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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
Tuesday, 5th 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 2

HOECHST v KIRIN

6 FEBRUARY 2002

DAY 3

1 BORUN - KITCHIN
 2 A. Auxiliary request 11 was formulated and it was accepted.
 3 Q. Who formulated it? Again, I do not want you to waive
 4 privilege, save in so far as you are entirely happy to do so.
 5 A. That is good, because I do not recall who formulated it.
 6 Q. Presumably you would have been involved?
 7 A. Presumably I would have been involved.
 8 Q. You say in paragraph 27 of your statement that the scientists
 9 were not shielding. What does that mean?
 10 A. There was an implication in one of the papers you filed that
 11 the insertion of SDS-PAGE as a limitation was done purposely
 12 without the knowledge or consent, to the extent that they
 13 could have consented, of Dr. Egrie, for example, and the only
 14 point I am making there is that while they were to my
 15 recollection involved in the formulation of those 15 sets of
 16 auxiliary sets of claims, there was nothing that kept them
 17 from having a copy, and in fact they probably did have a copy
 18 when they were handed up.
 19 Q. The next day?
 20 A. I know Mr. Brown is very clear on this. I will defer to his
 21 recollection. Mine is certainly not inconsistent. I know
 22 the board got them the next day. It might have been the case
 23 that they were done right there in the large appeal room and
 24 distributed to other parties overnight, but I think it is
 25 more likely than that Mr. Brown's recollection is correct

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1 BORUN - KITCHIN
 2 A. As well as the generalized statement. 2020 hindsight tells
 3 me that in 1984 I should have gone to Lin or somebody and
 4 say, "Well, we are going to say there are differences in
 5 every carbohydrate composition. We have got these
 6 preliminary tests. Give me some more so I can put them down
 7 -linkages, tetraantennary structure and the like. They will
 8 probably be supportable." If I had done that, we would have
 9 had tetraantennary structure to put into the claim instead of
 10 SDS. We would have had linkage differences which even
 11 Dr. Cumming (G's expert glycobiologist) said were entirely
 12 different between human and CHO cells. If that is the bad
 13 practice I am accusable of, I accept that too.
 14 Q. So in practice then you would have had a claim which was
 15 really to CHO cells; is that right?
 16 A. No. We would have had a claim that addressed the difference;
 17 for example, some of these differences were with bovine and
 18 hamster kidney cells.
 19 Q. I understand. The point you have just made would have been a
 20 distinction between human cells on the one hand and CHO or
 21 COS cells on the other; is that right?
 22 A. It would have been between urinary EPO and recombinant EPO of
 23 whatever stripe as long as you got a glycoprotein coming out.
 24 Q. That would have raised, no doubt, its own interesting
 25 questions of infringement?

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1 BORUN - KITCHIN
 2 that the board, as well as the other parties, got those on
 3 the morning of the third day. That would make more sense in
 4 terms of getting copies made and things like that. I doubt
 5 that there were the facilities to do 15 different things and
 6 make a couple of sets for each opposing party and have some
 7 for ourselves.
 8 Q. Looking at bundle A2, tab 2, page 146, you knew, did you not,
 9 that the passage from line 17 to 26 was wrong and could not
 10 be relied upon?
 11 A. 17 to 26. Some of it was wrong.
 12 Q. And you knew you could not rely upon that passage.
 13 A. We knew we could not rely on it if you are referring to the
 14 carbohydrate data. We knew we could not rely on the hexose
 15 value to establish a difference because there was a question
 16 about the validity. It just was a bad experiment. There
 17 was too much material out rather than came in. We certainly
 18 did not want to rely on the data reflecting fucose content.
 19 There the data was wrong both with respect to urinary and
 20 recombinant EPO. That was completely missed on
 21 O-glycosylation. That was not the difference. We would not
 22 have relied on it in any event. 0 and 0 are the same; not
 23 different. We could not rely on the hexose.
 24 Q. The only other paragraph upon which you could rely was the
 25 one immediately above it, the SDS-PAGE comparison.

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1 BORUN - KITCHIN
 2 A. I am at a loss to understand your question.
 3 Q. I will leave it. At any rate, there is no basis in terms of
 4 textual description of any such distinction in the patent, is
 5 there?
 6 MR. JUSTICE NEUBERGER: Once you have taken out lines 16 onwards.
 7 MR. KITCHIN: Yes. The board had indicated —
 8 A. There are no experiments to describe. I will give you that.
 9 There are no experiments to describe.
 10 Q. The board had indicated that relying upon average
 11 carbohydrate composition as a whole was not acceptable. We
 12 have looked at all those general distinctions sought to be
 13 drawn by Dr. Cumming, have we not?
 14 A. I am trying to remember whether or not there was a reference
 15 to a difference in molecular weight for the yeast-produced
 16 material.
 17 Q. But you were left as a practical matter —
 18 A. In that section certainly.
 19 Q. Relying upon and having to rely upon the paragraph from line
 20 6 through 10, which concerned SDS. Is that not right?
 21 A. I am looking now, that you have invited me to look to, see if
 22 there is something that addresses the apparent molecular
 23 weight of the yeast-produced material.
 24 MR. JUSTICE NEUBERGER: While he is looking, Mr. Kitchin, how are
 25 we doing in terms of time? We are running quite slowly.

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32 (Pages 449 to 452)

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