression in mammalian cells, in both CHO cells and
25 COS cells, do you see that?

1 MR. FLOWERS: Objection; lacks foundation
2 to the extent you mischaracterized the
3 document. The document speaks for itself.

4 A I see the sentence which I think you are
5 referring to which Amgen has disclosed the
6 production of in vivo biologically active
7 erythropoietin in mammalian cells and has
8 specifically exemplified the production of in vivo
9 biologically active monkey and human species
10 erythropoietin in monkey (COS) and Chinese Hamster
11 Ovary (CHO) cells.

12 Q The next statement says, "Numerous other
13 mammalian cells capable of effecting glycosylation
14 of expressed polypeptides were known to those
15 skilled in the art at the time of the present
16 invention."

17 Do you see that?

18 A Yes, I see that sentence.

19 Q Do you believe that was an accurate
20 statement at the time it was made?

21 A Yes.

22 Q Do you believe it is still an accurate
23 statement?

24 A Based on my understanding of the skill and
25 the art, yes, I believe it is accurate.

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1 withdrawn because (a) Process claims are not obvious
2 over host cell" -- I'm sorry, "process claims are
3 not obvious over those claims because of necessary
4 proper glycosylation of EPO for activity. Applicant
5 indicated that documentation to this effect is in
6 the record. (b) Product, host, and process claims
7 were involved in separate interferences in PTO,
8 hence claims are patently distinct. Examiner did
9 not comment on patentability of claims."

10 Did I read that statement correctly?

11 A I believe so, yes.

12 Q So based upon this statement, does it
13 indicate to you that during this examiner interview
14 Amgen's representatives, which included yourself,
15 Mr. Borun and Mr. Odre, were explaining to the
16 patent examiner that the '008, the obviousness-type
17 double patenting rejection should not apply because,
18 among other things, the '008 patent claims were the
19 subject of a particular interference and the claims
20 that were pending in the '868 application were the
21 subject of a different interference?

22 MR. FLOWERS: Mr. Suh, are you asking
23 whether he recollects that --

24 Q Uh-huh.

25 A -- or just on his statement?

1 Q Both.

2 MR. FLOWERS: I will object to the extent

3 the question requires Mr. Watt to formulate a

4 legal opinion about the statement right now.

5 If you are asking about his recollection,

6 that's fine.

7 A Yes, I recall that we argued the patent

8 office, probably discussed with the examiner in this

9 interview as indicated in the record, that the

10 product, process and DNA were in separate

11 interferences in the PTO.

12 Q Then if we go to Tab 43, just the next

13 paper, I believe it is Applicant's Amendment And

14 Remarks. On Page 4 of that document there begins a

15 discussion on heading "The Double Patenting

16 Rejection May Properly Be Withdraw" and Amgen

17 presents its -- I believe Amgen is presenting its

18 arguments as to why the double patenting rejection

19 should be withdrawn, and I want to direct your

20 attention to Page 7.

21 A Okay.

22 Q Okay?

23 And it states, "In proceedings before the

24 Board of Patent Appeals and Interferences, separate

25 interferences were drawn for the DNA-related subject

1 Amgen had used those words.

2 Q Do you recall whether those particular
3 words were ever used in a document that was authored
4 by Amgen?

5 A I think that they were, yes.

6 Q Which documents were they?

7 A Perhaps some briefs that were filed in the
8 interference.

9 Q Do you believe at the time that statement
10 was made in briefs that were filed in the
11 interference that Amgen was trying to be as truthful
12 and accurate as possible?

13 MR. FLOWERS: Objection; vague and
14 ambiguous.

15 A I have no reason to question the truth or
16 accuracy of representations made by Amgen before I
17 arrived so I have really no basis to know that, but
18 I have no reason to doubt the truth or accuracy of
19 the statement.

20 Q Did Amgen ever tell the patent office that
21 despite the fact that there were two different
22 interferences declared with respect to the host cell
23 claims and the process claims, that Amgen made
24 arguments that the -- to the Board of Patent Appeals
25 that these two particular counts were merely

1 different manifestations of the same invention?

2 MR. FLOWERS: Objection; vague and
3 ambiguous, outside the scope of the 30(b)(6)
4 topics.

5 A I don't remember using those words. I do
6 remember that Amgen argued that the patent office
7 had, one, already determined that they were separate
8 inventions according to the law of unity of
9 invention, perhaps is the word, and one of the
10 arguments on behalf of that was the institution of
11 the separate interferences.

12 MR. SUH: I would like to mark as Exhibit 8
13 a document bearing Bates stamp Number AM-ITC
14 00337649 to 7715.

15 (Exhibit 8 marked)

16 Q Mr. Watt, the court reporter has placed
17 before you Exhibit 8, and Exhibit 8 is the Brief For
18 The Senior Party Lin in Interference No. 102,097.

19 Have you ever reviewed this document
20 before?

21 A Yes, I believe I have.

22 Q When was the last time you reviewed this
23 document?

24 A It has been a number of years. I couldn't
25 tell you exactly when it was, but it has been a

1 A I think this is, as I mentioned before,
2 this is in reference to the Fritsch position which
3 you read out which is quoted there.

4 Q Uh-huh.

5 A And I would understand this to say simply
6 that the applications are related and I think on
7 both sides the claims at issue stem from a common
8 specification.

9 Q Do you recall that Amgen was arguing within
10 this particular document that because the patent
11 board had already resolved issues in favor of Amgen
12 in the '096 interference and in District Court
13 proceedings, that that should also bind the board of
14 interference with respect to finding priority for
15 Amgen in the '097 interference?

16 MR. FLOWERS: Objection. It is vague and
17 ambiguous. It is unclear whether you are
18 asking for his recollection.

19 A I recall that, again, based on the facts as
20 put forward by the parties in that Lin was the first
21 to actually clone the gene, express the gene in host
22 cells, detect its biological activity prior to
23 Fritsch cloning the gene, it was clear that priority
24 was clear to Amgen.

25 Q And when you mean Lin, you mean party Lin?

1 Are you referring to party Lin or to Dr. Lin
2 himself?

3 A It is the same person.

4 Q You are absolutely right, it is the same
5 person.

6 Do you recall whether Dr. Lin had any
7 involvement in the preparation of this document?

8 MR. FLOWERS: Objection; vague and
9 ambiguous.

10 A This document was filed before I joined
11 Amgen so I wouldn't know whether Dr. Lin had any
12 involvement in its preparation.

13 Q Okay. I want to direct your attention to
14 Page 24 of this document and there's a heading
15 there, B, "Summary of Lin's Position." Do you see
16 that?

17 A Yes.

18 Q And under small (iii) on Page 25, I'm going
19 to read this into the record. It states, "While the
20 count is directed to a process for preparing in vivo
21 biological active EPO using a mammalian host cell
22 transfected or transformed with an isolated DNA
23 sequence in coding human EPO, and the litigation was
24 directed to the purified and isolated DNA sequence
25 and host cells transfected or transformed thereby,

1 Q Derived from consistent inventive actions.

2 Let's take it one at a time.

3 Mr. Watt, it does say that this statement
4 was acknowledged by Fritsch, et al., but hasn't
5 Amgen actually adopted this statement by putting it
6 as part of their summary of Dr. Lin's position for
7 reference of this interference?

8 MR. FLOWERS: Objection; vague and
9 ambiguous, lacks foundation, outside the scope
10 of 30(b)(6) topics, and argumentative.

11 A I don't think I would characterize it that
12 way.

13 Q Isn't Amgen arguing the same position that
14 Fritsch acknowledged?

15 MR. FLOWERS: Same objections.

16 A Amgen is using Fritsch's position against
17 Fritsch, yes.

18 Q Yes. And Amgen is using Fritsch's position
19 that the count to be '097 and the DNA and host cell
20 claims of the District Court litigation were
21 different manifestations of the same invention;
22 isn't that correct?

23 MR. FLOWERS: Objection; vague and
24 ambiguous, lacks foundation, outside the scope
25 of the 30(b)(6) topics.

1 A Well, the document says what it says and I
2 think I gave you my understanding. I was, you know,
3 not involved in its drafting, I was not there, and I
4 can only tell you how I read the document today.

5 Q Sure. I believe that the words you had
6 used is that this particular statement was
7 consistent, it is derived from consistent inventive
8 actions. Right?

9 MR. FLOWERS: Objection; mischaracterizes
10 his prior testimony. That's not what he said.

11 A I'm not certain that's what I said and now
12 that you repeat it back to me, I can understand this
13 is not very clear in itself.

14 Q And I apologize, you know. It is not my
15 intention to mischaracterize your testimony, but
16 perhaps I could ask you again, with respect to this
17 particular statement on the top of Page 26 where
18 Amgen is stating "It is evident that these are only
19 different manifestations of the same invention,"
20 what did Amgen mean when it said that?

21 MR. FLOWERS: Same objections.

22 A Well, it is hard for me to give a meaning
23 when Amgen wrote the document or Amgen submitted the
24 document --

25 Q What does it mean to you?

1 Q Okay. So here Amgen is -- is it your
2 understanding that Amgen by this statement is saying
3 that the whole purpose of the claims of the '008
4 patent is to actually express and to make in vivo
5 biologically active human EPO?

6 MR. FLOWERS: Objection; vague and
7 ambiguous, lacks foundation. It is also
8 outside of the 30(b)(6) document.

9 A I see the words that you have called my
10 attention to. I'm not certain I can give them any
11 more meaning other than just what they say. So if
12 you are asking me to interpret this, I'm not certain
13 I can add much to this.

14 Q You cannot add much to it?

15 A No.

16 Q Okay.

17 A I don't think so.

18 Q Well, let's try the next statement. It
19 says, "Stated otherwise, the process language of the
20 Lin patent claims at issue in the litigation
21 ('encoding human EPO') is, for all intents and
22 purposes, a description of the present count," and
23 stop there.

24 Can you tell me what your understanding of
25 this statement is?

1 A I don't have much understanding of this, it
2 doesn't make much sense to me because the process
3 claims were not at issue in the litigation.

4 Q That's right. In fact, when it is talking
5 about the litigation, it is talking about the '008
6 patent, correct?

7 A That's what I understand it is referring
8 to. Since I wasn't involved in drafting this it
9 could be referring to something else, but I
10 understand it to be referring to the District Court
11 litigation on the '008 patent.

12 Q That's right.

13 And doesn't this statement indicate that
14 Amgen is arguing that the encoding human EPO
15 language within the DNA and host cell claims of the
16 '008 patent is for all intents and purposes a
17 description of the process for making recombinant
18 EPO that is the subject of the '097 interference?

19 MR. FLOWERS: Objection; vague and
20 ambiguous, lacks foundation, outside the scope
21 of 30(b)(6) topics. Also appears to call for
22 Mr. Watt to formulate a legal opinion as he
23 sits here which I would instruct you not to do,
24 Mr. Watt.

25 A I would not understand the language to

1 sitting here today?

2 MR. FLOWERS: Objection; vague and
3 ambiguous, lacks foundation, outside the scope
4 of the 30(b)(6). Also I would caution Mr. Watt
5 not to formulate legal opinions on the spot.

6 A Given the factual record that was found in
7 the District Court action, Lin was certainly the
8 first to clone the gene and the first to express the
9 recombinant EPO product.

10 Q I understand. But is that your
11 understanding of what this statement is saying?

12 MR. FLOWERS: Same objections.

13 A Well, I understand the statement. Again,
14 perhaps I should put in the qualifiers that we had
15 put in place with all these other statements that we
16 have been talking about that occurred prior to my
17 joining Amgen, but -- so I'm looking at this from a
18 perspective of years later as opposed to being
19 involved at the time and understanding what the
20 intent was at the time. My understanding of this
21 statement is based on that factual record and I
22 think the District Court decision was cited and
23 perhaps even submitted with this. So, yes, I think
24 it is referring to those factual findings that were
25 included in the District Court decision.

1 Q But focusing just on the underlined portion
2 of this language which I assume was underlined for
3 point of emphasis, isn't Amgen telling the patent
4 board that because Lin was the first to invent the
5 DNA sequence claims as well as host cells in a
6 manner allowing it to express the recombinant EPO as
7 was the subject of the '008 patent, he is, quote,
8 "of necessity the first to invent the process for
9 making the recombinant EPO," isn't that what this
10 statement is saying?

11 MR. FLOWERS: Objection; lacks foundation,
12 vague and ambiguous, outside 30(b)6, and
13 argumentative.

14 A Yes. Words to those effect appear on the
15 page but my understanding is that it is in the
16 context of not only the factual record which I just
17 described, but also the issues that and the position
18 that Fritsch was taking which again we discussed
19 previously that Fritsch's whole case turned on prior
20 conception of the DNA and that issue was resolved in
21 Amgen's favor in the District Court litigation.

22 Q Sure.

23 A So based on, you know, again, in the
24 context of Fritsch's position on priority, this --
25 and the facts that were found, this statement is