EXHIBIT 49

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

AMGEN, INC., Plaintiff, vs. F. HOFFMANN-LA ROCHE, LTD., a Swiss Company, ROCHE DIAGNOSTICS GmbH, a German Company, and HOFFMANN-LA ROCHE, INC., a New Jersey Corporation, Defendants	))))))))))))))	Civil Action No.: 05-12237 WGY **<u>REBUTTAL EXPERT REPORT OF PROFESSOR EINER ELHAUGE</u>**

May 11, 2007

II. ECONOMIC THEORY SHOWS THAT GREATER COMPETITION UNDER ASP+6% SYSTEM WILL NOT RAISE PRICES BUT RATHER WILL INCREASE DISCOUNTS

22. Professor Bernheim's analysis of pricing starts with the premise that buyers desire greater cost recovery and thus may have incentives to use drugs that have higher ASPs.[22] He then leaps almost immediately to the conclusion that "competition under the ASP-based reimbursement methodology may well place upward pressure, rather than downward pressure, on drug prices, treatment costs, and consequently, reimbursement costs."[23] But the conclusion does not follow from the premise. Simply because higher priced products provide greater reimbursement than lower priced products does not mean that manufacturers will compete by raising prices. What buyers want is more cost recovery, which can be provided by both discounts and reimbursements. Thus, whether competition causes net prices to go up or down in the ASP+6% markets depends on whether manufacturers compete via offering ever larger discounts (which drive net prices down) or by raising net prices to raise reimbursement levels. But Professor Bernheim does not seriously analyze the economic incentives that influence whether buyers will prefer sellers that offer greater discounts or sellers that offer higher prices. He simply asserts that buyers' desire for greater cost recovery may well drive prices up, rather than driving discounts higher. He then assumes that the incumbent firm can, after entry, simply choose whether it regards it as more attractive to compete with discounts or with higher prices, and thus concludes that, unless it were short-term oriented, the incumbent firm would prefer to increase prices.[24] But the incumbent cannot simply choose the grounds of competition it finds most attractive to itself, for entrants have incentives to choose the grounds that most advantage the entrant, and both must satisfy buyer demand and meet Medicare constraints.

23. Contrary to Professor Bernheim's conclusions, economic theory shows that increasing the amount of competition in the ASP+6% system leads to lower marketwide prices because rivals will compete with one another using discounts, not price increases. I demonstrate that this is so by applying the tools of economic theory to analyze manufacturer and buyer incentives under this system. In fact, two

[22] *See* Bernheim Report ¶78 & Figure 9.
[23] *See* Bernheim Report ¶80
[24] *See* Bernheim Report ¶90-93

independent lines of economic reasoning demonstrate Professor Bernheim's conclusions are economically baseless. First, new entry will not raise marketwide prices because economic theory shows that the incumbent firm will already be charging Medicare's maximum allowed quality-adjusted price, leaving no room to raise prices. Second, even ignoring this constraint, economic theory shows that buyer pursuit of greater cost recovery under the ASP+6% system will drive prices down. This is because buyers will seek to increase their cost recovery through discounts rather than price increases, and competitive sellers will have to satisfy that buyer demand to win sales. Further, sellers have strategic incentives to compete using discounts, not price increases. All this will drive prices down in a competitive market, much as buyer pursuit of lower prices will drive prices down in any other competitive market. This conclusion can also be demonstrated more formally by modifying the standard Bertrand model of competition to account for ASP+6% reimbursement; when modified, the Bertrand model shows that manufacturers will compete for buyers by offering discounts. The ASP+6% system also lowers prices by encouraging new entry and helping overcome switching costs. The available empirical evidence confirms my analysis and shows that competition under the ASP+6% system lowers prices.

A. New Entry Cannot Raise Prices Because an Incumbent Monopolist Will Already Price at the Maximum Quality-Adjusted Price

24. Professor Bernheim assumes that buyer demand for ESAs is totally inelastic.[25] This assumption would ordinarily imply infinite prices in a monopoly market, but Professor Bernheim also assumes that Medicare constrains prices by preventing the monopoly price from rising above some cap.[26] Chart 1 illustrates graphically what market demand and pricing look like under these two assumptions.

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[25] *See* Bernheim Report ¶102

[26] *See* Bernheim Report ¶¶ 53, 87, 98 & n 103, 102, 225