

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

_____	)	
AMGEN INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CIVIL ACTION No.: 05-CV-12237WGY
F. HOFFMANN-LA ROCHE LTD	)	
ROCHE DIAGNOSTICS GmbH	)	
and HOFFMANN-LA ROCHE INC.	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS’ MOTION TO PRECLUDE TESTIMONY FROM AMGEN’S  
BELATEDLY DISCLOSED FACT WITNESSES**

Roche respectfully moves the Court for an order precluding trial testimony from Nancy Spaeth, Dennis Fenton, Eli Friedman, Axel Ullrich, Arnold Berk, Joseph Eschbach and Stuart Orkin, all fact witnesses whom Amgen has belatedly disclosed with untimely Rule 26(a) supplemental disclosure statements submitted after the fact discovery cutoff.

Since fact discovery closed on April 2, 2007, Amgen has submitted two supplemental Rule 26(a) supplemental disclosure statements adding seven new witnesses who Amgen omitted from their original initial disclosure statement without any apparent justification. As Amgen frequently points out, it has previously litigated four of the five patents currently in suit and therefore it has been very familiar with the individuals possessing relevant information at least to issues concerning validity. Thus, Amgen was undoubtedly well aware of the identity of the witnesses in its untimely Rule 26

disclosures and of their knowledge relevant to the case at least from the time Amgen submitted its first of now *four* initial disclosure statements. Amgen was obligated under Rule 26 to disclose them then, but instead chose to wait, in some instances up until the second week of July, months after the end of fact discovery after the end of expert discovery and summary judgment briefing and less than two months from the trial date, to disclose them. Two of these witnesses (Arnold Berk and Dennis Fenton) have been Amgen employees, and two of them (Joseph Eschbach and Stuart Orkin) previously served as Amgen experts in the TKT litigation, Amgen cannot argue that it was not aware that these witnesses possessed relevant information at the time it made its Rule 26 disclosures during fact discovery. Roche is now prejudiced by its inability to depose the belatedly disclosed individuals as fact witnesses and seek their documents to determine the scope of their knowledge that Amgen claims is relevant to the issues to be tried in this case. Amgen's inexcusable delay in disclosing these witnesses defies the letter and spirit of Rule 26(a) initial disclosure requirements and amounts to trial by ambush.

Based on the foregoing, Roche requests that its motion to exclude the testimony of the seven named witnesses. In support of this motion, Roche submits an accompanying memorandum of law, and declaration of Alfred H. Heckel including exhibits.

**CERTIFICATE PURSUANT TO LOCAL RULE 7.1**

I certify that counsel for the parties have conferred in an attempt to resolve or narrow the issues presented by this motion and that no agreement could be reached.

Dated: July 16, 2007  
Boston, Massachusetts

Respectfully submitted,

F. HOFFMANN-LA ROCHE LTD,  
ROCHE DIAGNOSTICS GMBH,  
and HOFFMANN-LA ROCHE INC.

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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 (NEF) and paper copies will be sent to those indicated as non registered participants on the above date.

/s/ Keith E. Toms  
Keith E. Toms

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