

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

AMGEN INC.,)
)
)
 Plaintiff,)
)
 v.)
)
)
 F. HOFFMANN-LAROCHE)
 LTD., a Swiss Company, ROCHE)
 DIAGNOSTICS GmbH, a German)
 Company and HOFFMANN LAROCHE)
 INC., a New Jersey Corporation,)
)
 Defendants.)
 _____)

Civil Action No.: 05-12237 WGY

**AMGEN INC.'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION
PURSUANT TO FED. R. CIV. P. 56(F) FOR RELIEF [DOCKET NO. 652] FROM
AMGEN INC.'S MOTION FOR SUMMARY JUDGMENT THAT DR. LIN'S ASSERTED
CLAIMS ARE DEFINITE, ADEQUATELY DESCRIBED, AND ENABLED**

I. INTRODUCTION

Plaintiff Amgen Inc. (“Amgen”) hereby opposes the motion [docket no. 652] of Defendants F. Hoffman-La Roche, Ltd., Roche Diagnostics GmbH, and Hoffmann-La Roche Inc. (collectively “Roche”) for “an order providing for the opportunity for Roche to supplement its Opposition” to Amgen’s Motion for Summary Judgment that Dr. Lin’s Asserted Claims are Definite, Adequately Described, and Enabled [docket no. 531] [hereinafter Amgen’s Motion].

II. DISCUSSION

Roche’s most recent filing appears to be little more than an attempt to further delay adjudication of some of the many issues raised by Roche before trial commences in less than two months time. An examination of Roche’s arguments in light of the circumstances surrounding the filing of its motion reveals it to be wholly without merit.

First, it was Roche who chose to supplement its expert reports and thereby delay Dr. Lodish’s deposition. Counsel for Amgen first offered to tender Dr. Lodish on June 1, and when the parties agreed to postpone expert depositions, Dr. Lodish was offered for June 7, 8, or 11, all of which were refused. June 22 was offered and accepted, but then postponed to afford Roche time to review the supplemental expert reports Dr. Lodish submitted in response to Roche’s supplemental reports. The next date Dr. Lodish was available was July 3. Roche elected to wait until that date with full knowledge that its opposition would be due on July 5, and cannot now claim that it was caught unawares.¹

Second, Roche has already admitted, in the twenty-page brief it filed in opposition to Amgen’s Motion, that “*there are no issues of disputed fact regarding the definiteness of the*

¹ In suggesting that this delay was necessary in light of the three supplemental expert reports submitted by Dr. Lodish, Roche neglects to mention that each was necessitated by the submission of supplemental reports by Roche’s experts and that the final report of Dr. Lodish in particular concerned only the issue of obviousness-type double patenting and not any of the

three claim terms at issue in Amgen's motion."² Roche made this dispositive admission *two days after Dr. Lodish's deposition had been completed*. Having thus knowingly disclaimed indefiniteness as a factual basis for opposing Amgen's Motion, Dr. Lodish's testimony, if relevant at all, can only be relevant to the other bases asserted by Roche, adequacy of written description and enablement.

Third, fatally to its motion, *and contrary to the very statement of law Roche itself advances*, Roche fails to allege so much as a single disputed fact necessitating further briefing, and thereby fails to proffer any basis for its motion rising "sufficiently above mere speculation."³ Instead, Roche contends that the Good Cause basis for its motion is to be found in the declaration of Ms. Wacker. But that declaration merely states, in equally conclusory terms, that "Dr. Lodish made numerous material statements regarding the invalidity of the asserted claims of Amgen's patents under 35. U.S.C. § 112. Therefore, such information is highly relevant to Roche's Opposition."⁴ Roche's utter failure to identify even a single issue raised by Dr. Lodish's testimony, however, is telling.

Fourth, given the many motions for summary judgment that the Court must rule on before trial, a great deal of skepticism is warranted of any procedural motion that may affect the pretrial schedule at this late date. Having now had Dr. Lodish's final transcript in hand for almost a week and with Amgen's Reply now due, Roche has not yet filed any supplement or set forth even the most minimal factual basis to justify a delay in the proceedings, a delay which will be the direct result of Roche's own actions. Faced with Roche's conclusory statements in its

issues raised by Amgen's Motion.

² Docket no. 630 at 1 n. 2 (July 5, 2007) (emphasis added). Roche's sole qualification to its disclaimer, "however, there may be issues of fact relating to claim terms not at issue in this motion," is of no import here, since no such other claim terms are before the Court by way of Amgen's Motion.

³ Docket no. 654 at 3.

motion and supporting documents, and the scope of the argument already made in its opposition brief,⁵ it is difficult to conclude that the instant motion is anything other than a stalling tactic, one which the Court should not abide. Even if the Court decides to grant Roche's request to file additional briefing—above and beyond the twenty pages of argument it has already submitted—the hearing on Amgen's Motion should go forward as calendared.

III. CONCLUSION

For the above reasons, the Roche's motion should be denied.

July 12, 2007

Respectfully Submitted,

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⁴ *Id.* at 2.

⁵ The length of the arguments already made by Roche plainly belies its assertion that it cannot “present . . . facts essential to justify [its] opposition.” Fed. R. Civ. P. 56(f).

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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 and paper copies will be sent to those indicated as on-registered participants.

/s/ Patricia R. Rich

Patricia R. Rich